THE EXCLUSIONARY RULE LOTTERY

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ARTICLES

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Eugene Milhizer*

I. INTRODUCTION

Perhaps no Supreme Court decisions about the criminal justice system have provoked more criticism than those involving the exclusionary rule. According to the Court’s most recent pronouncements, the Fourth Amendment’s exclusionary rule is a judicially-created mechanism whose sole purpose is to deter future police misconduct by excluding, from trial, evidence obtained through unconstitutional searches and seizures. Apart from jurisprudential concerns, the rule’s bare utilitarian premise and simplistic approach render it morally and prudentially objectionable, and, therefore, in need of radical reconsideration or abandonment. These deficiencies can be exposed, in part, by a hypothetical “suppression lottery,” which will be presented later in this article. Before considering the lottery and addressing the modern exclusionary rule’s impoverished normative basis, it is useful to sketch its history and describe its stunning conceptual transformation.

II. THE HISTORY AND CHANGING RATIONALE OF THE EXCLUSIONARY RULE

The term “exclusionary rule” is itself a misnomer, as there are several different rules and theories for exclusion based on the type and nature of the governmental misconduct at issue and the rights thereby transgressed. For example, confessions obtained in violation of Miranda protections, and coerced statements (such as those obtained by torture and threats), each has its own distinct exclusionary rule. Evidence obtained via illegal searches so egregious as

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to “shock the conscience” is excluded under a third standard. Additional rules govern the Sixth Amendment and other constitutional and statutory violations. When people think about the exclusionary rule, they generally focus on the rule that excludes evidence obtained directly or derivatively from illegal searches and seizures in violation of the Fourth Amendment. This version of the exclusionary rule is most often invoked and will be addressed in this article.

The exclusionary rule excludes evidence from criminal trials in situations where that evidence is obtained as a direct result of an illegal search or seizure by police in violation of the Fourth Amendment. Further, any evidence derived from a violation of the Fourth Amendment will likewise be suppressed pursuant to the so-called “fruit of the poisonous tree” doctrine, provided the illegal conduct is not too attenuated. It matters not if the evidence is probative of guilt and necessary for a conviction, nor is it of any consequence if the crime involved is serious and the criminal is dangerous. Evidence is suppressed in order to deter future police misconduct, premised on the assumption that police are less likely to engage in illegal searches and seizures if they know that the evidence obtained illegally cannot be used in court. While the rule carries with it a variety of exceptions and limitations, the suppression of illegally obtained evidence to deter future police misconduct is its basic operating principle. In the oft-quoted words of Justice Benjamin Cardozo, the rule allows “the criminal ... to go free because the constable ... blundered.”

The exclusionary rule was not originally established to deter police misconduct, but rather to vindicate the rights of individuals and protect the integrity of the criminal justice system. In the 1914 case that first recognized the rule, Weeks v. United States, the Supreme Court reasoned that exclusion was an

6. For example, some pretrial identifications can be excluded under the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV; Stovall v. Denno, 388 U.S. 293, 294-98 (1967).
8. U.S. CONST. amend. IV.
9. Weeks v. United States, 232 U.S. 383, 398 (1914). Weeks applied the exclusionary rule to federal cases. Id. The rule was applied to the states via the Fourteenth Amendment in Mapp v. Ohio, 367 U.S. 643, 656-57 (1961).
11. See infra, e.g., notes 67-69 and accompanying text. This is not an exhaustive list. See, e.g., United States v. Havens, 446 U.S. 620, 626-27 (1980) (recognizing an impeachment exception to the exclusionary rule).
Summer 2008] EXCLUSIONARY RULE LOTTERY 757

integral part of a person's fourth amendment rights against unreasonable searches and seizures.\footnote{15} A few years later, the Court explained that without such a rule, the Fourth Amendment would be reduced to a mere "form of words."\footnote{16} As Justice Lewis Brandeis stated:

If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.\footnote{17}

Over the next several decades, deterrence of police misconduct became an increasingly important basis\footnote{18} and ultimately the singular justification for the rule.\footnote{19} During this same period, the Supreme Court recanted its original statements that the rule was of constitutional origin and announced instead that it had been created under its own rule-making authority. By 1974, the exclusionary rule had morphed into "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."\footnote{20} Exclusion was no longer a right of the victim of an illegal search or seizure. Insofar as preserving judicial integrity remained relevant, this rationale provided no protection under the rule beyond that designed to achieve deterrence. Thus, what began as a constitutional rule evoking noble aspirations was recast as a Court-devised policy initiative premised on utilitarian calculations.

