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# The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct

*Jeffrey Standen*\*

## I. INTRODUCTION

Apart from its constitutional status,<sup>1</sup> the exclusionary rule is nothing more than an instance of the common law remedy of restitution.<sup>2</sup> Like restitutionary remedies in general, it is founded on the principle of unjust enrichment.<sup>3</sup> The exclusionary rule requires that

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1. In *Weeks v. United States*, 232 U.S. 383 (1914), the court held that evidence seized in violation of the Fourth Amendment is inadmissible in federal prosecutions. *Weeks*, however, was surprisingly ambiguous on the question of whether or not exclusion is mandated by the Constitution. The Court went this far: "To sanction [the use of unconstitutionally obtained 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 against such unauthorized action." *Id.* at 394. *Weeks* was limited to cases where the illegal search was conducted by federal officers and the evidence was sought to be admitted in a federal criminal proceeding; the opinion explicitly rejected the proposition that the exclusionary rule should apply to violations by state or local police. When the Court subsequently extended the Fourth Amendment to the states by virtue of the Due Process Clause of the Fourteenth Amendment, the Court refused to extend the remedy of exclusion, *Wolf v. Colorado*, 338 U.S. 25 (1949), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961), thus implying that the remedy was not coterminous with the "right" of the Fourth Amendment. The Court again failed to resolve the issue of the constitutionality of the exclusionary rule in the *Mapp* opinion. *Mapp* on the one hand suggested that exclusion had a constitutional basis by declaring that exclusion is an "essential ingredient of the Fourth Amendment," 367 U.S. at 651, and that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655. The opinion nevertheless allowed states to rely on "other methods which, if consistently enforced, would be equally effective" in "detering unreasonable searches." *Id.*

2. See, e.g., Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983); Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

3. See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191 (1995). *But see*

the prosecution of a criminal defendant who is a victim of unconstitutional police conduct<sup>4</sup> must proceed without the benefit of its ill-gotten gain; for example, incriminating evidence discovered by virtue of an illegal police search must be suppressed.<sup>5</sup>

The use of exclusion as a remedy for unconstitutional police conduct is problematic. Restitutionary remedies are not generally favored in civil law.<sup>6</sup> Although their use may be growing,<sup>7</sup> their importance remains small in comparison to the dominant position of civil damages, a remedy that measures compensation by the victim's losses caused by the wrongdoer, not by the defendant's gain.<sup>8</sup> The relative dominance of civil damages raises the question why, when the Supreme Court chose from the menu of private civil remedies to address the problem of unconstitutional police conduct,<sup>9</sup> it selected the more uncommon remedy of restitution instead of damages.<sup>10</sup>

The Court's answer is found in its declaration that, among civil remedies, only exclusion adequately protects the underlying constitutional right.<sup>11</sup> This declaration assumes that damages are not as effective

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Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279 (1989).

4. The exclusionary rule applies to police conduct that violates the Fourth Amendment's prohibition on unjustified searches and seizures, *Mapp*, 367 U.S. at 643; the Fifth Amendment's privilege against self-incrimination, *Miranda v. Arizona*, 384 U.S. 436 (1966); the Sixth Amendment's right to counsel, *Massiah v. United States*, 377 U.S. 201 (1964); and the Fifth and Fourteenth Amendments' Due Process Clause, *Spano v. New York*, 360 U.S. 315 (1959).

5. See *Weeks*, 232 U.S. at 383; *Silverthorne Lumber, Inc. v. United States*, 251 U.S. 385 (1920).

6. See Laycock, *supra* note 3.

7. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

8. See DAN B. DOBBS, LAW OF REMEDIES § 1.1 (2d ed. 1993).

9. See *Weeks*, 232 U.S. at 383.

10. Compared to restitution, damages is a ubiquitous remedy. Restitution remains an underdeveloped area of the law. See generally JOHN P. DAWSON, UNJUST ENRICHMENT (1951); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES (2d ed. 1994).

