THE EXCLUSIONARY RULE IS DEAD. LONG LIVE THE EXCLUSIONARY RULE.

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INTRODUCTION

Americans love playing the lottery. The Colonists bought lottery tickets to help fund the Revolution (Alexander Hamilton: "Everybody . . . will be willing to hazard a trifling sum for the chance of considerable gain.")[1] We bought lottery tickets to fund the new nation's public works.[2] And we are still at it. In 2020, Americans spent over $90 billion on lottery tickets — that is more than we spent on books, concert tickets, video streaming, and movie tickets combined.[3]

But in 1911, when Fremont Weeks, a young delivery clerk in Kansas City was in the lottery game, Americans were experiencing a moment of ambivalence. There was still public demand,[4] but evangelical fervor, Progressive reforms, and corruption in some games turned lawmakers against the lottery.[5] By the late 1880s nearly every state had outlawed it.[6] And, critically, in 1890 Congress made it a federal crime to transport lottery materials through the mails.[7] Thus, when a federal marshal broke into Fremont Weeks' home and discovered evidence that he was mailing lottery coupons, he was charged with a federal crime.[8]

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[1] MATTHEW SWEENEY, THE LOTTERY WARS LONG ODDS, FAST MONEY, AND THE BATTLE OVER AN AMERICAN INSTITUTION 31 (Bloomsbury USA eds., 2009).

[2] *Id.* at 31-32. *See also* RANDY BOBBITT, LOTTERY WARS: CASE STUDIES IN BIBLE BELT POLITICS, 1986-2005 2 (Rowman & LittleField Publishers, Inc. eds., 2007).

[3] JONATHAN D. COHEN, FOR A DOLLAR AND A DREAM: STATE LOTTERIES IN MODERN AMERICA 2 (Oxford Univ. Press eds., 2022).

[4] *See* PAUL RUSCHMANN, LEGALIZED GAMBLING 14-15 (Alan Marzilli & Infobase Publ'n eds., 2008)

[5] *Id.* at 1-15. *See also* BOBBITT, *supra* note 2, at 2.

[6] BOBBITT, *supra* note 2, at 2.

[7] Federal Lottery Act of 1895, ch. 191, § 1, 26 Stat. 963 (current version at 18 U.S.C. § 130). Congress's specific aim was to end the Louisiana Lottery, "the most powerful and allegedly most corrupt lottery system in American history." DISTRICT OF COLUMBIA LAW REVISION COMMISSION, LEGALIZED LOTTERIES IN SEVERAL STATES, H.R. DOC NO. 95, *at* 16-17 (1977). The Louisiana Lottery, chartered in 1869, was so popular with Americans that for a time, one third of all the mail traveling through the New Orleans Post Office carried lottery money. *Id.* at 17.

[8] *Weeks v. United States*, 232 U.S. 383, 386 (1914). For a detailed history of the *Weeks* case, see generally TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 8-10 (Oxford Univ. Press eds., 2013); SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT 59-61 (Rutgers Univ. Press 2004).

Mr. Weeks had effective counsel, and they took his case all the way to the Supreme Court. But when they got there, they did not argue that Mr. Weeks was innocent. After all, the lottery coupons found in his room were solid evidence of guilt. Instead, counsel focused on the marshal's evidence gathering.[9] To begin, they submitted that the marshal had violated the Fourth Amendment in entering Weeks' home without a warrant. There was really no dispute about that; the Fourth Amendment violation — breaking into a home without a warrant — was obvious.[10] But we remember *Weeks v. United States* because of the second part of counsel's argument: the proper response to a Fourth Amendment intrusion, counsel argued, was to wholly exclude the tainted evidence from the government's prosecution.[11]

This was not a novel argument; indeed, the court had seemingly rejected it just ten years earlier in another case involving seized lottery tickets.[12] Accordingly, the government's Supreme Court brief included just a single page of argument pointing to the earlier precedent.[13] But this time, the Supreme Court dramatically changed course. In a unanimous 1914 decision, the court held that the lower court should have excluded the lottery tickets from the government's prosecution. To allow such ill-gotten evidence in a trial presided over by the judiciary, the Court explained, would make the courts intolerably complicit in the constitutional wrongdoing.[14]

As a matter of law, the *Weeks* decision was certainly a remarkable development.[15] There really was no precedent to support a rule that a court's necessary response to an officer's "unreasonable" Fourth Amendment search was exclusion of the ill-gotten evidence from a defendant's trial.[16]

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[9] *Weeks,* 232 U.S. at 389.

[10] *Id.* at 393.

[11] *Id.*

[12] *See Adams v. New York*, 192 U.S. 585, 594-95 (1904).

[13] DASH, *supra* note 8, at 61.

[14] *See Weeks*, 232 U.S. at 392–94. *See also infra* notes 142–47 and accompanying text (reviewing the *Weeks* Court's concerns about tainted evidence undermining "judicial integrity").

[15] *See* Olmstead v. United States*,* 277 U.S. 438, 462 (1928) ("The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction if obtained by government officers through a violation of the amendment."); *see also* DASH, *supra* note 8, at 63 ("For the first time, the Court included itself and the other federal courts in the obligation to enforce the Bill of Rights in their own proceedings.").

[16] Under the common law, ill-gotten evidence was entirely admissible; if the defendant were offended, the defendant's remedy was to pursue a civil trespass action against the officer. *See* Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule,* 211 MIL. L. REV. 211, 262 (2012). The Supreme Court had previously excluded material evidence in *Boyd v. United States*, 116 U.S. 616 (1886), but ultimately that case was about the right against self-incrimination. *See* MACLIN, *supra* note 8, at 8 ("Unlike *Boyd*, *Weeks*

And as a few contemporary critics pointed out, the *Weeks* rule lacked calibration: *Weeks* instructed that exclusion of ill-gotten evidence was the *automatic* response to *any* constitutional violation — no matter the degree of the officer's intrusion or if the evidence was necessary to prosecute a violent felon.[17] "The criminal is to go free because the constable has blundered," Then-Judge Cardozo famously quipped. "The privacy of the home has been infringed, and the murderer goes free."[18]

Presumably, the notion of a violent felon walking free because of a constable's blunder was as provocative in 1914 as it is now. But outside of the legal commentary, there was no contemporaneous public handwringing about the *Weeks* decision. While a few newspapers reported the case with others on its docket, there was no editorializing.[19] This made sense because there was not much to talk about: the outcome was not particularly outrageous. Sure, Fremont Weeks would escape federal charges despite his obvious guilt. But he was just a lottery man, after all. And Americans do love playing the lottery.

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There would come a time when Americans talked a good amount about the Fourth Amendment exclusionary rule.[20] But for a generation after it was announced in *Weeks*, the rule garnered little attention. This is because, as Part I.A of this Article examines, despite Cardozo's warnings,

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concluded that the Fourth Amendment alone forbade the admission of illegally obtained evidence in a federal prosecution.").

[17] John Henry Wigmore, the famous scholar of evidence law, found the *Weeks* rule preposterous, observing that if police obtained through an unreasonable search "an infernal machine, planned for the city's destruction . . . the diabolical owner" could assert *Weeks* "and be supinely accorded by the Court a writ of restitution, with perhaps an apology for the "outrage.'" *See* John Henry Wigmore, *Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. 479, 481 (1922). Other contemporary scholars were less critical. *See, e.g*. Zachariah Chafee, *The Progress of the Law, 1919–1921 Evidence*, 35 HARV. L. REV. 302 (1922).

[18] *People v. Defore,* 242 N.Y. 13, 24 (N.Y. 1926).

[19] See *May not Seize Papers; Supreme Court Makes Ruling that May Affect Dynamiter's Case*, N.Y. TIMES, Mar. 1, 1914, at 1.

[20] This paper singularly examines the Fourth Amendment exclusionary rule; the analysis does not necessarily apply to the Fifth Amendment exclusionary rule. Self-incriminating statements obtained in violation of the Fifth Amendment raise the specter of false confessions; the constitutional violation calls into question the reliability of the evidence. *See* Stone v. Powell, 428 U.S 465, 496-97 (1976) ("If a suspect's will has been overborne, a cloud hangs over his custodial admissions."). Not so with Fourth Amendment violations; the manner of gathering material evidence does not impact the reliability of that evidence. For these reasons, it makes sense here to decouple the Fourth Amendment exclusionary rule from the Fifth Amendment rule. *See id.* (explaining that reliability concerns are the relevant distinction between the exclusionary rule under the Fifth Amendment and the rule under the Fourth Amendment).

for its first four decades the exclusionary rule regularly only applied in prosecutions of vice crimes — offenses like Weeks' that involved sex, gambling, and alcohol. This version of the exclusionary rule was not particularly controversial; the public could tolerate an exclusionary rule that only undermined prosecutions of such lifestyle crimes. But as Part I.B explains, everything changed with the 1961 *Mapp* case, which by nationalizing a robust exclusionary rule, expanded its reach beyond prosecutions of lifestyle crimes. Now the exclusionary rule was also to be applied in prosecutions of violent crimes. And for decades, we talked about the exclusionary rule all the time.

But then, somewhere around the turn of the century, we stopped talking about the exclusionary rule again. Part II suggests the reason: in the past generation, a shadow exclusionary rule has taken root. Under the shadow regime, trial courts don't follow the "formal" exclusionary rule. Instead, before excluding evidence obtained in violation of the Fourth Amendment, trial courts engage in a nuanced balancing of the costs and benefits. The upshot of this shadow balancing regime is that today exclusion of evidence is again generally reserved for low-level crimes. In other words, we don't talk about the exclusionary rule anymore because the exclusionary rule again stopped leading to outrageous outcomes.

The shadow exclusionary rule operated by the lower courts is appealing, not the least because it expresses an exclusionary rule that the public can tolerate. But as Part III reviews, the shadow rule really does live in the shadows; it exists in derogation of controlling precedent. And in operation, this has led inexorably, if unintentionally, to a body of precedent that dramatically narrows Fourth Amendment protections. Part IV argues that we should bring the shadow regime into the sunshine by ratifying a new "open-air" balancing regime. I conclude by identifying the costs and benefits a trial court judge might fairly put on the scales in this new balancing regime.

I. PUBLIC INTEREST IN THE EXCLUSIONARY RULE: A BRIEF HISTORY

A. From Weeks *to* Mapp

It can be hard to appreciate the limited reach of the exclusionary rule in its first decades. *Weeks* certainly contemplated exclusion in cases involving violent crimes, but for a generation, that was largely, if not entirely, a theoretical outcome. *Weeks* only applied to the prosecution of federal crimes in federal courts.[21] And before the omnibus crime bills of the 1960s, federal criminal law did not reach far into Americans' lives (the Constitution, of course, leaves maintaining "internal order" to the

[21] *See* Wolf v. Colorado, 338 U.S. 25 (1949) (confirming that states were not bound by *Weeks*).