Most of the criticism of the modern exclusionary rule and its analogues falls into one of two categories. Many critics, including Justice John Harlan, challenge the Court's authority to create such a rule under the auspices of its supervisory authority over state courts.\footnote{21} Others dispute the factual premises underlying the Court's utilitarian calculations, arguing that violations of the Fourth Amendment are usually unintended,\footnote{22} and preferred alternative means

\footnotesize{\citenum{15} The Court in Weeks unequivocally rejected the notion that the remedial purposes of the exclusionary rule were aimed at offending officers when it instructed that "[w]hat remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies." Id. at 398.

\footnotesize{\citenum{16} Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

\footnotesize{\citenum{17} Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

\footnotesize{\citenum{18} Mapp, 367 U.S. at 656 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

\footnotesize{\citenum{19} See Stone v. Powell, 428 U.S. 465, 485 (1976) (instructing that the judicial integrity justification for exclusion has only a "limited role [to play] ... in the determination [of] whether to apply the [exclusionary] rule in a particular context"); Janis, 428 U.S. at 446 (instructing that deterrence is the "prime purpose" of the rule, if not the sole one").


\footnotesize{\citenum{21} Mapp v. Ohio, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting) ("[N]o one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts.").

other than the suppression of evidence, such as civil suits, are adequate to address the problem.

In comparison, little has been said about the legitimacy of suppressing evidence based on utilitarian calculations in general, and the Court's formula in particular, even assuming the Court has the authority to establish such a rule and its underlying factual assumptions are correct. Such normative and prudential questions deserve serious reflection and consideration. Before such an examination can be meaningfully undertaken, however, it is necessary to more fully portray the minimalist and utilitarian character of the modern exclusionary rule.

III. A Narrow Utilitarian Calculation

Suppose the police illegally eavesdrop on a phone conversation between A and B, in which they implicate each other, as well as C, in a criminal enterprise. Thereafter, A, B, and C are each tried in separate criminal trials. Can the incriminating evidence taken in violation of the Fourth Amendment be admitted at any, or all, of their trials? The Supreme Court's jurisprudence would hold that suppression is required at A's and B's trial, but not C's trial. Although this line drawing can be explained as a matter of "standing"—i.e., A's and B's fourth amendment rights were violated, but C's were not—the standing-based distinction is recognized only insofar as it is consistent with the over-arching deterrent justification for the exclusionary rule. These mixed results are consistent with the deterrent imperative because the exclusion of the evidence at A's and B's trial is thought to be a sufficient disincentive for police misconduct. Excluding the same evidence at C's trial, although achieving some marginal additional deterrence, is judged to be outweighed by the social cost of denying probative evidence to the fact finder.

As a second example, assume an illegal search of D's home by the police uncovers a murder weapon and leads to the identification of a witness, who can provide incriminating testimony against D. Case law holds that the murder weapon must be suppressed, but the witness may be permitted to testify.

311, 332-45 (1991) (arguing that most violations of the Fourth Amendment involve a good faith misunderstanding of the law or misinterpretation of the facts by the police).


24. The Supreme Court no longer treats the issue of standing separately from the merits of a suspect's fourth amendment claims. Rakas v. Illinois, 439 U.S. 128, 138-39 (1978). Thus, in the case of a contested search, the Court would simply ask whether the suspect had an expectation of privacy in the area searched by the police. See Katz v. United States, 389 U.S. 347, 350-51 (1967) (holding that the Fourth Amendment protects against certain intrusions upon expectations of privacy).