11. See *Mapp v. Ohio*, 367 U.S. 643 (1961). Along with the constitutional footing on which it justified the exclusionary remedy, see *supra* note 1, the Court in *Mapp* grounded the exclusionary rule in its practical effectiveness as a deterrent. "Only last year the Court itself recognized that the 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.'" *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1961)). In subsequent decisions, the Supreme Court appears to have moved away from the constitutional footing cited in *Mapp*, more squarely embracing the deterrent rationale. The Court stated in *United States v. Calandra*, 414 U.S. 338, 354 (1974), that the "use of illegally obtained evidence . . . presents a question, not of rights, but of remedies." It termed the exclusionary rule "a judicially created remedy designed to safeguard Fourth Amendment rights gen-

tive as exclusion at discouraging constitutional wrongs and that exclusion is in fact adequate to the task. It is surprising that the Court's assumption, that the exclusionary remedy does deter abuses of constitutional rights, has gone mostly unremarked in the voluminous commentary on the exclusionary rule. Subsequent judicial decisions and academic scholarship have ignored or accepted this dubious contention.<sup>12</sup> Although many commentators have debated the jurisprudence of exclusion, they focus on the problem of the connection between the right and the remedy<sup>13</sup> or the practical and theoretical shortcomings of using damages to address police misconduct.<sup>14</sup> For the most part, the virtues and shortcomings of exclusion have not been extensively considered.<sup>15</sup> Thus the very assertion that the Court made, that exclusion promises to provide more deterrence than does a damages remedy, has escaped scrutiny.<sup>16</sup>

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erally through its deterrence effect, rather than a personal constitutional right." *Id.* at 348. This retreat from *Mapp* raises questions about the legitimacy of the rule's enforcement against the states. See Joseph Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); see also Donald Dripps, *Living with Leon*, 95 Yale L.J. 906, 936 (1986) (arguing that if no effective sanction attached to the Fourth Amendment, then the amendment would not qualify as law, thus betraying "the fundamental principle of constitutionalism, which is after all that the Constitution states the law").

12. See, e.g., Barnett, *supra* note 2, at 945 ("Some of these problems [in comparing exclusion and damages] are avoided in this article by assuming what in any event is most likely quite true: that the exclusionary rule does deter police misconduct.").

13. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395 (1989); Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537 (1990); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 S. CAL. L. REV. 1 (1994); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994). Judges have debated the rule along the same lines. See *United States v. Jefferson*, 906 F.2d 346, 351–52 (8th Cir. 1990) (Bowman, J., and Lay, C.J., concurring).

14. See Meltzer, *supra* note 2; 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 (1981).

15. The one aspect of exclusion that has been examined is the total amount of deterrence, as an empirical matter, that exclusion creates in an attempt to discourage unconstitutional police actions. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

16. To avoid raising issues tangential to this paper, discussion of the exclusionary rule will be limited to its application to violations of the Fourth Amendment. Exclusion is also the remedy for violations of the Fifth and Sixth Amendments, but arguably exclusion there rests on different grounds. See, e.g., Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L.

Examined along several dimensions borrowed from the more robust scholarship on civil remedies, exclusion does not appear to constitute a clearly superior device to deter constitutional harms in comparison to damages. Part II of this paper will consider exclusion in terms of its allocative efficiency.<sup>17</sup> From this perspective, exclusion is intended to provide a solution to the problem of externalities, here the positive externality of deterring wrongful conduct.<sup>18</sup> This part will suggest that exclusion, like restitutionary remedies more generally, does not promise to generate as much deterrence as would a damages remedy arrayed against miscreant officers. This part will conclude by suggesting that damages are so productive of positive externalities that they could substantially replace other public sanctions in shaping officer conduct. Part III will reconsider exclusion, not as a response to the positive externality problem, but rather as an attempt to overcome the “Prisoner’s Dilemma” that can be employed to model the police-citizen interaction.<sup>19</sup> This part will suggest that a damages remedy, not exclusion, appears more likely to induce the cooperative behavior that will ensure maximum joint returns. Part IV compares the tendencies of exclusion and damages to minimize principal/agency problems, thus minimizing unconstitutional police conduct.<sup>20</sup> Finally, Parts V<sup>21</sup> and VI<sup>22</sup> consider practical advantages frequently cited in favor of exclusion. The analysis here, as throughout the paper, suggests that damages are at least as good

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REV. 865, 878 (1981) (stating that a constitutional violation of Fifth Amendment occurs when coerced confession is admitted at trial).

17. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.2, at 13 (5th ed., Aspen Law & Business 1998) (stating that “efficiency . . . denote[s] that allocation of resources in which value is maximized”). Value is maximized when no further change in some relevant economic variable would yield more benefits than costs. The criterion for the achievement of this state of efficiency is less obvious: under the “Pareto Efficiency” criterion, efficiency is reached when the welfare of any one person cannot be enhanced without making another person worse off. *Id.* at 13–14. It implies only consensual transactions with unanimous consent “of all affected persons.” *Id.* at 14. Under the “Kaldor-Hicks” efficiency criterion, as long as the person who benefits from a change in an economic variable could in theory compensate the person who loses from such a change, irrespective of whether or not in fact such compensation occurs, then the change in variable is efficient. *Id.* This approach to efficiency is consistent with utilitarian perspectives and permits nonconsensual transactions. See generally HENRY N. BUTLER, *ECONOMIC ANALYSIS FOR LAWYERS* 77–78 (1998).