States).[22] Indeed, at the time of the *Weeks* decision*,* there were only a few federal criminal statutes aimed at individuals.[23] One was the 1873 Comstock Act, which made it unlawful to use the mail to distribute obscenity.[24] Another was the 1890 Lottery Act, under which Fremont Weeks was prosecuted.[25] And third was the 1910 Mann Act, which criminalized the transportation across state lines of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[26] A meaningful addition came in 1919 with passage of the Volstead Act which executed the Eighteenth Amendment's national prohibition of alcohol.[27] The upshot is that in the decades after *Weeks*, most federal prosecutions were for "vice" crimes — lifestyle offenses involving sex, gambling, and especially, alcohol. In other words, the *Weeks* rule, in application, was not exactly letting murderers go free.[28]

State court experimentation with the exclusionary rule produced similarly unremarkable outcomes. Between 1914 and 1960, every state supreme court considered adopting a version of the *Weeks* rule.[29] Most of them rejected it.[30] And those states that did adopt an exclusionary rule often made express what the federal cases only implied by operation: the exclusionary rule was generally reserved for vice crimes.[31] In a 1960 opinion, *United States v. Elkins,* the Supreme Court cited twenty-four opinions in which a state supreme court had adopted a form of the exclusionary

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[22] *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1138-45 (1995) (reviewing development of federal criminal statutes prior to the 1960s).

[23] *See id.* at 1142. Beyond these "morality" crimes impacting interstate commerce, the existing federal criminal laws focused on civil rights and business regulation matters. *See id.* at 1140-42.

[24] An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of immoral Use, Act of Mar. 3, 1873, Ch. 258, 17 Stat. 598 ("Comstock Act"). *See generally* RICHARD HIXON, PORNOGRAPHY AND THE JUSTICES 8-9 (1996).

[25] *See* 18 U.S.C. §§ 1301.

[26] 18 U.S.C. § 2421.

[27] Volstead Act, Pub. L. 66-66 (1919) (executing Eighteenth Amendment by making it illegal "to manufacture, sell, barter, transport, import, export deliver, furnish or possess" intoxicating liquors).

[28] For an excellent recounting of how the public's early acceptance of the exclusionary rule turned on the public's ambivalence about enforcing liquor prohibition laws, see Wesley M. Oliver*, Prohibition's Anachronistic Exclusionary Rule,* 67 DePaul L. Rev. 473 (2018).

[29] *See United States v. Elkins*, 364 U.S. 206, 224 (1960).

[30] *See id.* Some rejected the exclusionary rule because of the specter of violent felons escaping justice. *See, e.g.*, *Defore,* 242 N.Y. at 24. Other states presumed the rule was limited to liquor and like offenses, but still rejected it on principle. *See, e.g., Rosanski v. State,* 106 Ohio St. 442, 462, 140 N.E. 370, 376 (1922).

[31] Only four states adopted a version of the exclusionary rule unlimited by the nature of the crime at play. *See* Oliver, *supra* note 28, at 511.

rule.[32] Not a single case involved a violent crime. Two of the cases involved exclusion of stolen goods (one involved stolen sheep). [33] Another involved possession of a firearm.[34] The remaining twenty-one cases involved exclusion of evidence in an obscenity, gambling, or alcohol case.[35]

Police overreaching in pursuing alcohol offenses was unquestionably the impetus for state court experimentation with the exclusionary rule.[36] For example, in adopting its version of the exclusionary rule in 1922, the Florida Supreme Court made plain it was intended for use in Prohibition cases:

> For one to acquire illegally, or illegally to possess, intoxicating liquors is a crime; but it is a crime that generally affects a few persons in a restricted locality. To permit an officer of the state to acquire evidence illegally and in violation of sacred constitutional guaranties, and to use the illegally acquired evidence in the prosecution of the person who illegally acquired the intoxicants, strikes at the very foundation of the administration of justice, and where such practices prevail make law enforcement a mockery.[37]

Or as the Tennessee Supreme Court succinctly put it: "Some things are to be more deplored than the unlawful transportation of whisky; one is the loss of liberty."[38]

At the start, then, the exclusionary rule was, either expressly or impliedly, restricted to prosecutions of vice crimes, lifestyle crimes that the American public has always been ambivalent about enforcing. (Notably,

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[32] *Elkin*s, 364 U.S. at 224.

[33] *See* Rohlfing v. State*,* 230 Ind. 236, 102 N.E.2d 199 (1951) (stolen goods); State v. George, 32 Wyo. 223, 231 P. 683 (1924) (stolen sheep).

[34] *See* State v. Hoover, 347 P.2d 69 (Ore. 1959).

[35] *Elkins,* 364 U.S. at 224 (cataloging cases).

[36] *See* Oliver*, supra* note 28*,* at 494 *("*Looking at state court decisions, one discovers that the exclusionary rule gained acceptance in the states only because of Prohibition.").

[37] Atz v. Andrews*,* 84 Fla. 43, 94 So. 329 (1922). *See also* Byrd v. State, 80 So. 2d 694, 697 (Fla. 1955). In some states, a version of the *Weeks* rule was established by statute; the statutes either restricted the exclusionary rule to liquor offenses or, more generally, to misdemeanors. *See e.g.* Ala.Code, 1940 (Supp.1955), Tit. 29, § 210 (limiting the rule to exclusion of illegally obtained evidence in the trial of certain alcohol control cases); Md.Ann.Code, 1951, Art. 35, § 5 (restricting rule to misdemeanor cases). The Texas statute was particularly pinched; it only applied the rule where there was an invasion of the home and a liquor violation at play. *See* Vernon's Tex.Stat., 1948 (Code Crim.Proc. art. 727a). *But see* 9 R.I. Gen. Laws Ann. § –19–25 (West) (adopting general rule of exclusion).

[38] Town of Blacksburg v. Beam, 88 S.E. 441 (S.C. 1916). This and like cases are catalogued in Oliver, *supra* note 28, at 494–506.

most of the crimes at play in the early exclusionary rule cases are not even crimes anymore.[39]) This goes a long way in explaining why, at first, the public was wholly disinterested in the exclusionary rule. In operation, the rule just was not outrageous.[40] If losing a few lottery or liquor convictions was the cost to be paid to give the Fourth Amendment some teeth, well, we could live with that.[41] Then came *Mapp*. And for the next generation, Americans talked about the exclusionary rule all the time.

B. From Mapp *to Today*

In *Mapp v. Ohio*, decided in 1961, the Supreme Court nationalized *Weeks*' version of the exclusionary rule, compelling all state courts to apply the robust federal rule. In *every* prosecution, ill-gotten evidence was to be excluded — even if the police misconduct was de minimis and a violent crime was at play.[42] Importantly, *Mapp* itself did not directly raise the specter of violent criminals going free; in keeping with the earlier cases, a vice crime, pornography, was at issue.[43] But state courts, then and now, handle the vast majority of violent felonies prosecuted in America.[44]

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[39] *See, e.g.*, State Lottery Law, Mo. Rev. Stat. §§ 313.200 – 313.350 (1985) (creating a state-run lottery in state where Fremont Weeks was charged); U.S. Const. Amend. XXI, § 1 (repealing the prohibition of alcohol); Ariz. Rev. Stat. §§ 36-2850 – 36-2865 (2020) (regulating the legal use of marijuana in adults over twenty-one); *see also* Jason Krause, *The End of the Net Porn Wars*, 94 A.B.A.J 52 (2008) (polling U.S. Attorneys and concluding Justice Department no longer intended to pursue obscenity crimes except child obscenity cases).

[40] Also tempering any public outrage was the fact that the police misconduct in the early cases was often fairly egregious. *See, e.g.*, Amos v. United States, 255 U.S. 313 (1916) (excluding evidence "where officers without a search warrant swoop down on a private residence, obtain admission through the exertion of official pressure, and seize private property."). It's hard to divorce public tolerance of the early exclusionary rule from public concerns about overzealous investigations of Prohibition crimes. Oliver, *supra* note 28, at 474-75 ("In the minds of even staunch present-day opponents of the rule, the tradeoff of sacrificing reliable evidence to curb rampant unjustified physical intrusions during Prohibition would likely be defensible.").

[41] *Cf.* William T. Plumb, Jr., *Illegal Enforcement of the Law*, 24 CORNELL L.Q. 337, 379 (1939) ("If the application of the [exclusionary] rule could be divorced from popular prejudices concerning the liquor, gambling, and revenue laws, in the enforcement of which the federal rule saw its greatest growth, and if a murderer, bank robber, or kidnapper should go free in the face of evidence of his guilt, the public would surely arise and condemn the helplessness of the courts against the depredations of the outlaws.").

[42] Mapp v. Ohio, 367 U.S. 643 (1961).

[43] *Id.* at 644-45.

[44] *See* CAROLYN NESTOR LONG, MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES 108 (2006). For example, in 2006, there were 206,140 violent felony convictions in state courts. *See* NAT'L JUD. REporting Program, Felony Sentences in State Courts 2006-Statistical Tables 3, https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf. In contrast, that same year there

That meant that the exclusionary rule, if applied faithfully, would near certainly impact violent felony prosecutions.[45] Thus, it was a short step from *Mapp* to *Coolidge v. New Hampshire*, where the Supreme Court in 1971 ordered the exclusion of probative relevant evidence in a state court trial of a child murderer.[46] That *was* something to talk about.[47]

While conservative legal scholars complained about *Mapp*'s intrusion on state's rights and its creative constitutionalism,[48] it was the specter of a violent felon being released on a "technicality" that captured the public's attention.[49] Fair to say, the newly-nationalized exclusionary rule did not poll well.[50] And for politicians advancing law and order campaigns, the

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were only 3,237 violent offenses *prosecuted* in federal courts. *See* https://www.bjs.gov/fjsrc/var.cfm?ttype=one_variable&agency=AOUSC&db_type=CrimCtCases&saf=IN.

[45] *See* Thomas Davies, *The Supreme Court Giveth, and the Supreme Court Taketh Away: The Century of Fourth Amendment Search and Seizure Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 991 (2010) (recounting that after *Mapp*, "the search cases that reached the Court were no longer confined to booze, drugs, and white-collar crimes; now they sometimes also included burglary, armed robbery, rape, and murder."); *see also* Gary Goodpaster, *An Essay on Ending the Exclusionary Rule,* 33 HASTINGS L.J. 1065, 1067 (1982) (writing in 1982 that "[p]ublic fear of crime is intense" and "[i]n this atmosphere of public fear, desperation, and anger, the exclusionary rule appears a sinister ally of criminal forces."); LONG, *supra* note 44, at 101-09.