26. See United States v. Cecconelli, 435 U.S. 268, 274-75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but
Inanimate objects are suppressed, but witness testimony is often allowed based on the same assumptions regarding exclusion: suppression of the weapon is sufficient to achieve enough deterrence, while additional suppression of the witness’s testimony is too costly despite its indirect deterrent effect. 27

In both scenarios, the assumed benefit of deterring future police misconduct is balanced against the social cost of excluding probative evidence of guilt. In each case, the advantages of significant deterrence is deemed to outweigh the burdens of suppression, while the benefits of more attenuated deterrence is determined to be insufficient to outweigh these costs. It is striking that these are the only factors considered by the Court in fashioning its complicated and far-reaching utilitarian formula. The seriousness of the crime and the future threat of the criminal are irrelevant. 28 The necessity of the evidence at issue to prove guilt is irrelevant. 29 The motives of the police are irrelevant. 30 The effectiveness of other methods of deterrence is irrelevant. 31 The fact that the rule promotes cynicism 32 and perjury 33 is irrelevant. Indeed, the integrity of the justice system, real and perceived, is also irrelevant. 34 Nothing else matters except deterring police misconduct and the countervailing social cost of excluding probative evidence. 35

deleining to adopt a “per se rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment”).

27. See id. at 278 (recognizing the greater cost of excluding witness testimony). As a third example, the Court has declined to apply the exclusionary rule in federal habeas corpus proceedings because the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context. See Stone, 428 U.S. at 494-95.

28. See Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 Mich. L. Rev. 1, 11-29 (1987) (acknowledging, but rejecting, the proposition that the rule should be considered when determining whether to apply the exclusionary rule).

29. Stone v. Powell, 428 U.S. 465, 490 (1976) (“[T]he physical evidence sought to be excluded is typically reliable and often the most probative evidence bearing on the guilt or innocence of the defendant.”).

30. See Heffernan & Lovely, supra note 22, at 365.

31. See, e.g., Carol S. Steiker, Response, Second Thoughts about First Principles, 107 Harv. L. Rev. 820, 848 (1994) (contending that even though remedies other than exclusion are theoretically preferred, the “exclusionary rule is ... the best we can realistically do”).

32. See 1 Joshua Dressler & Alan C. Michaels, Understanding Criminal Procedure § 20.04[D][2][b], at 381-83 (4th ed. 2066) (noting that to “the public ... the sight of guilty people going free because reliable evidence that could convict them is suppressed by judges on the basis of a technicality” is repulsive) (internal quotations omitted) (citation omitted).

33. See William T. Pizzi, Trials Without Truth 38-39 (1999) (explaining the exclusionary rule promotes untruthful police testimony (so-called "testifying") and helps create “[a]n attitude of cynicism [that] starts to pervade courthouses as the criminal justice system cools to expect and tolerate dishonesty under oath”).

34. See supra notes 32-33.

35. See Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (“[W]e have held [the exclusionary rule] to be applicable only where its deterrence [of police misconduct] outweigh[s] its "substantial social costs."”). To be fair, some proponents of the rule may concede that many or all of the above factors are technically relevant, but nevertheless substantially outweighed by the imperative of deterring future police misconduct. See, e.g., Steiker, supra note 31, at 848-52.
Perhaps the most obvious moral objection to the modern exclusionary rule involves not what the rule considers, but what it ignores.\textsuperscript{36} If police deterrence and the unspecified social cost of acquitting guilty criminals is all that is calibrated, then fundamental concerns involving individual rights and values,\textsuperscript{37} and the common good,\textsuperscript{38} are ignored or shortchanged. For example, the rule undermines retribution, which is the moral imperative of a just conviction and punishment,\textsuperscript{39} by excluding probative and reliable evidence of guilt at criminal trials.\textsuperscript{40} Other legitimate purposes for convicting and punishing wrongdoers, such as deterring crime,\textsuperscript{41} rehabilitation,\textsuperscript{42} incapacitation,\textsuperscript{43} and others,\textsuperscript{44} are also

\textsuperscript{36} Perhaps the least obvious objection is that the exclusionary rule has eroded fourth amendment protections. See Calabresi, \textit{supra} note 1, at 112 (observing that "the exclusionary rule ... is most responsible for the deep decline in privacy rights in the United States"). Courts may sometimes interpret the text of the Amendment more narrowly and be more willing to credit doubtful police testimony because of the heavy social costs imposed if a constitutional violation is found and thus evidence is suppressed. \textit{Id.}