18. See *infra* notes 23–32 and accompanying text.

19. See *infra* notes 100–11 and accompanying text.

20. See *infra* notes 124–43 and accompanying text.

21. See *infra* notes 144–73 and accompanying text.

22. See *infra* notes 174–93 and accompanying text.

as exclusion in meeting the stated social objectives, and in fact are probably better, offering a more refined solution to the perpetual problem of constraining police behavior.

## II. EXCLUSION, ALLOCATIVE EFFICIENCY, AND EXTERNALITIES

In *Elkins v. United States*,<sup>23</sup> the Court contended that exclusion presents the only effective remedy to deter wrongful police conduct: “The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”<sup>24</sup> Deterrence can usefully be thought of as an externality.<sup>25</sup> The sanction of exclusion assessed in one case aims to influence conduct in others. The claim that exclusion presents the best means of compelling adherence to the Constitution is at bottom a claim that exclusion will better generate identifiable externalities and that those externalities will be positive.<sup>26</sup> Unlike negative externalities,<sup>27</sup> the problem posed by positive externalities is that “the market,”<sup>28</sup> left unregulated, will likely under-produce the desired good

23. 364 U.S. 206 (1960).

24. *Id.* at 217. The Court added in *Mapp v. Ohio* that were exclusion not the sanction for unconstitutional police conduct then “the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties. . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.” 367 U.S. 643, 655–56 (1961).

25. An externality is the effect of an action that influences the well-being of nonconsenting parties. See BUTLER, *supra* note 17. The “consenting” parties to a criminal action refers to the government as prosecutor and the criminal defendant. Deterrence refers to the effect of the disposition of the case between the prosecutor and the defendant on other parties; specifically, that the outcome creates incentives for others, here police officers, to avoid the outcome by not engaging in the specified behavior. See POSNER, *supra* note 17, at 237–50; JAMES Q. WILSON, THINKING ABOUT CRIME 162–82, 198–209 (1975); Ernest van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 706–20 (1981).

26. A “positive” externality is one where the social benefits of engaging in an activity are greater than the private benefits. See BUTLER, *supra* note 17, at 380. A classic example of a good that produces positive externalities is the inoculation, which not only lessens the incidence of disease in the recipient but also inhibits contagion, producing a benefit for others.

27. Economic analysis holds that crime itself is an externality. See Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1. More clearly, constitutional violations by police officers are also an externality, as violations usually arise as a by-product of otherwise lawful and socially desirable police intrusions.

28. “The market” is defined generally as the gamut of private, consensual transactions, including those based on a contract and those without, that together amount to an identifiable if ephemeral phenomenon. See generally POSNER, *supra* note 17, at 3–24.

because a portion of the utility from the good is distributed to a diffused group and not captured by one person;<sup>29</sup> and thus, no one person will pay enough for the good for it to be sold at the margin.<sup>30</sup> A positive externality is thus tantamount to a public good.<sup>31</sup>

The problem with public goods is ensuring their supply. The deterrence of wrongful police conduct would likely be underproduced if one of two conditions obtained: if a significant amount of wrongful behavior went undetected or if that substantial underdetection were not remedied by penalties that substantially exceeded the officer's gain.<sup>32</sup> In other words, if there are detection problems,<sup>33</sup> it is imperative that the remedy for wrongful police conduct be sufficiently sizable to ensure the optimal production of the positive externality of deterrence.

Civil remedies are numerous and diverse, and they differ in their ability to produce positive externalities depending on the context in which they are applied. In outline, civil remedies are divisible into two categories: those based on gain and those based on loss.<sup>34</sup> Remedies based on gain include restitution<sup>35</sup> and forfeiture;<sup>36</sup> loss-

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29. This claim is not without its objectors. Under the Coase Theorem, R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), there is impliedly no such thing as an externality, merely transactions costs and ill-defined property rights that stand in the way of mutually consensual trades. For instance, the problem of pollution is not a problem of externality and consequent internalization but rather a problem of minimizing transactions costs among all persons affected by the pollution and then assigning a clear property right in the pollution. At that point, the parties can trade assets and rights to arrive at a mutually beneficial resolution to the problem, or at least as beneficial as the wealth positions of the parties will permit.