[46] Coolidge v. New Hampshire, 403 U.S. 443 (1971). The defendant had been convicted of first-degree murder and sentenced to life imprisonment. *Id.* at 448. Without the excluded evidence, state prosecutors were compelled to accept a plea of second-degree murder; the defendant was paroled in 1982. *See* Jeff Woodbum, *The Crucial Coolidge Case,* NEW HAMPSHIRE MAGAZINE, June 19, 2014.

[47] *See* Davies, *supra* note 45, at 971 (observing that the "extension of constitutional protections to persons accused of violent crimes did incite and scare the public"); LONG, *supra* note 44, at 109 (2006) ("The exclusionary rule, no doubt unfamiliar to those outside of law enforcement community, was introduced to many Americans for the first time. . . . The decision polarized the country."); MACLIN, *supra* note 8, at 83 ("For nearly everyone, the ruling in Mapp v. Ohio was stunning. The public's disapproval was exacerbated by the fact that the exclusionary rule arrived at a time when reported crimes rates soared and crime control became a dominant concern for most Americans").

[48] *See generally* LONG, *supra* note 44, at 110-12.

[49] *See id.* at 112 ("The most persuasive rhetorical criticism against *Mapp* focused on the direct consequence of the exclusionary rule — the exclusion of reliable, often probative evidence, which potentially allows 'obviously guilty criminals to go free.").

[50] *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1035 (1974) (reviewing that a "solid majority of American reject the modern Fourth Amendment exclusionary rule."). *See also* Norman Robertson, *Reason and the Fourth Amendment — the Burger Court and the Exclusionary Rule,* 46 FORDHAM L. REV. 150-160 (1977) (reviewing contemporaneous opposition to the exclusionary rule).

notion of a judge allowing a violent criminal back to the streets was low-hanging fruit.

During his 1968 presidential campaign, Richard Nixon persistently complained that the exclusionary rule "set free patently guilty individuals on the basis of legal technicalities[51] and thus "effectively shielded . . . criminals from prosecution."[52] Then-Associate Justice Warren Burger practically went on a lecture tour railing against the rule calling it "one of the greatest hoaxes on the public."[53] In 1980, Ronald Reagan famously called the exclusionary rule "absurd" to a group of police chiefs and throughout his administration actively campaigned for its abrogation.[54] Throughout the 1970s and 80s, bills to repeal the rule were introduced in nearly every Congress, often enjoying bipartisan support.[55] And so it went for decades. In 2000, the GOP Platform pledged that the party would work to "[r]eform the Supreme Court's invented Exclusionary Rule, which has allowed countless criminals to get off on technicalities."[56]

But after 2000, it seems, Americans stopped talking about the exclusionary rule. Somewhere along the way, the rule lost its appeal as a law-and-order punching bag. Yes, it remains catnip for legal scholars.[57] But as a subject of public discourse, the exclusionary rule has all but disappeared. Since 2000, no GOP platform has referenced the exclusionary rule.[58] No bill to repeal the rule has been introduced in Congress since 1999.[59]

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[51] LONG, *supra* note 44, at 160.

[52] *See* RICHARD NIXON, TOWARD FREEDOM FROM FEAR 13 (1968).

[53] See MACLIN, *supra* note 8, at 126-27 (describing speeches that "revealed Burger's utmost antipathy toward the exclusionary rule").

[54] Stuart Taylor, *Exclusionary–Rule Fight Moves to Supreme Court,* N.Y. TIMES, Jan. 26, 1982, at A7. During a 1981 speech, President Reagan complained that the exclusionary rule "rests on the absurd proposition that a law enforcement error, no matter how technical, can be used to justify throwing an entire case out of court, no matter how guilty the defendant nor how heinous the crime." Lee Lescaze, *Reagan Blames Crime on 'Human Predator'*, WASH. POST (Sept. 29, 1981). Edwin Meese III, soon-to-be Reagan's Attorney General argued in a New York Times editorial that "[a]pplied as it is today, what the rule really does is endanger innocent victims, while letting criminals escape." Edwin Meese, 3d, Opinion, *A Rule Excluding Justice*, N.Y. TIMES (Apr. 15, 1983).

[55] *See, e.g.*, S. 881, 93d Cong. (1973); Criminal Justice Reform Act, H.R. 7117, 97th Cong. (1982); Exclusionary Rule Limitation Act, S. 237, 99th Cong. (1985); Criminal Justice Reform Act, S. 1970, 100th Cong. (1987).

[56] *2000 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (July 31, 2000), https://www.presidency.ucsb.edu/documents/2000-republican-party-platform.

[57] *See infra* note 134 and accompanying text.

[58] *See* THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/2000–republican–party–platform (cataloging Republican Presidential campaign platforms).

[59] It appears there has been no bill to repeal the exclusionary rule since 1999 when Senator Orrin Hatch (R-UT) sponsored the 21st Century Justice Act of 1999 as part of the 106th Congress.

Through the 1980s, the New York Times persistently gave its opinion pages over to exclusionary rule debate.[60] But the paper's editorial pages now have addressed the exclusionary rule just once in the last twenty-five years.[61]

And consider this: In both his 2016 and 2020 campaigns, former President Donald Trump executed a sure "law and order" campaign — among other things, he persistently asserted that "I am your president of law and order,"[62] endorsed the controversial stop and frisk police practice,[63] instructed police not to be "too nice" to suspects,[64] called police "the most mis-treated persons in America,"[65] and denounced "activist judges." Yet, despite hitting all these related notes, Donald Trump never mentioned the exclusionary rule on the campaign trail.[66] These days, the exclusionary rule seems to have as much political potency as arguing for a return to the gold standard. What gives?

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[60] *See, e.g.*, Tom Wicker, Opinion, *In the Nation; Reagan and Crime*, N.Y. TIMES, Oct. 2, 1981, at A35; Frederick B. Campbell, Opinion, *A 'Compensatory Rule'*, N.Y. TIMES, Dec. 14, 1983, at A31; Yale Kamisar, Opinion, *Court's 'Good Faith' Exception*, N.Y. TIMES, Jul. 11, 1984, at A25.

[61] "Exclusionary Rule," advanced key term search, N.Y. TIMES ARCHIVE (Opinion Section), nytimes.com. *See also* Adam Cohen, *Is the Supreme Court about to Kill Off the Exclusionary Rule*, N.Y. TIMES (Feb. 15, 2009), https://www.nytimes.com/2009/02/16/opinion/16mon4.html?searchResultPosition=1.

[62] Donald Trump, Presidential Address, June 2, 2020, https://www.youtube.com/watch?v=NvOjWTmSNMM; *see also Transcript of the Second Debate*, N.Y. TIMES, Oct. 10, 2016, available at https://www.nytimes.com/2016/10/10/us/politics/transcript-second-debate.html.

[63] *See* Emily Flitter, *Trump Praises "Stop-and-Frisk" Police Tactic*, REUTERS (Sept. 21, 2016), https://www.reuters.com/article/us-usa-election-trump/trump-praises-stop-and-frisk-police-tactic-idUSKCN11R2NZ.

[64] *See* Christina Wilkie, *Trump Praises 'Stop and Frisk,' Calls for Tougher Policing Tactics,* CNBC (Oct. 8, 2018), https://www.cnbc.com/2018/10/08/trump-praises-stop-and-frisk-calls-for-tougher-policing-tactics.html (reporting that in 2017, President Trump told a group of law enforcement officers, "Please don't be too nice. … Like when you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over? . . . You can take the hand away, OK?"); *see also* Matt Zapotosky, *President Trump's Justice Dept. Could See Less Scrutiny of Police, More Surveillance of Muslims*, WASH. POST, Nov. 10, 2016, (reporting that Trump advised Chicago Police to be "very much tougher than they are right now.").

[65] Ryan Teague Beckwith, *Read the Full Transcript of the Sixth Republican Debate in Charleston*, TIME (Jan. 15, 2016), https://time.com/4182096/republican-debate-charleston-transcript-full-text/.

[66] "Exclusionary Rule," Key Term Search, AMERICAN PRESIDENCY PROJECT AT THE UNIVERSITY OF CALIFORNIA AT SANTA BARBARA, presidency.ucsb.edu (filtered for the Donald Trump presidential campaign).

II. WHY THE PUBLIC DOESN'T TALK ABOUT THE EXCLUSIONARY RULE ANYMORE

A. The "Guerilla Warfare" Narrative

One explanation for the public apathy is that a fifty-year campaign by a conservative bloc of the Supreme Court has rendered the Fourth Amendment exclusionary rule so impotent that it has simply become irrelevant. This might be called the "guerilla warfare" narrative.[67] It proceeds something like this: The assault began in 1970 when Warren Burger replaced Earl Warren as Chief Justice.[68] In short order, joined by Nixon's three other appointments to the Court, the Burger Court announced in the 1974 *Calandra* decision that the exclusionary rule was not constitutionally-compelled.[69] This meant the new conservative Court could proceed to diminish the rule without actually abrogating a precedent of constitutional dimension.

Next, the Burger Court assigned a utilitarian, rather than a principled, justification for the rule. The rule was no longer intended to valorize Fourth Amendment values, as *Weeks* and *Mapp* suggested.[70] Now, the rule was purely instrumental, and it existed only for its deterrence values — the idea being that the exclusionary rule "worked" by deterring bad cops

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[67] *See* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 133 (2003) ("With only a few exceptions, the Burger and Rehnquist Courts have waged a kind of "guerilla warfare" against the law of search and seizure.").

[68] *See* Jennifer Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUMBIA L. REV. 670, 690 (2011) ("Burger came to the Court in 1969 with a well-known record of hostility toward the exclusionary rule, and over the course of his tenure pursued an agenda directed toward its curtailment."); MACLIN, *supra* note 8, at 126 ("Certainly, eliminating the exclusionary rule was one of the goals of Chief Justice Warren Burger.").

[69] *See* United States v. Calandra, 414 U.S. 338, 347-52 (1974). *See also* Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. UNIV. L. REV. 747, 750 (2010) (observing that the Burger Court, "in what can only be described as a blinding flash of self-awareness, discovered that the rule was created under the Court's own rulemaking auspices rather than being constitutionally compelled.").