\textsuperscript{38} For a discussion of the common good, see Milhizer, \textit{supra} note 37, at 67-69 (2006). \textit{See also} Mortimer J. Adler, \textit{ARISTOTLE FOR EVERYBODY} 105-08 (1979) (discussing the inter-relationship of the common good, truth, and justice); Finnis, \textit{supra} note 37, at 154 ("[T]he common good of such an all-round association was said to be the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development."); \textit{Jacques Maritain, THE PERSON AND THE COMMON GOOD} 42 (John J. Fitzgerald trans., 1947) Maritain writes:

[The] common good of political society is ... the sum or sociological integration of all the civic conscience, political virtues and sense of right and liberty, of all the activity, material prosperity and spiritual riches, of unconsciously operative hereditary wisdom, of moral rectitude, justice, friendship, happiness, virtue and heroism in the individual lives of its members.

\textit{Id.} He further states that "[t]he common good includes all of these and something more besides .... For it includes also, and above all, the whole sum itself of these; a sum which is quite different from a simple collection of juxtaposed units." \textit{Id.}

\textsuperscript{39} \textit{See Immanuel Kant, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT} 194-98 (W. Hastie trans., 1887) (explaining punishment can be imposed only because the individual on whom it is inflicted has committed a crime); Michael S. Moore, \textit{The Moral Worth of Retribution, in Responsibility, Character and the Emotions: New Essays in Moral Psychology} 179, 179-92 (Ferdinand Schoeman ed., 1987) (explaining that punishment is justified only because offenders deserve it).

\textsuperscript{40} Stone v. Powell, 428 U.S. 465, 490 (1976).

\textsuperscript{41} \textit{See Eugene R. Milhizer, Reflections on the Catholic Bishops' Statement about Deterrence, SOC. JUST. REP.} (forthcoming 2008) (discussing various aspects of deterrence and the legitimacy of deterrence as a basis for criminal punishment).

\textsuperscript{42} \textit{See Herbert L. Packer, THE LIMITS OF THE CRIMINAL SANCTION} 53 (1968) (describing rehabilitation as "[t]he most immediately appealing justification for punishment").

devalued. Basic values like truth, justice, and security are considered only insofar as they are derivative consequences of police deterrence and unspecified competing social costs. Thus, even if the limited benefits and burdens considered by the contemporary exclusionary rule could be accurately identified and meaningfully quantified, the range of considerations is far too narrow and impoverished for a fitting, value-based application of utilitarian principles.

IV. APPLYING THE RULE TO ITS LOGICAL ENDS

The Supreme Court’s contemporary approach to the Fourth Amendment and the exclusionary rule, if extended to logical ends, is even more troubling. The principle that suppression is appropriate only insofar as needed to achieve a desired amount of deterrence necessarily implies that any extra suppression, above and beyond what is required for the purpose of achieving the desired deterrence, is too costly and therefore unjustified. Too much exclusion would be as inefficient as too little exclusion. Accordingly, the Supreme Court, in fashioning a utility-based exclusionary rule, would be obligated to consider whether less suppression than is currently imposed would be adequate to achieve sufficient deterrence.

To illustrate the point, assume that enough deterrence of future police misconduct (or, for that matter, the same amount of deterrence as is presently realized) could be achieved if the suppression of evidence was ordered in only 75% of all trials involving unconstitutional searches or seizures in which illegally obtained evidence is currently suppressed. If this assumption is correct, then the imperative of maximizing utility would require that illegally obtained evidence be admitted in 25% of these trials, thereby reducing the net social costs of excluding probative evidence.

While the particular percentages are inconsequential, less than 100% of the presently ordered suppression would be adequate to achieve a desired level of deterrence. It cannot be seriously argued that if evidence was suppressed in only 99% of all cases involving police misconduct where evidence is now suppressed, a 1% greater chance of non-suppression would entice the police to act illegally and risk the consequences of near-certain suppression. From the perspective of a calculating and goal-oriented police officer, the substantial risk of suppression (99%) would clearly outweigh miniscule possibility (1%) that illegally obtained evidence (which presumably could not otherwise be legally obtained) would ultimately be admitted. Thus, one may confidently assume that under the current