30. One example of a positive externality is vaccinations, which not only benefit the recipient in warding off disease, but benefit the community by diminishing contagion. As a result, it is allocatively efficient for the government to subsidize vaccinations in order to promote their employment to the point where social gains are maximized.

31. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

32. On optimal penalties in criminal law, see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). The textual statement should be qualified by recognition that the gain and loss from unconstitutional police conduct accrues not directly to the particular police officer but to the department or larger governing entity. See *infra* notes 135–37 and accompanying text.

33. See *infra* notes 64–68 and accompanying text. On detection problems and the law as it applies to punitive remedies, see Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982).

34. See Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 150 (1995).

35. Professor Kull, who is the Reporter for the Third Restatement of Restitution, has described restitution as based on the concept of unjust enrichment. See Kull, *supra* note 3; see also DOBBS, *supra* note 8, § 4.1(1).

based remedies ordinarily include damages,<sup>37</sup> fines,<sup>38</sup> and injunctions.<sup>39</sup> The thesis in this section also has two parts: first, except for unusual situations, gain-based remedies in general, and exclusion in particular, hold little promise for the generation of positive externalities and should be avoided when crafting a remedy to meet a social aim; second, on the other hand, loss-based remedies hold so much promise to generate positive externalities that they could largely supplant existing public remedies.<sup>40</sup>

If this thesis is correct, then, unfortunately, much of the Court's jurisprudence on the exclusionary rule is wrong.<sup>41</sup> Remedies measured by gain, in contrast to remedies based on loss, will tend not to produce sufficient positive externalities. Gain and deterrence, unlike loss and deterrence, are a poor match: deterrence is based on loss, aiming to prevent conduct that results in loss.<sup>42</sup> A remedy such as ex-

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36. Forfeiture varies in scope, but a common feature is that the wrongdoer must forfeit the fruit or gain amassed from the crime. *See generally* DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (1993). Civil forfeitures proceed *in rem*, by which the basis of the suit is not the wrongdoing of the owner but, strangely, the property itself. *See* Arthur W. Leach & John G. Malcolm, *Criminal Forfeiture: An Appropriate Solution to the Civil Forfeiture Debate*, 10 GA. ST. U. L. REV. 241, 246 (1994); Steven L. Schwarcz & Alan E. Rothman, *Civil Forfeiture: A Higher Form of Commercial Law?*, 62 FORDHAM L. REV. 287, 292-93 (1993).

37. *See* United States v. Hatahley, 257 F.2d 920, 923 (10th Cir. 1958) (stating that damages are measured by the market value of the loss).

38. Fines under the federal sentencing guidelines are based on the severity of the crime. *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (1994). The severity of the crime in turn is in part based on the loss incurred from the crime. *See id.*; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

39. *See* Jeffrey Standen, *Private Remedies for Public Purposes*, WILLAMETTE L. REV. (forthcoming 2000).

40. Public remedies include administrative or regulatory approaches to minimizing police misconduct. *See* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-72 (1981).

41. Lawmakers seem to be very interested in adding on what amount to private remedies to public legal regimes and often appear to prefer to add gain-based remedies when they do so. Forfeiture to the state, a remedy created by legislatures, has recently become popular in the criminal system and is measured by the putative defendant's gain. Restitution to the victim is another private remedy that has gained a foothold in the criminal system. Although restitution is characteristically measured by defendant's gain, most state statutes use the term "restitution" somewhat awkwardly to indicate a payment of damages, measured by loss, from the perpetrator to the victim. *See, e.g.*, OR. REV. STAT. § 147.125 (1999) (including the victim's losses and harm caused by crime in the measure of the victim's restitution). Thus, "victim restitution" is not restitutionary in character and so will be excluded from consideration in this discussion.

42. Bentham's classic definition of deterrence compared the utility of benefits to the

clusion that is measured by wrongful gain without regard to the degree of loss caused by wayward police officers will likely prove somewhat inapt to its task. Moreover, the use of exclusion as the primary remedy for unconstitutional police conduct, rather than as an occasional substitute, as restitution is used more commonly in the law of civil remedies, compounds the seriousness of its usual limitations and creates new ones.