[70] *See Mapp*, 367 U.S. at 659 ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."); *Weeks*, 232 U.S.at 392 ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures … should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.").

in the field who, if not for the threat of exclusion of ill-gotten evidence in a future trial, would otherwise cross Fourth Amendment boundaries.[71]

With deterrence as the purpose of the rule, the Court was able in the 1984 *Leon* decision to adopt a new "good-faith" exception to the exclusionary rule.[72] Under the good faith exception, even if a police search overstepped Fourth Amendment boundaries, if the search was conducted by officers in good faith reliance on a court-issued search warrant, exclusion was no longer the necessary response.[73] The idea was that if officers in good faith obtained a warrant issued by a judge before conducting a search, even if the issuing court made a mistake, exclusion of collected evidence wouldn't serve the rules' instrumental *raison d'etre*: In such a circumstance, there is no "bad cop" to deter. Consequently, *Leon* placed almost all searches conducted pursuant to a warrant beyond the reach of the exclusionary rule.[74]

As the Burger Court morphed into the Rehnquist and Roberts Courts, more body blows weakened the Exclusionary Rule. *Nix v. Williams,* decided in 1985, allowed admission of improperly-obtained evidence if the evidence would have been "inevitably discovered" anyway during a lawful search.[75] *Murray v. United States*, decided in 1988, allowed admission of ill-gotten evidence if the same evidence was also obtained through an "independent source" untainted by the initial illegality.[76] The bloodletting continued. Over the next twenty-five years, in a series of cases, the court incrementally broadened the circumstances under which a good faith violation of the Fourth Amendment would *not* demand exclusion.[77] Add to

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[71] *Calandra*, 414 U.S. at 615 ("[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); *Stone*, 428 U.S. at 481 ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights."). *See also* LONG, *supra* note 44, at 168-69 (observing that the upshot of *Calandra* was that "the application of the rule as a remedial device was limited to situations where it would fulfill its deterrence purpose.").

[72] *See* United States v. Leon, 468 U.S. 897 (1984).

[73] *Id.* at 922 ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."). The idea was that if the singular purpose of the rule was to "deter" bad cops, exclusion wasn't necessary if, before conducting a search, an officer in good faith obtains a warrant from a judicial officer. In that scenario, the reasoning goes, there is no bad cop to deter. *Id.* at 920-21.

[74] MACLIN, *supra* note 8, at 250-51 (explaining that the *Leon* decision "signaled that motions to suppress should rarely be granted when police obtain warrants.").

[75] Nix v. Williams, 467 U.S. 431 (1984).

[76] Murray v. United State*s*, 487 U.S. 533 (1988).

[77] *See, e.g.*, Illinois v. Krull, 480 U.S. 340 (1987) (holding that good faith reliance on statute later declared unconstitutional does not require exclusion);

this a liberal "attenuation" doctrine[78] and some standing restrictions,[79] and what you have left, the story goes, is a hollowed out and irrelevant exclusionary rule.[80]

But the success of the Supreme Court's guerilla war against the exclusionary rule is generally overstated. To begin, in general, the most sweeping of the court's reforms — the good faith exception — still applies only where a search is conducted pursuant to a warrant.[81] And in America every year, tens of millions of searches and seizures are conducted *without* a warrant.[82] These are generally stops and searches of persons and vehicles on the streets, where inevitable discovery, independent source, attenuation and standing arguments against exclusion rarely find purchase. This means in the majority of searches in America, a Fourth Amendment violation, at least on paper, still compels exclusion of the tainted evidence.

In any event, while hard numbers are hard to come by, the available data certainly does not suggest the rule is moribund. From September 1, 2021 to August 31, 2022, in Texas alone, the criminal courts resolved over 5,700 motions to exclude.[83] Presuming other jurisdictions hear a proportionate number of motions, a conservative extrapolation of that number suggests at least 40,000 motions to exclude resolved across all state and federal courts. And this number hardly reflects the full scope of exclusionary rule practice in America; it includes only those motions to exclude where a court actually issued a ruling; it does not capture the large number

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Arizona. v. Evans, 514 U.S. 1 (1995) (holding that good faith reliance on non-police database suggesting suspect had outstanding arrest warrant does not require exclusion); Herring v. United States, 555 U.S. 135 (2009) (holding good faith reliance on faulty police database indicating outstanding arrest warrant does not require exclusion); Davis v. United States, 564 U.S. 229 (2011) (holding that good faith reliance on subsequently overturned appellate decision does not require exclusion).

[78] Wong Sun v. United States, 371 U.S. 471 (1963) (holding that exclusion is not required where discovery of the evidence is so far removed from the illegal action as to "attenuate the taint" of police misconduct); Utah v. Strieff, 136 S. Ct. 2056 (2016) (holding that a lack of flagrant impropriety, a lack of temporal proximity, or an intervening circumstance are sufficient to attenuate the evidence from an act of police misconduct that does not require exclusion).

[79] *See* Rakas v. Illinois, 439 U.S. 128 (1978); Brown v. United States, 411 U.S. 223 (1973); *Wong Sun*, 371 U.S. at 491-92.

[80] *See* MACLIN, *supra* note 8, at 302.

[81] *See supra* notes 68-71 and accompanying text. *See also* William T. Pizzi, *The Need to Overrule Mapp v. Ohio,* 82 U. COLO. L. REV. 679, 696 (2011) ("[T]here is no good faith exception for police actions on the street, where the vast majority of Fourth Amendment confrontations take place.").

[82] Last year alone, American police conducted over 20 million warrantless Terry stops of vehicles. THE STANFORD OPEN POLICING PROJECT, https://openpolicing.stanford.edu/findings/#:~:text=The%20results%20of%20our%20nationwide,20%20million%20motorists%20every%20year.

[83] *See* TEXAS JUDICIARY, ANNUAL STATISTICAL REPORT FY 2022 151 (2022), https://www.txcourts.gov/media/1456803/ar-statistical-fy-22-final.pdf.

of cases where a motion is filed (or threatened) but a plea deal is reached before a ruling. Even if only a small percentage of these motions are granted (or influence a plea deal) on search and seizure grounds[84] there is no escaping that the Fourth Amendment exclusionary rule impacts a significant number of prosecutions every year in America.[85] The exclusionary rule is hardly irrelevant. To wit, in 2018, the Supreme Court itself applied the exclusionary rule because an officer violated the Fourth Amendment by *looking at* a motorcycle parked in the defendant's driveway without first obtaining a warrant.[86] So why don't we talk about the exclusionary rule anymore?

B. The Shadow Exclusionary Rule

In 1988, HBO aired a documentary about the exclusionary rule titled "Do the Guilty Go Free?" The producers answered that question with a hearty "yes," presenting three cases where an apparent murderer was set free by action of the exclusionary rule.[87] If that documentary were filmed today, the producers would struggle to find enough freed murderers to profile. Modern cases where a court granted a motion to exclude that effectively released a violent felon are astonishingly rare. For instance, despite robust exclusionary rule practice over the past twenty years, I have only been able to find one case where application of the Fourth Amendment exclusionary rule ultimately led to the release of an apparently guilty murder suspect.[88] Is this evidence that in investigations involving violent

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[84] Most estimates suggest that only three percent of motions are granted. *See, e.g.*, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 44 (1994) (reviewing startling low rate of successful motions to suppress in the modern era).

[85] A search of the Westlaw database suggests that in 2022, federal courts by themselves granted at least in part, over 600 motions to suppress evidence.

[86] *See* Collins v. Virginia, 138 S. Ct. 1663, 1675 (2018).

[87] DO THE GUILTY GO FREE? (HBO 1988). The film highlighted, among two others, serial killer Larry Eyler, who was released from jail in 1984 after an Indiana judge suppressed essential evidence pointing to Eyler's involvement in the murder of Ralph Calise. *See generally* GERA-LIND KOLARIK WITH WAYNE KLATT, FREED TO KILL: THE TRUE STORY OF SERIAL MURDERER LARRY EYLER (2012).

[88] *See* State v. Akers, 2021 ME 43, 259 A.3d 127 (2021) (vacating murder conviction after the exclusion of probative evidence on grounds that officers purposely violated Defendant's Fourth Amendment rights). The Akers murder conviction was straightforward: Defendant had a long-standing feud with the victim; Defendant made highly inculpatory statements to police; and during the execution of a search warrant based on those statements, the victim's body and a machete with the victim's blood on it were found on defendant's property. *See id.* at 132-34. However, the Maine Supreme Judicial Court held that both the inculpatory statements and the physical evidence should have been excluded from trial because they were the fruit of "undoubtedly purposeful" Fourth Amendment violations at the outset of the police investigation. *See id.* at 140. Notably, the high

felonies, police officers simply never commit material violations of the Fourth Amendment? Or is there something else going on?

It is something else. We do not talk about the exclusionary rule anymore because somewhere between *Mapp* and today, trial courts quietly stopped applying the automatic rule of exclusion. Instead, operating within a shadow regime, before excluding improperly-obtained evidence, trial courts employ a nuanced balancing of the costs and benefits of application of the rule. Under this balancing, where the social costs are high — for instance, a violent felon would walk free — the scales weigh against excluding tainted evidence. In such a case, the benefits of the rule (valorizing Fourth Amendment principles, encouraging better policing) simply do not outweigh the cost of allowing a felon to walk free. Conversely, if the social costs are low — *e.g.*, a marijuana possessor goes free — a trial court may find the benefits of applying the rule balance the scales in favor of exclusion. In effect, over sixty years, the courts have bent the exclusionary rule back to its original form: a rule of exclusion reserved for low-level lifestyle crimes and serious Fourth Amendment intrusions.

Every study of the exclusionary rule over the past forty years confirms the existence of this shadow exclusionary rule regime. [89] Emblematic is a 1986 Chicago Tribune study of Chicago court cases.[90] The data in that study indicated that in violent crimes generally, trial courts excluded evidence in only 0.5% of cases.[91] On the other hand, trial courts suppressed evidence in 13% of drug cases, which is to say a motion to exclude in a

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court offered the trial court a way of saving the prosecution, suggesting that on remand the court consider whether the excluded evidence might be admissible on grounds not yet argued. *See id.* at 142 n.3. Nevertheless, the trial court confirmed exclusion of the statements and physical evidence; thereafter, the State was compelled to finally drop the murder charge against defendant. *See* Emily Allen, *State Drops Murder Charge against Limington Man whose Conviction Was Thrown Out*, PORTLAND PRESS HERALD (Aug. 29, 2022). Frankly, as one who studies the exclusionary rule, the outcome of the case astounds me.