45. See Stone, 428 U.S. at 490 (observing the exclusionary rule “reflects the truthfinding process”).

46. See id. (observing the exclusionary rule “often frees the guilty”).

47. DRESSLER & MICHAELS, supra note 32, § 20.04[D][2][a], at 380 (observing that when a “murderer goes free [because evidence is suppressed] people are less secure in their persons, houses, papers, and effects”).
How could a partial suppression regime operate? Obviously, the decision whether to suppress could not be made before the merits of the suppression issue are litigated. To do so beforehand would be premature; as the exclusion of probative evidence could not be ordered unless and until it can be premised on a judicial finding that the police conduct was unconstitutional. Likewise, it appears obvious that the suppression decision would have to be made randomly or based on criteria unknown to the police at the time when they are participating in a search or seizure. If the ultimate suppression decision was made in relation to factors known by the police before they act—such as the seriousness of the crime or the dangerousness of the suspect—the same assumptions that underlie the exclusionary rule could prompt the police to adjust their conduct and risk the possible exclusion of evidence because of the urgent need to apprehend a particularly dangerous offender. This would undermine the goal of police deterrence that the rule seeks to achieve.

For these reasons, the best possible approach that serves the purposes of the Court’s utilitarian balance involves random exclusion or non-exclusion of illegally obtained evidence. Suppose it has been determined that suppression is needed in only 75% of the cases involving illegal searches and seizures to achieve the desired quantum of deterrence. After a judicial determination that the search or seizure was illegal, the defendant would be invited to participate in a suppression lottery. Perhaps a large contraption could be wheeled out to the front of the court room, with 75% of the ping-pong balls inside having the word “SUPPRESS” and the remaining 25% having the word “ADMIT” written on them. The balls could then be set in motion by blowing air, and the defendant could flip a switch so that a ball is randomly selected that would determine his fate.

From the narrow perspective of the modern exclusionary rule, the suppression lottery, or something similar, makes perfect sense. Such an approach would achieve desired deterrence while reducing the overall, countervailing social costs. The percentages of the SUPPRESS and ADMIT balls could be adjusted over time based on updated empirical data relating to the suppression of evidence and incidents of police misconduct. In any event, as these are the only values to be considered, the lottery provides greater utility than the present approach and should therefore be implemented.

V. THE NEED FOR A NEW PARADIGM

Not even the staunchest defenders of the modern exclusionary rule will support a suppression lottery. If nothing else, such a spectacle would be inconsistent with the decorum and solemnity expected in our courts. 48 But I

48. The notion that there is a certain dignity, decorum, and solemnity in a court is evidenced by a judge’s authority to permit or not permit certain things within the courtroom. See, e.g., Jensen v.
suspect that most exclusionary rule supporters will object even if random
determinations about non-exclusion are made in a more dignified manner. They
will be offended by such a sterile and unprincipled basis for deciding an issue
laden with normative implications.
And so, the lottery discussion is useful, not as a serious policy proposal, but
as a means for exposing the moral insufficiency of the modern exclusionary rule.
Deterring future police misconduct is a worthwhile goal that helps protect
individual rights and serves the common good. But deterrence is far from the
only value at stake, and binding the many costs of suppression exclusively to this
benefit constitutes an imprudent and even immoral approach to the issue. What
is euphemistically referred to by the Court as “social costs” must be seriously
identified, deconstructed, and evaluated. What is the “social cost” of
preempting retribution and other legitimate reasons to punish wrongdoers, or
releasing dangerous offenders into society, or undermining confidence in the
criminal justice system? These are important questions that deserve thoughtful
answers.
The validity of the Court’s assumptions about the deterrent effect of
excluding illegally obtained evidence likewise needs to be meaningfully
evaluated. One might begin by questioning the validity of the underlying
assumption that the exclusion of evidence deters future police misconduct.
First, it is likely that, more often than not, a police officer’s violation of the
Fourth Amendment is unintended and lacks malice. Second, even in the case of
deliberate violations, the sanction of exclusion is too remote and attenuated to