*A. Measured by Deterrence*

The Court's implicit belief that exclusion is superior to damages at deterring undesirable police conduct may be faulty. Assume that both exclusion and damages are employed in all cases, without transactions costs, detection problems,<sup>43</sup> or other impediments to enforcement and without regard to the complex agency problems that might result from the potential imposition of a personal damages judgment on a police officer.<sup>44</sup> In other words, in every case where unconstitutional police conduct has occurred, assume that the evidence seized as a result of that conduct is excluded by the exclusionary rule or, if in a damages system, that damages, measured either by the loss to the suspect or by the government's savings in not complying with constitutional rules,<sup>45</sup> are extracted.

For a remedy based on gain to deter more than one based on loss, then either the aggregate of gain or its average must exceed that of loss. The total penalty imposed on the wrongdoer<sup>46</sup> by a remedy measured by the wrongdoer's gain is the inability to enjoy that

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disutility of losses. As long as losses exceed benefits, or pain exceeds pleasure, then the actor is deterred from undertaking the activity. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, W. Pickering 1823) (1789).

43. Detection problems will be reintroduced below. *See infra* text accompanying notes 64–68.

44. These agency problems will be discussed below. *See infra* text accompanying notes 124–43.

45. In most cases, these two measures should equal each other. For instance, because the harm to the defendant from an illegal search is not necessarily the search itself, which may have taken place in any event, but rather that the search was conducted without the notice, safety, and justification ensured by proper authorization. The suspect's constitutional right is not to be free from searches but rather to be free from unauthorized searches; the suspect's entitlement is to have the police go to the trouble of obtaining a proper warrant.

46. The "wrongdoer" under Fourth Amendment law is either the officer who has violated the Constitution or some larger entity, such as the police department, government, or entire community, all of whom might benefit from the reduction in crime that arguably might result from an officer's violation of a suspect's rights.

gain.<sup>47</sup> Ex ante, the expected penalty would equal the total value of lost gains divided by the number of constitutional violations. For exclusion to impose a greater expected penalty than damages, the total penalty inflicted on wrongdoers by exclusion must exceed the total penalty that would be imposed by damages measured by loss. In short, gain must be greater than loss. Gain could exceed loss if one of the following three conditions obtains: (1) numerical frequency, if more cases produce gain than involve loss; (2) absolute superiority, where the total quantum of gain in the run of cases exceeds the amount of loss (without regard to numerical superiority); or (3) gain elicits superior detection rates (again overcoming numerical inferiority).

None of these conditions likely obtains. It is likely that police officers who violate the Constitution create more loss than they gain. Respecting the first condition of numerical superiority, it appears more plausible to conclude that police officers more often cause net harm from violating the Constitution than they enjoy net gain in the form of evidentiary advantages. Because a great deal of police activity is likely unmotivated by the desire for evidence and conviction,<sup>48</sup> police may choose to violate the Constitution without intending to use discovered evidence at trial.<sup>49</sup> For example, police may subdue a disturbance, disperse gamblers, or dispossess the cache of a drug user all without a mind to developing evidence for a criminal trial.<sup>50</sup> If police in such instances violate the Constitution, they cause unalloyed

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47. The total penalty might also include various collateral sanctions from unconstitutional conduct, such as a diminution in police department funding, officer job termination, or new laws restricting police investigations; it is assumed, however, that such collateral sanctions would not differ according to whether exclusion or damages were the prevalent remedy for unconstitutional police conduct. See generally John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual's Reputation*, 21 J. LEGAL STUD. 159 (1992).

48. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1060-77 (1995) [hereinafter Stuntz, *Privacy's Problem*]; see also William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1267-72 (1999) (outlining range of permissible searches and required justifications) [hereinafter Stuntz, *Fourth Amendment Privacy*].

49. See *United States v. Occhipinti*, 998 F.2d 791, 800 (10th Cir. 1993) (stating that where no evidence is obtained the propriety of police action need not be resolved). If the only item seized is a person, then the exclusionary rule does not operate to divest the court of its jurisdiction to try the person, nor need the person be released. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

50. See Stuntz, *Fourth Amendment Privacy*, *supra* note 48; Stuntz, *Privacy's Problem*, *supra* note 48.

harm, gaining no evidentiary advantage.<sup>51</sup> On the other hand, cases where police have gained a large evidentiary advantage from a violation of the Constitution but inflicted only a trivial harm appear to be rare. Apocryphal “exclusionary rule horror stories,” where the obviously guilty go free on the basis of trivial police misbehavior, are difficult to find.<sup>52</sup> Perhaps the true number of “big gain” cases cannot be known because presumably many of them would lead prosecutors, faced with the possible loss of key evidence, to offer large concessions in plea bargains to avoid losing at trial.<sup>53</sup> Even considering the possible existence of big gain cases that disappear in plea bargains, in all likelihood gain cases remain less common than loss cases.