[89] Studies persistently find that the exclusionary rule remedy is generally applied only in cases with low public safety costs. *See* Peter Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, U. ILL. L. REV. 223, 234–35 (1987) (reviewing study confirming that "vast majority" of granted motions to exclude involve crimes where the defendant, if convicted, "would never have been given detention time"); NAT'L INST. JUST., U.S. DEP'T JUST., THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 18 (1982) (finding that the "effects of the exclusionary rule are most evident in drug cases and are felt in a significant portion of drug arrests."); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts,* 63 U. COLO. L. REV. 75, 83 (1992); RSCH. PLAN. BUREAU, MONT. BD. CRIME CONTROL, THE IMPACT OF THE EXCLUSIONARY RULE UPON THE MONTANA CRIMINAL JUSTICE SYSTEM 4 (1984).

[90] Joseph R. Tybor & Mark Eissman, *Illegal Evidence Destroys Few Cases*, CHI. TRIB. (Jan. 5, 1986).

[91] *Id.*

drug case was twenty-five times more likely to be granted than a motion to exclude in a violent felony case.[92] In the same vein, in 98% of the cases where evidence was excluded, the underlying crime was a misdemeanor.[93] These are, of course, the results that one would expect under a regime where the costs of exclusion are weighed against its benefits.[94]

There are, then, two exclusionary rules: the *de jure* rule, the one on the books that still requires automatic exclusion where police commit a Fourth Amendment violation in the course of a warrantless search. And there is the *de facto,* or shadow rule, where exclusion of evidence is reserved for low-level lifestyle crimes or egregious police misconduct. In other words, in operation, the modern exclusionary rule looks a lot like the pre-*Mapp* rule. All of which is to say, that the public stopped caring about the exclusionary rule because the exclusionary rule again stopped leading to outrageous outcomes.

Importantly, the shadow exclusionary rule really does operate in the shadows. Still-controlling Supreme Court precedents instruct that evidence collected without a warrant in the course of a Fourth Amendment violation must be excluded, irrespective of the crime at play.[95] Indeed, the Supreme Court has specifically rejected crime severity as a proper consideration in assessing application of the exclusionary rule.[96] But in real life, crime severity matters a great deal, and everyone knows this is how the game is played.[97]

That the lower courts operate a shadow exclusionary rule in derogation of formal precedent does not necessarily mean that lower courts are engaged in a broad conspiracy of subversion. Rather, the shadow regime may just be an inexorable consequence of the fact that judges, like everyone else, are moral beings. In 2015, Avani Mehta Sood published the results of a study she ran on decision-making in the exclusionary rule

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[92] *Id.*

[93] *Id.*

[94] Notably, a 2019 study examining Court of Appeals decisions from 1972 to 1986 empirically confirmed the core premise of the shadow exclusionary regime: "Our analysis shows that as crime severity increases, judges become significantly less likely to exclude challenged evidence on Fourth Amendment grounds--even though crime severity is not a doctrinally relevant consideration." Jeffrey A. Segal et. al., *The "Murder Scene Exception"-Myth or Reality? Empirically Testing the Influence of Crime Severity in Federal Search-and-Seizure Cases*, 105 VA. L. REV. 543, 544 (2019).

[95] *See supra* notes 78-79 and accompanying text.

[96] Mincey v. Arizona, 437 U.S. 385 (1978) (rejecting "murder-scene exception" to application of exclusionary rule).

[97] *See, e.g.*, *Orfield*, *supra* note 89, at 83 (reviewing study results indicating that court personnel, including judges, understand that where serious crimes are play, judges may purposefully ignore the law to prevent evidence from being suppressed).

context.[98] Subjects were cast as judges, given one of two fact patterns of a warrantless automobile search, and asked to assess whether a Fourth Amendment violation requiring exclusion occurred.

The fact patterns included a straightforward Fourth Amendment violation and were identical except for one twist: in the first case, the defendant is found in possession of a large quantity of heroin with the intent to sell to high school students.[99] In the second case, the defendant is found with marijuana with the intent to sell to "terminally ill cancer patients to ease their suffering."[100]

The results come as no surprise: even though the fact patterns were identical beyond the nature of the crime and even though the hypothetical search was "unambiguously illegal,"[101] subjects assigned to judge the marijuana case found a Fourth Amendment violation triggering exclusion only 40% percent of the time. Subjects assigned to judge the heroin case, by contrast, found a Fourth Amendment violation requiring exclusion of evidence 85% percent of the time.[102]

Importantly, Professor Sood did not read the results to suggest that courts and judges purposely ignore precedent to avoid application of the exclusionary rule.[103] Rather, she suggested what was at play was "motivated cognition" — a sort of unconscious bias that pushes judicial decision-makers to resolve exclusionary rule motions in favor of the more moral choice.[104] From this perspective, then, it is probably best to view the shadow rule as the inevitable consequence of human beings on the bench implicitly seeking a moral course.

III. THE PROBLEM WITH LAW IN THE SHADOWS

The shadow exclusionary rule employed by the lower courts is appealing, not the least because it expresses an exclusionary rule that the public can tolerate. It tames the excesses of the automatic remedy while still providing courts opportunity to exercise oversight over Fourth Amendment boundaries in cases with low social costs. And that oversight can be meaningful. The exclusionary rule is most often applied to

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[98] Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543, 1543 (2015).

[99] *Id.* at 1566.

[100] *Id.* at 1566.

[101] *Id.* at 1582.

[102] *Id.* at 1582-83. These results were replicated when the study participants were actual judges. *See* Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 911 (2015) ("Judges are not computers. By design, the justice system is a human process, and, like jurors, judges are influenced by their emotions to some degree ... however sincerely they may try to prevent it.").

[103] *Id.* at 1563.

[104] *Id.* at 1562.

contraband evidence discovered during a warrantless street search.[105] As street searches are the types of searches that carry the greatest risk of systemic oppression, the shadow exclusionary rule still affords the judiciary the opportunity — if it is interested — to exercise oversight of the balance of power between police and the citizenry.[106] Indeed, the shadow rule tracks some of the more thoughtful proposals for reform of the rule.[107]

But there is a big problem with the shadow exclusionary rule: it blatantly contravenes binding precedent requiring automatic exclusion of tainted evidence obtained during an unreasonable, warrantless search. In the American judicial system, for a trial court to ignore binding precedent is verboten. Thus, in a case involving a violent felon, a court operating within the shadow regime cannot simply declare that there was an obvious Fourth Amendment violation but then explain that, in the case before it, the costs of applying the rule simply overwhelm the benefits.

Instead, in the face of the precedents, to avoid exclusion in the morally knotty case, a trial court has a singular option: find no Fourth Amendment violation in the first place. That is, rather than explain its nuanced balancing of costs and benefits, to justify its decision not to exclude ill-gotten evidence, a court has to "reason" that officers did not, in the first place, offend the Fourth Amendment. Thus, if determining whether an officer lacked reasonable suspicion for a traffic stop meant excluding evidence necessary to convict a violent felon, the court's only recourse to avoid exclusion is to find upon a second look that there was reasonable suspicion after all. And, critically, over a generation, these decisions aggregate to the point that the evidentiary standard for "reasonable suspicion" becomes lower and lower. This is the heart of the problem with the shadow exclusionary rule: over the course of years, it leads inexorably, if unintentionally, to a body of precedent that dramatically narrows Fourth Amendment protections. Stated another way, the shadow regime dramatically *expands* the universe of acceptable police intrusions.

Guido Calabresi, then a judge on the Second Circuit, persuasively described this phenomenon in a 2003 law review article. In operating the shadow exclusionary rule, Calabresi explained, courts "keep expanding what is deemed a reasonable search and seizure."[108] Here is how he described the "very easy to understand process":

> This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was

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[105] *See supra* notes 78–79 and accompanying text.

[106] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

[107] *See, e.g.*, John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036–37 (1974) (arguing in favor of excepting serious crimes from reach of exclusionary rule); James D. Cameron & Richard Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.D.R. 109, 142-52 (1984) (arguing in favor of a balancing approach to the exclusionary rule).

[108] Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

> reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision. The hydraulic effect, . . .means that courts keep expanding what is deemed a *reasonable* search or seizure.[109]

Calabresi did not mince words. This process, writ large, he wrote "is most responsible for the deep decline in privacy rights in the United States."[110]

Finally, there is a cost of the shadow rule beyond diminished privacy rights. As Barry Friedman argued, whatever the merits of lower courts' efforts to sanitize the exclusionary rule, "the game being played here is deeply troubling if one cares at all about the rule of law."[111] After all, as Friedman points out, in operating a shadow regime, "the entire judiciary is participating in one giant sham."[112] The courts' "[w]inking," Friedman, argues, "breeds contempt: contempt for the law, and for the Court's own pronouncements."[113] There is something to this.

I often teach first-year law students about the exclusionary rule. We first learn about the de jure exclusionary rule. Then we examine whether a trial court will exclude marijuana evidence discovered during a warrantless search of a college student's car. On these facts, the students easily proceed on the presumption that finding a Fourth Amendment violation will lead to exclusion of the marijuana evidence. Next, I tweak the fact pattern so that the evidence to be excluded is necessary to prosecute a murderer. To their great credit, the students, having only recently learned about the rule of law, still insist that exclusion of the tainted evidence must follow. And then, because I am preparing students to practice in the real world, I tell them about the shadow exclusionary rule. There is a certain violence here, revealing to students who have barely begun their journey that the law is not what it says it is. Our current exclusionary rule impugns the rule of law; it weakens privacy rights; it's incoherent and indefensible. The exclusionary rule is broken. It is time to clean house. So what comes next?

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[109] *Id.*

[110] *Id.* There is another invidious cost of the shadow regime; it incentivizes courts to ignore manipulation of the record by testifying officers. *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 607–09 (2011) (reviewing scholarship suggesting that real impact of exclusionary rule is that it encourages police perjury in order to ensure Court does not find a Fourth Amendment violation).

[111] Barry Friedman*, The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 52-53 (2010).

[112] *Id.*

[113] *Id.*

IV. BRINGING THE EXCLUSIONARY RULE OUT OF THE SHADOWS

We could just dispense with exclusionary rule altogether; get the judiciary out of the business of supervising police evidence-gathering and trust the executive and legislative branches to ensure that police respect Fourth Amendment boundaries. But it is worth remembering that the court in *Mapp* imposed a strict exclusionary rule on state courts mainly because the other branches were not, by any reasonable measure, doing a great job supervising police investigations.[114] Indeed, imposing the exclusionary rule on state court proceedings was not the court's first impulse. In 1949, twelve years before *Mapp*, the question of imposing the exclusionary rule on state courts was squarely before the Supreme Court in *Wolf v. Colorado*.[115] At that time, the court blinked; while it held states were bound by the Fourth Amendment, the court held the exclusionary rule was not a necessary adjunct.[116]

Why the change of heart twelve years later in *Mapp*? As states' police abuses became more publicized, the court likely just could not avert its eyes. There was Jim Crow, of course, which made a mockery of the constitutional rights of communities of color,[117] but respect for Fourth Amendment boundaries was wanting everywhere.[118] Against this dreadful backdrop, one might view nationalizing the exclusionary rule as a regrettable necessity — a mechanism for judicial oversight over criminal procedure when policing was generally pretty rotten. Critically, the modern Court acknowledges this legacy.[119] It is why, even as the modern Court

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[114] *See* Wayne Lafave, *Improving Police Performance through the Exclusionary Rule*—Part II: *Defining the Norms and Training the Police*, 30 MO. L. REV. 566, 569 (1965) ("[T]he several legislatures have given less than adequate attention to the need for clear-cut rules on police conduct."); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 45 (2001) ("American legislatures consistently have failed to address defects in the criminal process, even when they rise to crisis-level proportions.").