Superior Court, 201 Cal. Rptr. 275, 280 (Cal. Ct. App. 1984) (stating that there is a standard for
appropriate attire for an attorney, which is “whether it interferes with courtroom decorum
disrupting justice” and the judge has the authority to require attorneys to dress accordingly); Gerald
G. Ashdown & Michael A. Menzel, The Convenience of the Guillotine?: Video Proceedings in
proceedings in federal court in part because “proceedings conducted by video may not reflect the
solemnity and decorum befitting a proceeding in federal court”); Christo Lassiter, TV or Not TV—
Statutory Appendix, 86 J. CRIM. L. & CRIMINOLOGY 1002, 1015-16 (1996) (underscoring that
certain states allow the judge to decide whether to permit cameras in the courtroom based in part on
whether it detracts from the solemnity, decorum, and dignity of the court). Further, lottery-based
procedures introduce the possibility of substantive legal problems, such as violating concepts of
due process inherent in court decorum rights. See Murphy v. Florida, 421 U.S. 794, 799 (1975)
(asserting that defendant is entitled to a system of “solemnity and sobriety” pursuant to due process
principles).

49. In Stone, 428 U.S. at 489, the Court characterized the “social costs” of the exclusionary
rule as being “well known.” This assertion, at best, assumes too much. While society may have an
intuitive sense of some of the costs of suppression, social and otherwise, the breadth and depth of
the rule’s burdens remain largely unexplored.

50. Numerous articles suggest that the exclusionary rule does not and cannot function as a
meaningful deterrent. See, e.g., Ronald L. Akers & Loan Lanza-Kaduce, The Exclusionary Rule:
Legal Doctrine and Social Research on Constitutional Norms, 2 SAM HOUSTON ST. U. CRIM. JUST.
CENTER RES. BULL. 1, 6 (1986); Dallin H. Oaks, Studying the Exclusionary Rule in Search and

51. See Heffernan & Lovely, supra note 22, at 365.
constitute a meaningful deterrent. Third, many of the most problematic searches and seizures are never judicially reviewed precisely because they are problematic; often such cases are buried by the police and possible suppression motions are bargained away as part of guilty plea arrangements. Fourth, as noted previously, police officers—especially the malicious officers who are the best candidates for deterrence—may lie to avoid suppression. Fifth, even where suppression is ordered, it often occurs long after the wrongful conduct and the sanction may never be communicated to the offending officer. Finally, some officers may intentionally violate the Fourth Amendment because they find that the incentives for conducting illegal searches and seizures—the suspect’s arrest and indictment, loss of employment, deportation, deprivation of privacy, and liberty—outweigh the disincentive of the possible future suppression of evidence.

The Court has never used persuasive empirical evidence in its opinions to support or dispute its deterrence rationale. Assuming a causal relationship between suppression and deterrence once existed, does this continue to the present day? Police departments are now more professional. Intra-departmental discipline of officers who engage in misconduct and recourse to civil suits against offending police officials appear more effective than in the past. And, even assuming that a meaningful relationship between suppression and deterrence presently exists, it is likely that the importance of deterring police misconduct via suppression would vary between police departments and jurisdictions depending on a variety of factors. It is doubtful that one size fits all, yet the Supreme Court paints with a universal brush when it announces Court-made rules relating to constitutional rights.

52. Dressler & Michaels, supra note 32, § 20.04[C], at 376.
53. Id.
54. See Pizzi, supra note 33, at 38-39.
55. Dressler & Michaels, supra note 32, § 20.04[C], at 376.
56. Id.
58. Developments in the Law: Confessions, 79 HARV. L. REV. 935, 940 (1966) (contending that police misconduct occurs only in “extraordinary cases, having no relation to the ordinary day-to-day operations of a police department”). As one dissenting justice in Miranda asserted in the context of obtaining confessions, “the examples of police brutality mentioned by the Court [in the majority opinion] are rare exceptions to the thousands of cases that appear every year in the law reports.” Miranda v. Arizona, 384 U.S. 436, 499-500 (1966) (Clark, J., dissenting).
60. See generally Slobozian, supra note 1, at 384 (discussing civil suits and finding them inadequate to address police misconduct).
There is, in fact, a disturbing absence of any genuine empirical evidence pertaining to the Court’s assumptions that underlie the modern exclusionary rule and the many values implicated by it. One might expect just the opposite: that a pragmatic result sought through utilitarian means would be steeped with empirical support. The dearth of empirical evidence suggests several conclusions. First, many of the factual assumptions involved with exclusion do not easily lend themselves to statistical evaluation and study. Second, many of the values it implicates cannot be measured empirically, but are essentially unquantifiable moral questions. Third, the Court is not especially concerned about the factual basis for its policy pronouncement. Finally, courts are particularly incapable of engaging in the type of empirical fact finding used for policy making, which should be reserved to the elected branches of government because of their competence, resources, and political authority.