Respecting the second condition, absolute superiority, gain could outweigh loss in fewer cases but to such an extent that in the aggregate it would exceed loss. Assuming risk-neutrality on the part of the officer,<sup>54</sup> the expected penalty is a product of the enforcement

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51. Only evidentiary advantages “count” because that gain is the sole gain to which the exclusionary rule responds. Other enforcement gains, such as increased obedience to law or to police that might come from unconstitutional police action, are not “disgorged” by exclusion because no trial occurs and officers do not seek one.

52. One horror story, although not arising under the Fourth Amendment, is *Brewer v. Williams*, 430 U.S. 387 (1977), where a conversation in the course of a lawful transport of a murder suspect between police stations induced the suspect to identify the location of the murder victim’s body, thus implicating himself in a heinous crime. The conversation was later adjudged to constitute an impermissible interrogation, despite the absence of coercion, and the evidence was excluded. The evidence was subsequently admitted under the “inevitable discovery” exception to the exclusionary rule. See *Nix v. Williams*, 467 U.S. 431 (1984).

53. The available data suggest that these cases do not arise with great frequency. See, e.g., Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611, 621 (reviewing data indicating that the rule results in nonprosecution or nonconviction of between 0.6% and 2.35% of suspects arrested for felonies in the state of California); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 596 (reporting that motions to suppress were filed in 5% of cases but were successful only 0.7% of time).

54. If the risk preferences of offenders varies from risk neutrality, then a different trade-off between the magnitude of the penalty and the frequency of its imposition would be in order. See Becker, *supra* note 32. Most economists conclude that variations in the frequency of the imposition of punishments would have greater effect on deterrence than would increasing the magnitude of punishment. See Michael K. Block & Robert C. Lind, *Crime and Punishment Reconsidered*, 4 J. LEGAL STUD. 241, 246–47 (1975); Michael K. Block & Robert C. Lind, *An Economic Analysis of Crimes Punishable by Imprisonment*, 4 J. LEGAL STUD. 479, 489–90 (1975). Offender preferences between magnitude and frequency should also vary by opportunity costs or wealth. See John R. Lott, Jr., *Should the Wealthy Be Able to “Buy Justice”?*, 95 J. POL. ECON. 1307 (1987).

rate times the magnitude of the penalty.<sup>55</sup> With unity of enforcement, the total penalty from exclusion would be greater than that from damages if the penalty to the prosecution from exclusion were sufficiently large to overcome the relative paucity of occurrence. It appears improbable, however, that gain is absolutely superior to harm. The literature on the exclusionary rule suggests that it is rare that a piece of excluded evidence is of singular value in a particular criminal trial.<sup>56</sup> Unconstitutional police searches, on the other hand, may carry significant costs. Unlawful police intrusions can cause physical damage and psychic loss, including the loss of constitutional rights.<sup>57</sup> Even were gain found to be absolutely superior to loss, damages could still be set to exceed the value of the evidentiary gain,<sup>58</sup> thus ensuring adequate deterrence. On balance it seems unlikely that so much evidentiary gain is obtained from comparatively few cases to overwhelm the more prevalent harm attending unconstitutional police activity.

The third condition relaxes the assumption of perfect enforcement and thus presents a more complex picture. Even assuming that gain is neither numerically nor absolutely superior to loss in cases involving unconstitutional police conduct, the third condition, if satisfied, would supply a cogent basis for the claim that exclusion deters to a greater extent than would damages. In a world of imperfect enforcement, this condition posits that the remedy of exclusion engenders greater enforcement activity than would a competing damages remedy. If gain does elicit better enforcement, then the expected penalty from exclusion might exceed that from damages, and, consequently, the exclusionary rule would produce comparatively greater positive externalities and thus fewer constitutional breaches.

To help decide if this third condition obtains, it is useful to characterize gain and loss as two sides of a continuum, with the left side of the continuum consisting of cases where the incriminating value of the seized evidence (the gain) exceeds the harm inflicted by the unconstitutional search and with the right side of the continuum consisting of cases where the harm inflicted exceeds the incriminat-

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55. See Becker, *supra* note 32.

56. See *supra* note 53; Maclin, *supra* note 13, at 45.

57. Damages claims for Fourth Amendment violations are both infrequent and apparently inadequate. See Kamisar, *supra* note 13, at 563; Maclin, *supra* note 13, at 62–65.