[115] *Wolf v. Colorado,* 338 U.S. 25 (1949)

[116] *See id.* at 33.

[117] *See* Davies, *supra* note 45, at 983 ("[T]he impetus for incorporation in *Mapp* surely traces back directly to the horrors of lynch justice in the Scottsboro Case, Brown v. Mississippi and far too many others.").

[118] *See* MACLIN, *supra* note 8, at 84 (reviewing widespread disregard for Fourth Amendment boundaries prior to *Mapp* decision). In explaining their decision to adopt a state exclusionary rule in 1955, the California Supreme Court explained they were motivated by the poor state of policing: "[W]ithout fear of criminal punishment or other discipline, law enforcement officers, sworn to support the Constitution of the United States and the Constitution of California, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder." People v. Cahan, 282 P.2d 905, 907 (Cal. 1955).

[119] The "regrettable necessity" theme is endorsed in the modern Supreme Court's arguments that the exclusionary rule is ripe for modification. The idea is that, yes, things were awful in 1961, but things have improved. Thus, Justice

has continued to pinch the exclusionary rule's reach, it has persistently retained power to reenergize the rule in the face of "recurring or systemic negligence."[120]

So we keep the exclusionary rule. The question is in what form? Scholars suggested all sorts of ways to improve the rule, [121] but there is only one pragmatic approach: we ratify the shadow rule. That is, we create an "open air" balancing regime: trial courts are instructed to first assess whether police invaded a suspect's Fourth Amendment rights. If the court finds they did, the question of exclusion is presented. Exercising its discretion, the court then weighs the benefits of excluding the evidence (valorizing Fourth Amendment values; improving policing) against the social costs (undermined prosecutions leading to public safety risks; guilty persons escaping justice). If the court finds that the benefits outweigh the costs, the court orders exclusion of the ill-gotten evidence.

Even if in the "open air", there are reasons to be wary about a balancing regime. As Justice Brennan once warned, balancing of costs and benefits relies on "intuition, hunches, and occasional pieces of partial and often inconclusive data."[122] Accordingly, Yale Kamisar argued that a balancing regime will lead to "erratic, indeed capricious, application of the exclusionary rule."[123] Fair enough. But the existence of the shadow regime confirms that judges are incapable of administering an automatic rule of exclusion. And we know that that their efforts to evade it cause harm. Sure, a balancing regime might be unruly, but after sixty years of

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Scalia, in 1986's *Hudson* case, justified not applying the exclusionary rule to "knock and announce" offenses in part because "[w]e cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago." Hudson v. Michigan, 547 U.S. 586, 597 (2006).

[120] Herring v. United States, 555 U.S. 135, 144 (2009).

[121] We could replace the exclusionary rule with some other mechanism for judicial oversight of criminal procedure. A number of thoughtful proposals have been offered. *See e.g.* Calabresi, *supra* note 108, at 115–18 (suggesting that the "penalty" for a Fourth Amendment intrusion should be assessed, not by excluding the evidence, but by reducing the defendant's sentence if convicted); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule,* 1999 U. ILL. L. REV. 363 (arguing in favor of replacing exclusionary rule regime with administrative court that would hear Fourth Amendment claims and be able to award money damage). Each of these proposals has merit. But, for the purposes of this paper, I presume they are not politically or jurisprudentially feasible.

[122] *Leon*, 468 U.S. at 942 (Brennan, J., dissenting).

[123] Yale Kamisar, *'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule*, 86 MICH L. REV 1, 11–29 (1987). Kamisar also persuasively argued that abrogating the automatic rule of exclusion with a balancing regime "would signal a weakening of our resolve to enforce the dictates of the fourth amendment" which arguably "would positively encourage" Fourth Amendment violations. *Id.* at 34, 38.

experience, it is probably best to create rules for the trial court judges we have, not the ones we wish we had.

At first blush, one could read the Supreme Court's recent exclusionary rule cases as arguing for ratification of the shadow exclusionary rule. For instance, in the 2011 *Davis v. Hudson* decision, the Supreme Court suggested that "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs."[124] This sounds much like the balancing at play with the shadow rule. But, as I have written elsewhere, it is not.[125] The balancing contemplated by the modern Court weighs the costs of exclusion solely against its "deterrence" benefit. [126] That is not accidental: premising the rule exclusively on its ability to deter bad cops in the field allowed the modern Court to create a broad good faith exception [127] But it's a legal fiction; there are undoubtedly other social benefits that flow from the exclusionary rule.[128] Fortunately, in a true balancing system, the Court's "deterrence only" jurisprudence can be discarded in favor of a more reasonable accounting of the exclusionary rule's social benefits.[129]

So exactly what social costs and social benefits will go on the scales in a new "open air" balancing regime? Assessments of the costs and benefits of the exclusionary rule are not hard to come by. There are over 467 full-length law review articles on Westlaw with "exclusionary rule" in the title. Add to these the books, the chapters in treatises, the practice guides, and the tens of thousands of court decisions, and one could easily spend a career consuming nothing but exclusionary rule content.[130] But in the end, the costs, and benefits that a reasonable trial court should place on the scales can be easily distilled.

A. The Costs of Exclusion

Let's start with the costs. First and foremost, exclusion of relevant evidence exacts a public safety cost. Exclusion of evidence always detracts

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[124] *Davis*, 564 U.S. at 237; *see also Hudson*, 547 U.S at 591 (indicating that the exclusionary remedy should be reserved for cases "where its deterrence benefits outweigh its 'substantial social costs'") (quoting Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 373 (1998); *Herring,* 555 U.S. at 147 (asserting that in order for a court to exclude evidence the "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system").

[125] *See* Andrew Carter, *Good Cops, Bad Cops, and the Exclusionary Rule*, 23 U. PA. J. CONST L. 239, 260–65 (2021).

[126] *See id.*

[127] *See id.*

[128] *See infra* notes 131–43 and accompanying text.

[129] *See* Carter, *supra* note 125, at 260-65.

[130] *"Exclusionary Rule,"* WESTLAW PRECISION, http://westlaw.com (Advanced search for titles of law review articles) (last visited Sept. 14, 2023); *"Exclusionary Rule,"* GOOGLE SCHOLAR, http://scholar.google.com (last visited Sept. 14, 2023).

from the truth-finding process, which if the evidence is uniquely probative, leads to lost prosecutions, which sometimes set "the guilty free and the dangerous at large."[131] Opponents of the exclusionary rule tend to over-assess the public safety costs-- they do not account for the moderating force of the shadow regime, which implicitly accounts for public safety.[132] Still, it is inescapable that every decision to exclude ill-gotten evidence will impact a prosecution: a prosecution designed to serve public safety. But the public safety costs are not a fixed value.

At one extreme, the public safety cost of excluding evidence could be quite heavy — exclusion of the evidence leads to a case dismissal or a lost jury verdict that puts a violent felon back on the street. On the other extreme, the public safety cost of exclusion could be marginal — the exclusion of the evidence leaves a prosecution effectively intact, or exclusion of the evidence simply undermines a misdemeanor prosecution of a nonviolent drug offender. In any reasonable balancing regime, then, the public safety cost of a particular decision to exclude evidence will be a function of the necessity of the evidence and the seriousness of the underlying crime.

Beyond the public safety costs, jurists and commentators also sometimes assign a "judicial legitimacy" cost to the exclusionary rule's operation. While not substantially developed in the literature, the idea here is that exclusion of relevant evidence subverts the foundational truth-finding mission of the courts which, especially if a guilty person is set free, has the "effect of generating disrespect for the law and administration of justice."[133] This "legitimacy" argument is, at bottom, an argument that public

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[131] *Hudson*, 547 U.S. at 591; *see also Davis*, 564 U.S. at 237 ("Exclusion exacts a heavy toll on both the judicial system and society at large . . . [I]ts bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment."); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364-65 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions."); United States v. Payner, 447 U.S. 727, 734 (1980) (acknowledging "that the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case").

[132] *See* Tybor & Eissman, *supra* note 90 (reviewing a study indicating that less than one percent of motions to exclude in violent crime matters are granted and observing "[t]his finding contradicts a broadly held assumption that violent offenders often go free because of the controversial exclusionary rule . . . .").

[133] *Stone*, 428 U.S. at 491. These concerns about the exclusionary rule have deep roots. *See* Rosanski v. State, 106 Ohio St. 442, 462 (1922) (rejecting exclusionary rule because if it "should be adopted by the courts as the true interpretation of our sacred Bill of Rights, it would no longer be recognized as a charter of government and as a guaranty of protection of the weak against the aggressions of the strong, but rather as a charter of unbridled license and a certificate of character to the criminal classes").

opinion matters: if the courts lose the support of the public, they cannot exist. And letting violent criminals go free on technicalities breeds public contempt for the courts as institutions of justice. [134]

In a regime where the courts persistently let violent criminals go free, placing a "judicial legitimacy" cost on the scales arguably makes sense. During the 1970s and 1980s, for example, there is no denying that operation of the exclusionary rule played a part in the public's mistrust of the courts.[135] But under an open-air balancing regime, where public safety costs are free to go on the scales, there should not be a lot of "letting violent criminals go free." Again, the shadow rule is not producing much public contempt. Indeed, by adopting an "open air" balancing regime, we would only be pouring concrete on a regime that the public already tolerates.

In the new "open air" exclusionary rule, then, it is doubtful that trial court judges should assess a distinct court legitimacy cost; rather, this cost is already baked into the public safety assessment. In sum, in a balancing regime, the only costs that need go the scales are the public safety costs measured by the nature of the prosecution undermined and the necessity of the evidence in proving guilt.[136] So what goes on the other side of the scales?