One might even speculate, with good reason, that the police can, and do, routinely circumvent the exclusionary rule to undermine its assumed deterrent effect. For example, if the police are after C, they may deliberately violate the rights of A and B in order to obtain evidence to be used at C’s trial. In this situation, C does not have “standing” under the exclusionary rule to raise illegal searches and seizures that violate A’s or B’s fourth amendment rights. Also, the police may simply want to hassle C (because of his race, political views, or any other reason for that matter) without illegal searches and seizures. As long as no


63. See Stone, 428 U.S. at 492 (noting a lack of empirical evidence that the exclusionary rule deters police misconduct).

64. See, e.g., Schweiker v. Wilson, 450 U.S. 221, 230 (1981) (indicating that Congress is “the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems”); Oregon v. Mitchell, 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part) (acknowledging that “[t]he nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions” in comparison with the role of the legislature); Robin Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 CORNELL L. REV. 527, 575 (1994) (recognizing that “[c]ourts are supposed to use moderation in reviewing decisions of the lawmakers in order to avoid engaging in policymaking, because determining policy is not a function allocated to the judicial branch,” particularly when the judge is appointed and not elected); Archibald Cox, The Role of Congress in Constitutional Determinations, 46 U. CIN. L. REV. 199, 209 (1971) (stating that the legislature is a better fact-finding institution than the court system for making laws because it has greater familiarity with “current social and economic conditions”); Stephen F. Ross, Legislative Enforcement of Equal Protection, 72 MINN. L. REV. 311, 323 (1987) (noting that “politically responsive officials are in a better position” to evaluate facts and policies for lawmaking purposes, and therefore courts should “abstain and defer to the legislature” to fulfill that role).

65. See, e.g., United States v. Payner, 447 U.S. 727, 729-31 (1980) (addressing the issue of federal agents intentionally violating the fourth amendment rights of one person to obtain evidence to use against another person).

66. Id. at 731-32.
evidence thereby obtained is introduced at C’s trial, the exclusionary rule is incapable of providing relief or promoting deterrence. In addition, the police are well-aware of the existence of multiple exceptions to the exclusionary rule—such as the good faith exception, public safety exception, inevitable discovery, to name a few—that collectively detract from the presumption that illegally obtained evidence will be suppressed. Knowledge of these possibilities erodes the rule’s deterrent effect.

But let us assume for a moment that the Court is correct that suppressing illegally obtained evidence deters police misconduct. Such a causal relationship endorses a most disturbing variation of an “ends justifying the means” approach to social policy. The end of reducing police misconduct is unquestionably beneficial. But the means of achieving it—deliberately allowing dangerous criminals to go free and crimes to go unpunished—is unquestionably problematic. It would be akin to deterring doctors from engaging in medical malpractice under threat of withholding needed medical care from other patients. Assuming future malpractice is thereby deterred, this result cannot justify the harm to other individuals and damage to the common good that is deliberately caused. Indeed, it could be plausibly argued that the hypothesized approach to reducing medical malpractice is less morally objectionable than the Court’s exclusionary rule, as the former seeks to improve overall patient care by apportioning patient-care resources to maximize utility, while the latter seeks to deter police misconduct by facilitating the release of dangerous criminals into society.