58. Professor Barnett has discussed the parameters for the amount of the award. See Barnett, *supra* note 2, at 977–80.

ing value of the evidence.<sup>59</sup> Enforcement activity under the exclusionary rule is instigated by private action: the defendant's decision to seek suppression of evidence on constitutional grounds. The largest possible amount of deterrence that could be created by that decision would be in cases at or near the extreme left side of the continuum, where gain is larger than loss. There the disproportion between the prosecution's evidentiary gain and harm inflicted is greatest, and the successful claim would carry the largest penalty to the prosecution.<sup>60</sup> Moreover, criminal defendants could be relied on to seek exclusion in these cases. Because defendants would have enhanced motivation to request suppression of evidence with higher incriminating value, the rule of exclusion would tend to elicit enforcement efforts in a cluster on the left side of the continuum. If this explanation is correct, then the third condition might obtain, strengthening the claim of exclusion's superiority in producing positive externalities.

The problem with this explanation supporting the third condition is that no continuum between gain and loss likely exists. Of course, there is a distribution of Fourth Amendment cases along the dimension of the degree of suspicion an officer must have to intrude in a citizen's life,<sup>61</sup> but this distribution of cases results from a distribution of privacy interests, particularly in the form of property rights,<sup>62</sup> and not necessarily according to the level of harm or intrusion visited upon the citizen by the officer.<sup>63</sup> An officer can intrude in

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59. Posner has suggested that Fourth Amendment law can be plotted along a scale that balances the level of intrusion with the evidentiary value of the search. See POSNER, *supra* note 17, § 28.1; Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 75.

60. This proposition assumes that the harm to the defendant from the illegal search is for all practical purposes equal to the prosecution's gain from that search—not gain in the form of evidence obtained, but rather gain in the form of saved labor costs. If this assumption is incorrect, then intractable problems of the subjectivity or incomparability of gain and harm emerge, made more complex because different groups enjoy the gain and experience the harm. See generally Barnett, *supra* note 2, at 946–47.

61. See Stuntz, *Fourth Amendment Privacy*, *supra* note 48; see also Stuntz, *Privacy's Problem*, *supra* note 48.

62. See Stuntz, *Fourth Amendment Privacy*, *supra* note 48; see also Stuntz, *Privacy's Problem*, *supra* note 48.

63. A search of a space where a homeless person lives can be intensely intrusive yet proceed without cause because no recognized privacy interest is invaded. See D'Aguannao v. Gallagher, 50 F.3d 877, 880 (11th Cir. 1995) (stating that a homeless person had no reasonable expectation of privacy in storing personal items on another's property without consent). *But see* United States v. White, 890 F.2d 1012, 1015 (8th Cir. 1989) (peering into a closed bathroom stall did not violate any reasonable expectation of privacy); Connecticut v. Mooney, 588 A.2d

a limited way on a citizen in the public square with no suspicion at one end of the continuum<sup>64</sup> but needs a judicial warrant supported by probable cause to search a home at the other.<sup>65</sup> The magnitude of loss suffered by the victim of an unconstitutional search and the magnitude of evidentiary gain from a search, however, appear to be independent.<sup>66</sup> There is little reason to assume that the evidentiary gain to the prosecution is larger when derived from a low-harm search than a high-harm one; in fact, the converse seems more intuitively accurate.<sup>67</sup> Consequently, it is possible that large-gain cases are distributed evenly or randomly across the continuum from low-harm to high-harm cases and that any actual bias toward either end is random.<sup>68</sup>

Adopting the behavioral assumption that defendants are more likely to be interested in suppressing evidence when the evidence's incriminating value is higher, then defendants' motivation to enforce their rights will be unrelated to the amount of harm visited upon

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145, 152 (Conn. 1991) (holding the opposite when personal items are stored on public property). Police may intrusively search an "open field" without cause because no recognized privacy is at stake, even where the owner has taken extraordinary pains to express his subjective interest in actual privacy. *See Oliver v. United States*, 466 U.S. 170, 176-77 (1984) (entering an "open field" with a locked gate and a "No Trespassing" sign was legal). *See generally Katz v. United States*, 389 U.S. 347 (1967).

64. *See supra* note 48.

65. *See Johnson v. United States*, 333 U.S. 10, 13-17 (1948).

66. *See supra* note 48.