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[134] *See* Slobogin, *supra* note 121, at, 436-37 ("[T]he rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism, because it makes courts look oblivious to violations of the criminal law and involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty."); LONG, *supra* note 44, at 112 (reviewing critique that the rule would "inevitably lead to a loss of public confidence in the system as people learned of guilty criminals being freed on 'technicalities'").

[135] *See* Harry M. Caldwell & Carol A. Chase*, The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 45 (1994) ("Americans are concerned with rising crime and they sense that the criminal justice system is not adequately protecting them from crime or criminals. If pressed to identify a focal point of criticism of the justice system, many would name the Exclusionary Rule.").

[136] Other costs of the modern exclusionary rule regime have been identified. William Stuntz has argued that the exclusionary rule over-incentivizes defense counsel to pursue motions to suppress rather than building a case for actual innocence. *See* William Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997). And there are costs of the rule measured by judicial resources dedicated to resolving suppression motions. *Scott*, 542 U.S. at 366 ("The exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded."). The challenge, though, is how to assess these systemic costs in a particular case. Indeed, under an open-air balancing regime, if the court is facing the question of whether to exclude evidence, it has already concluded that the Fourth Amendment claim there under

B. The Benefits of Exclusion

1. Valorization of Fourth Amendment Values

The first social benefit of excluding ill-gotten evidence is that it operates to valorize Fourth Amendment values — it reinforces the moral covenant between a free people and its government. In an open-air balancing regime, an order excluding evidence will always be preceded by a public pronouncement that an officer's conduct offended the people's privacy rights. Next, by excluding the ill-gotten evidence, the court communicates that overstepping Fourth Amendment boundaries has consequences.[137] In this manner, by proclaiming a Fourth Amendment offense and excluding the ill-gotten evidence, a court expresses "society's authoritative moral condemnation" of Fourth Amendment intrusions.[138] This is what might be called the "moral or educative influence" of the exclusionary rule.[139] In this vein, "[a]s a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the fourth Amendment credible."[140] The rule turns the Fourth Amendment into something more than a mere "form of words."[141]

Here is a way to think about it: imagine you are a trial court judge in a criminal court, and the defendant seeks exclusion of probative evidence in an unlawful gun possession prosecution. The evidence was obtained after government officers, without a warrant, forced their way into defendant's home by gunpoint in the middle of the night. As a judge charged with guarding the people's rights, would you exercise your discretion to exclude the ill-gotten evidence? I would — because an invasion of the home in the dead of night eviscerates the privacy rights at the heart of our

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consideration was in fact meritorious. How does one assess an overrepresentation of dubious claims by weighing it against exclusion in a meritorious one?

[137] *See Weeks*, 232 U.S at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

[138] Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 833-34 (2013) (quoting Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352 (1996)).

[139] Johannes Andenaes, *The Moral or Educative Influence of Criminal Law*, *in* LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 50, 50-59 (June Louin Tapp & Felice J. Levine eds., 1977)*; see also* Steven Cann & Bob Egbert, *The Exclusionary Rule: Its Necessity in Constitutional Democracy*, 23 HOW. L.J. 299, 317 (1980) (observing that the exclusionary rule works as "a communicative device, teaching and reinforcing democratic values").

[140] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 711 (1970).

[141] *Mapp*, 367 U.S. at 648 (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)).

contract with the government; it is a moral offense against the American covenant. Excluding the evidence would communicate my disgust, my opprobrium at such an offense to the Bill of Rights. It would be a way for me to valorize Fourth Amendment values, to communicate that the rights of a free people have to matter.[142]

Notably, in the early cases, the Supreme Court expressed the "valorization" benefit in terms of avoiding the cost of admitting tainted evidence in a trial overseen by the judiciary. In *Weeks*, for example, the Court explained that to admit tainted evidence at trial would make the judiciary "an accomplice to a constitutional violation."[143] The idea is that by admitting tainted evidence, a court would be sanctioning "lawlessness by officers of the law," which would have a "tragic effect upon public respect for our judiciary."[144]

The early Supreme Court was not reticent in expressing this asserted threat. Indeed, reading the pre-Burger Court cases, it appears that admitting ill-gotten evidence posed an existential risk not just to the judiciary but to the Republic itself.[145] In the 1926 *Olmstead* opinion, Justice Brandeis explained that failure to exclude ill-gotten evidence "would bring terrible retribution . . .[i]f the Government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy."[146] In *Mapp*, Justice Clark warned that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[147]

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[142] I've previously written about the modern Court's effective ban on discussing valorization of Fourth Amendment values when assessing the benefits of excluding ill-gotten evidence. *See* Carter, *supra* note 125, at 260-61. In the earlier paper, I submitted this effective ban was in service to a contorted jurisprudence that would become a relic under an open-air balancing regime. *See id.* at 264. This paper, therefore, presumes that trial judges exercising discretion in an open-air balancing regime will be free to weigh the benefit of valorizing Fourth Amendment values.

[143] *Weeks*, 232 U.S. at 394 (explaining that to admit ill-gotten evidence would be "to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people").

[144] *Wolf,* 338 U.S. at 46 (Douglas J., dissenting); *see also Elkins*, 364 U.S. at 223 ("Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.").

[145] *See* Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 393 (2010) ("One could read these early cases and wonder how our system of justice would not crumble without the exclusionary rule to protect the judiciary's dignity and to safeguard the liberties our forefathers fought for in the struggle against British tyranny.").

[146] *Olmstead*, 277 U.S. at 485 (1928).

[147] *Mapp*, 367 U.S. at 659.

That is all a bit much. Prior to *Mapp*, of course, many states did not have an exclusionary rule.[148] More than a few retained self-ruling governments and functional judiciaries. But even if there is something to this notion of excluding evidence to avoid the "costs to judicial integrity," it is hard to put it on the scales as a discrete benefit. Rather, it makes more sense to include judicial integrity as a piece of the broader valorization of Fourth Amendment values benefit. That is, one way the rule valorizes Fourth Amendment values is by declaring that the court will not be a partner in lawlessness.

On the scales, the "valorization" benefit, like the public safety cost, is not a fixed value. Rather, the benefit obtained by valorizing Fourth Amendment protections in a particular case turns on the nature of the Fourth Amendment intrusion. On one extreme — an officer breaks into a home without a warrant — excluding the ill-gotten evidence would serve a weighty "valorization" benefit. Such grotesquely unlawful conduct demands public affirmation of Fourth Amendment values. On the other extreme — an officer makes a clumsy mistake in administration of field sobriety exercises during a DUI investigation — the valorization of Fourth Amendment values "benefit" would be diminished.

In sum, by excluding ill-gotten evidence, a trial court can obtain a sure benefit by reinforcing the American moral that a free people cannot tolerate unreasonable searches and seizures. But there is a separate impact: excluding evidence also communicates to police and prosecutors that if similarly tainted evidence is brought to court again, it will again be excluded. And here we arrive at the deterrence benefits of the exclusionary rule.

2. Deterrence

That exclusion of ill-gotten evidence might produce a social benefit by deterring officers in the field from committing Fourth Amendment intrusions is well-trod terrain.[149] But there are reasons to be deeply skeptical of the notion that the threat of exclusion actually deters officers in the field.[150] A lack of empirical support for the deterrence theory has vexed generations of scholars.[151] And from a behavioral economics perspective,

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[148] *See supra* note 30.

[149] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) (explaining that in justifying application of the exclusionary rule "we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future"); *Elkins*, 364 U.S. at 222 (reviewing that one purpose of the exclusionary rule "is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.").

[150] *See, e.g.*, Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54 (observing that "[n]o one actually knows how effective the exclusionary rule is as a deterrent…").

[151] *See, e.g.,* Oaks*, supra* note 140, at 709 (doubting that it is possible to quantify the effects of the exclusionary rule on policing); John Barker Waite, *Evidence—Police Regulation by Rules of Evidence*, 42 MICH. L. REV. 679, 685

in most investigatory settings there are reasons to doubt the rule expresses a deterrence value.[152]

To begin, deterrence presupposes knowledge; that is, in order for an officer to be deterred from crossing constitutional boundaries, they need to have knowledge of where those boundaries are.[153]And not all search and seizure settings enjoy constitutional boundaries sufficiently mapped to support a deterrence theory; rather, most searches are judged by imprecise "reasonable suspicion" or "probable cause" standards.[154] Second, deterrence requires some degree of certainty in the consequences. [155] And in most cases, the likelihood that an officer's constitutional violation will lead to exclusion of evidence in a distant trial is too remote to support a deterrence theory.[156]

(1944) (noting that deterrence is "a logical enough theory" but not "one shred of evidence has been discovered" to support it). For exhaustive reviews of the efforts to empirically measure the exclusionary rule's deterrence effect, see LONG, *supra* note 44, at 129–32; Slobogin, *supra* note 121, at 368-69.

[152] *See* Jacobi, *supra* note 110, at 595 (conducting economic analysis of exclusionary rule and finding bare support for asserted deterrence impacts on officers in field); Slobogin, *supra* note 121, at 372-75 (concluding that both economic and behavioral theories suggest the exclusionary rule "is not a particularly effective way of motivating police to obey the Fourth Amendment.").

[153] Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 175 (2004) (reviewing that for deterrence to work a potential offender must know what actions are required to avoid the sanction); Illinois v. Krull, 480 U.S. 340, 348-49 (1987) ("[B]ecause the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'") (citing United States v. Peltier, 422 U.S. 531, 542 (1975)).

[154] *See* William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 691 (2011) ("[T]he Court has failed to provide the sort of guidance that a powerful exclusionary rule demands because concepts such as "probable cause" and "reasonable suspicion" cannot be refined in such a way as to produce clear answers in specific situations.").

[155] *See* Daniel S. Nagin, *Deterrence in the Twenty-First Century,* 42 CRIME AND JUSTICE IN AMERICA: 1975-2025, 199, 199 (2013) (reviewing studies and concluding that certainty of punishment is key to deterrence). *See also* Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL OF RTS J. 821, 833 (2013) (reviewing that under economic model, the exclusionary rule only "discourages an unconstitutional search if the loss of the evidence discovered, *multiplied by the likelihood of exclusion,* exceeds the value of the evidence the police anticipate finding.") (emphasis added).