A moral and wise alternative for deterring police might be through civil suits and the criminal punishment of miscreant officers, combined with intra-departmental disciplinary protocols and enhanced police training. These means are not at the Court’s disposal. Such programs would by necessity be of legislative and executive origin rather than judicially developed. Thus, an unfortunate consequence of the Court’s activism is that the legitimate policy makers have been less inclined to enact effective alternatives to the exclusionary rule because of the rule’s very existence. It is a basic principle that for a law to

67. Leon, 468 U.S. at 924.
68. In New York v. Quarles, 467 U.S. 649, 651 (1984), the Court established a public safety exception to the Miranda warnings requirements. It might be reasonably assumed, in the appropriate case, that the Court would recognize a similar exception for the Fourth Amendment or, at a minimum, for its exclusionary rule.
69. Nix v. Williams, 467 U.S. 431, 448 (1984) (holding that when “the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible”).
71. See, e.g., 18 U.S.C. § 242 (making it a federal crime for anyone acting under color of law to deprive a person of his constitutional rights).
72. See Hudson, 547 U.S. at 598 (discussing “the increasing professionalism of police” departments since the inception of the exclusionary rule).
be just if it must be promulgated by a legitimate authority.\textsuperscript{73} The Court's decision to fashion an exclusionary rule to achieve deterrence is not only unjust insofar as it was made by an illegitimate authority, but also imprudent in effect because it has no doubt preempted the legitimate authorities from addressing the problem of police misconduct.\textsuperscript{73}

VI. CONCLUSION

It is time for the Supreme Court to act like a court and not a quasi-legislative body.\textsuperscript{75} The Court may wish to reconsider whether the exclusion of unconstitutionally-obtained evidence is constitutionally mandated.\textsuperscript{76} This is a jurisprudential issue within the Court's competence and authority to decide. If the Court concludes that the exclusionary rule is required by the Fourth Amendment, then we must accept the decision, amend the Constitution, or elect Presidents who are likely to appoint Supreme Court justices who would hold a more restrained view of constitutional interpretation.

If the Court instead decides that exclusion is not constitutionally required, then it must rescind the exclusionary rule and leave it to the policy-making branches of government to develop policies to deter future police misconduct. This new maneuver room for lawmakers would carry with it increased responsibilities, and citizens would have a renewed responsibility to insist that their political leaders effectively address police misconduct and to hold them politically accountable if they do not. Rescinding the exclusionary rule would

\textsuperscript{73} See, e.g., St. Thomas Aquinas, Summa Theologica, in READINGS IN CLASSICAL POLITICAL THOUGHT 508, 510 (Peter J. Steinberger ed., 2000) (discussing the competence to make and promulgate laws).

\textsuperscript{74} The idea of preemption can be illustrated by the states' approach to exclusion prior to the Court's application of its Fourth Amendment exclusionary rule during the 1950s. In \textit{Wolf v. Colorado}, 338 U.S. 25, 33 (1949), the Court held that the Fourth Amendment exclusionary rule applied to federal trials, but not to the states. In \textit{Mapp v. Ohio}, 367 U.S. 643, 656-57 (1961), the Court overruled \textit{Wolf} and held that the exclusionary rule applied to the states. In 1949, "almost two-thirds of the States were opposed to the use of the exclusionary rule," but in the ensuing years up until the \textit{Mapp} decision "more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the ... rule" requiring the exclusion of illegally obtained evidence at federal trials. \textit{Id.} at 651.

\textsuperscript{75} In his dissent in \textit{Dickerson v. United States}, Justice Scalia argued that

\begin{quote}
the Court's continued application of the \textit{Miranda} code to the States despite [the Court's] consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of \textit{Miranda}'s salvation but rather evidence of its ultimate illegitimacy.
\end{quote}

\textsuperscript{530} U.S. 428, 456 (2000) (Scalia, J., dissenting). The same can be said about a court-imposed Fourth Amendment exclusionary rule. See generally Joseph Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100 (1985) (discussing the limits on the Court's authority to create prophylactic rules).

\textsuperscript{76} Justice Brennan, a proponent of the exclusionary rule, lamented that its deconstitutionalization "left [him] with the uneasy feeling that ... a majority of [his] colleagues have positioned themselves to ... abandon altogether the exclusionary rule in search-and-seizure cases." United States v. Calandra, 411 U.S. 338, 365 (1973) (Brennan, J., dissenting).
afford the appropriate authorities the chance to fashion public policy based on moral values informed by practical experience. It would allow an approach to be developed which is consistent with situational variables and capable of adjusting over time. It would unburden society from the consequences of an immoral and unwise rule, imposed by an illegitimate authority, designed to minimize one evil by threatening a different and often greater evil. We can and should do better than the current version of the exclusionary rule, and we would all be better for it if we did.