[156] *See* Carter*, supra* note 125, at 245-47. *See also* Michael D. Cicchini, *Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 461 (2010) (conducting economic analysis and concluding that exclusionary rule "*does not* and *cannot* deter police misconduct" because "the expected cost to the police of their own misconduct ... is nearly always zero" and

Considering the above, in the past, I have called the deterrence theory "little more than hopeful conjecture."[157] Still, there is at least a subset of cases where excluding ill-gotten evidence likely does obtain a deterrence benefit. For example, there is a straightforward Supreme Court precedent that requires police to obtain a warrant before attaching a GPS device to a suspect's car.[158] That is an easy bright line rule; a well-trained officer should know that attaching a device without a warrant is a certain Fourth Amendment violation. And there is a likelihood of consequences. Presented with a motion to exclude, it is hard to imagine a court ignoring such a plain constitutional transgression — crossing such a well-defined line would stand as a knowing (or at least a purposely indifferent) violation of the Fourth Amendment. Under such circumstances, a future officer investigating a crime might very well pause before attaching a GPS device without first obtaining a warrant. In a particular case, then, a trial court could find exclusion of ill-gotten evidence would obtain a strong deterrence benefit.

Because the "deterrence benefit" of the exclusion of tainted evidence turns on the nature of the Fourth Amendment intrusion, it invites another sliding scale. when an officer crosses a well-defined Fourth Amendment boundary, a court can reasonably assess a deterrence benefit in favor of excluding ill-gotten evidence. On the other hand, where an officer stumbles across an ill-defined boundary, the deterrence benefit of exclusion would be diminished.[159]

A related, and weightier, benefit of excluding improperly-obtained evidence is what William Merten and Silas Wasterstrom in a 1992 law review article called "systemic deterrence."[160] The notion here is that while an individual officer may or may not be deterred by the specter of loss of evidence in a particular case, the aggregate of trial court decisions excluding ill-gotten evidence would refract at a systems level. Thus, to avoid

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"the probability that the evidence will be suppressed ... even in cases of egregious police misconduct, is very close to zero.").

[157] Carter, *supra* note 125, at 242.

[158] United States v. Jones, 565 U.S. 400, 404 (2012).

[159] Notably, this line of reasoning is already well-established in the Supreme Court's recent good faith holdings. *See Davis*, 564 U.S. at 238 ("When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force and exclusion cannot pay its way.") (internal quotations and citations omitted).

[160] *See generally* William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 394 (1981) (using the term "systemic deterrence" to describe the exclusionary rule's "effect on individual police officers through a police department's institutional compliance with judicially articulated [F]ourth [A]mendment standards.").

giving a defendant fodder for a successful motion to exclude, police departments will train officers in how to abide Fourth Amendment boundaries.[161]

A good illustration of this systemic deterrence can be found in the DUI setting. If you have ever been present for a roadside DUI investigation (or seen one on YouTube), you have witnessed officers administering the so-called Standard Field Sobriety Tests (SFSTs): the one-legged stand, the walk-and-turn, and the horizonal gaze nystagmus test (that's where the officer shines a flashlight across a suspect's eyes).[162] In a series of exclusionary rule cases in the 1980s and 1990s, courts established that a failing score on the SFST provided officers with probable cause for a constitutional seizure, *i.e.*, a DUI arrest.[163] However, if the SFSTs were administered improperly, courts did not hesitate to find there was no probable cause for an arrest and that any material evidence thereafter acquired (*i.e.*, breathalyzer results proving guilt) had to be excluded.[164]

How did police bureaucracies respond? Police departments are in the business of protecting public safety and obtaining DUI convictions is a key element of this goal. Indeed, effective enforcement of DUI laws has, in some estimates, contributed to saving over 400,000 lives in the last forty years.[165] Police Departments also know that courts will grant a motion to exclude if an officer relies on the standard field sobriety tests for probable cause but administers them improperly.[166] Those outcomes undermine the department's mission, and therefore, the department takes steps to train

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[161] *Id.* at 399 (observing that to protect prosecutions "[p]rofessional police forces can be expected to encourage [F]ourth [A]mendment compliance through training and such guidelines as the department provides for conducting searches, seizures and arrests."). *See also Leon*, 468 U.S. at 953 (Brennan, J., dissenting) ("[T]he chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally.").

[162] *See generally* DAVID JOLLY, DUI/DWI: THE HISTORY OF DRIVING UNDER THE INFLUENCE 120–124 (2009) (describing police reliance on Standard Field Sobriety Tests to establish probable cause for a DUI arrest); MARGARET JASPER, DWI, DUI AND THE LAW at 21-24 (2004) (same).

[163] *See, e.g.*, Ballard v. State, 955 P.2d 931, 931 (Alaska Ct. App. 1998); State v. Superior Court, 718 P.2d 171, 176-78 (Ariz. 1986); State v. Ito, 978 P.2d 191, 205 (Hawai'i App. 1999); State v. Baue, 607 N.W.2d 191, 197 (Neb. 2000).

[164] *See* State v. Homan, 732 N.E.2d 952, 955 (Ohio 2000) (reviewing that for SFTS to provide probable cause for arrest, "the police must have administered the test in strict compliance with standardized testing procedures."); Strickland v. City of Dothan*,* 399 F. Supp. 2d 1275, 1290 (M.D. Ala. 2005) ("Because the court finds that the sobriety tests were administered incompetently, Strickland's arrest was unsupported by probable cause in violation of the Fourth Amendment.").

[165] *MADD Marks 40 years of Lives Saved*, MADD, https://www.madd.org/madd-marks-40-years-of-lives-saved/ (last visited Jul 8, 2023).

[166] *See Homan*, 732 N.E.2d at 955.

officers in how to properly administer the SFST. Indeed, in most states, an officer must complete twenty-four hours of training in order to administer the SFST.[167] In this vein, the exclusionary rule improves police training.

This notion that the exclusionary rule improves policing in American is not particularly controversial. The modern Supreme Court endorsed the rule's systemic, or bureaucratic, deterrence benefit.[168] The challenge is in how to place this "systemic deterrence" benefit on the scales in an open-air balancing regime. The benefit to improved police training is likely to be small in a particular case — it is the aggregate of decisions to exclude that resonates at a systems level. My suggestion is that in order to preserve systemic deterrence benefits, we place a presumption in favor of exclusion on the scales after a violation of the Fourth Amendment is found.

A final instrumental benefit of the exclusionary rule is worthy of examination here. The Fourth Amendment is fiendishly imprecise; it says little more that the police shall not conduct "unreasonable searches."[169] If left with that bare text, an officer in the field would surely struggle to navigate constitutional boundaries. However, exclusionary rule practice persistently asks courts to draw boundaries between reasonable and unreasonable searches (*e.g.*, is it reasonable for an officer to attach a GPS devise to a suspect's car without first obtaining a warrant?). By resolving these cases, courts are able to draw specific lines for officers in the field (No, it is *not* reasonable to attach the GPS without first obtaining a warrant). A benefit of exclusionary rule practice, then, is that it provides courts the cases they need to give specific meaning to the Fourth Amendment's proscription against unreasonable searches.[170]

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[167] *See*, *e.g.*, *FDOT Grant Funded Traffic Safety & DUI Enforcement Training*, FLORIDA PUBLIC SAFETY INSTITUTE, https://www.flhsmv.gov/ driver –licenses –id –cards/education –courses/dui –and –iid/licensed–dui–programs–florida (reviewing 24-hour curriculum for training in administration of NHTSA/IACP Standardized Field Sobriety Testing).

[168] *Davis*, 564 U.S. at 246 (noting that the exclusionary rule's deterrent impact depends on "'alter[ing] the behavior of individual law enforcement officers *or the policies of their departments*'") (emphasis added) (citing *Leon*, 468 U.S. at 916); *Leon*, 468 U.S. at 920 n.20 (observing that the exclusionary rule both provides an "impetus" to police training programs that both "make officers aware of the limits imposed by the Fourth Amendment" and "emphasize the need to operate within those limits."); *cf. Hudson*, 547 U.S. at 599 (acknowledging that since *Mapp,* there has been "increasing professionalism of police forces" and "wide-ranging reforms in the education, training, and supervision of police officers.").

[169] U.S. CONST. amend. IV.

[170] *See* Terry v. Ohio, 392 U.S. 1, 13 (1968) ("In our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents."); Slobogin, *supra* note 121, at 400 ("The exclusionary rule clearly facilitates appellate perusal of Fourth Amendment claims because it provides a strong incentive to bring a claim (dismissal of criminal charges), and the claim can be brought within a setting that is tailor-made for

In an earlier paper I suggested that in a balancing regime, this "line-drawing" benefit would weigh favorably in favor of exclusion.[171] However, under an open-air balancing regime, courts will resolve motions to exclude in two steps. In the first place, the court will decide if an officer intruded on the suspect's Fourth Amendment rights. If a Fourth Amendment intrusion is identified, the court will then decide if the costs of responding to that transgression by excluding the evidence outweigh the benefits that exclusion would obtain. The line-drawing benefit is obtained in the first step, where the court resolves the constitutional question of whether search was reasonable or not. There is really no Fourth Amendment boundary-drawing benefit to put on the scales in the second step.[172]

CONCLUSION

My legal training was the liberal kind, and I started this paper with a vague goal of mounting a spirited defense of the Fourth Amendment exclusionary rule against the incursions of the modern Supreme Court. But the rule I set out to defend—where ill-gotten evidence is excluded irrespective of the underlying crime or the nature of the officer's misconduct—is dead, and it has been for a while. Frankly, it was doomed from the start. Trial court judges are, under their judicial robes, human beings. Their decision-making was always going to express a "moral" exclusionary rule: one where exclusion of ill-gotten evidence is reserved for unignorable police misconduct and prosecutions of misdemeanors and vice crimes. It is time to accommodate this reality. It is time to adopt an exclusionary rule for the real world.

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resolving such issues — judge-run suppression hearings at which criminal defense attorneys familiar with the case refine the issues."); Goodpaster, *supra* note 45, at 1073 (explaining that an "important function of the rule is judicially to develop and articulate partial codes of lawful police behavior and of civil liberties."). *See also* Carter, *supra* note 125, at 250–53.

[171] *See id.* at 252.

[172] In the Section 1983 context, a similar two-step process is contemplated in assessing the application of qualified immunity: First, the court assesses whether there was a constitutional violation; second, the court assesses whether a reasonable officer would have plainly understood their conduct was unconstitutional. *See generally* Saucier v. Katz, 533 U.S. 194, 201 (2001). This process would appear to ask courts, like the exclusionary rule cases, to draw Fourth Amendment lines as a first step. *See id.* However, the Supreme Court has authorized courts to skip the first step in Section 1983 cases. *See* Pearson v. Callahan, 555 U.S. 223, 237 (2011) (endorsing process whereby a trial court can dismiss Section 1983 case based on qualified immunity without ever considering whether there was a constitutional violation in the first place). Consequently, today Section 1983 litigation has little impact on drawing Fourth Amendment boundaries. *See* John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 132–36. It follows that for the exclusionary rule's line-drawing benefit to remain intact, trial courts should not be authorized to skip the first step.

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