67. Assuming zero information costs, police have an incentive to incur greater risk of illegality, thus committing marginally greater intrusions on privacy, the higher the expected evidentiary gain. Of course, police search in many settings where information is costly and discoveries of valuable evidence is unexpected, and so the positive correlation between loss and gain should not be great. Nonetheless, the opposite assumption, which is the third condition in the text, would seem implausible. In addition, to the extent that police searches are shaped by endowment effects, police might be induced to pursue evidentiary gain even where the harm that might result from an unconstitutional act appears of greater comparative value. Police officers who have lawfully but unfruitfully expended hours searching a house pursuant to consent might unlawfully continue that search, even after attempts are made by the resident to withdraw consent, in the hope of getting "some evidence" as compensation for the large sunk costs already expended in the search.

68. One argument in favor of a correlation between high gain and low loss derives from marginal analysis. In order for exclusion to provide greater deterrence than would damages, gain only needs to exceed loss at the margin, excluding sunk costs. Gain would tend to exceed loss where loss is small, and thus if criminal defendants pursue exclusion in these cases, then exclusion would extract a larger penalty than would damages measured by loss. But the textual conclusion of a random distribution of cases seems more plausible in light of the incentives of officers to search more intrusively the higher the expected reward.

them in the illegal search.<sup>69</sup> Part of the government's gains from an illegal search stem from its avoidance of the costs of adhering to the Constitution: the more harmful the illegality, the "cheaper" the price to obtain the evidence. As a result, the largest penalty that exclusion can assess occurs where a piece of evidence of high probative value that was purchased at a large discount is lost to the prosecution. Defendants will seek exclusion without regard to the purchase price paid for the evidence. Because no correlation necessarily exists between gain and loss in the area of unconstitutional police activity, enforcement activity under the exclusionary rule is likely rather random. To create its strongest deterrent effect, the rule of exclusion relies on the occurrence of and its application in cases where gain and harm are most disproportionate. The exclusionary rule needs widely known "exclusionary rule horror stories" to deter effectively. The enforcement activity that a damages remedy would generate suffers from the same limitation, only in reverse. Because harm and gain from unconstitutional activity appear to be disconnected, the defendant would presumably be motivated to seek the damages penalty where the constitutional infraction is most serious and not necessarily where the infraction produced the most gain in the form of incriminating evidence. Damages would provide maximum deterrence in cases where loss to the victim far exceeded evidentiary gain but would elicit little enforcement expenditures where the converse were present.

As a result, neither exclusion nor a hypothetical damages remedy can lay claim to producing superior enforcement activity by the defendant. The remedies operate along different dimensions. The gain-based remedy of exclusion theoretically promises to produce greater positive externalities where gain tends to exceed loss consistently, either because of the numerical or absolute superiority of cases involving gain or where gain would tend to elicit greater enforcement expenditures. However, the employment of gain-based remedies in the criminal area appears to be misdirected because criminal wrongdoing, including harms resulting from police wrongdoing, invokes circumstances where harms will routinely exceed gains. Activity that is

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69. The extent of loss caused by the constitutional invasion may influence the likelihood of success of the suppression motion, and thus itself might induce such motions at the margin. The point of the argument is not that defendants never have reasons to seek suppression in high-gain/low-harm cases but only to point out the doubtfulness of the assumption that they would tend to do so in a way systematically biased in favor of such cases.

illegal should be illegal in part because it causes more harm than good;<sup>70</sup> if so, then remedies based on gain will not be sufficiently punitive to generate adequate social deterrence. The relative infrequency with which gain-based remedies, such as restitution, appear in the common law of remedies<sup>71</sup> suggests their systematic weakness. Gain-based remedies should be reserved for those situations in which gains exceed losses and do so to such an extent that a loss-based remedy is unlikely to elicit desirable enforcement expenditures by the aggrieved.<sup>72</sup> Loss-based remedies such as damages, conversely, would likely produce more deterrence if employed in situations where harm tends to exceed gain, a situation that should be more prevalent in the criminal law.

*B. Measured by the Risk of Error*

Damages also appears comparatively superior to exclusion along another dimension: the relative risk of error. Specifically, despite its appearance as a simple remedy to administer,<sup>73</sup> exclusion actually is more difficult than damages to administer if one's aim is to generate deterrence. Damages produce adequate deterrence by a mere rough approximation of actual damages. An approximation suffices because, as with any activity that merits the condemnation of law, unconstitutional police actions should as a general matter cause more harm than good.<sup>74</sup> To restate an earlier supposition, activity that is on balance socially beneficial is an unlikely target for prohibition,<sup>75</sup> as a result, it seems plausible to assume that the harms stemming from unconstitutional police conduct on the whole exceed the benefits.

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70. See POSNER, *supra* note 17, § 7.1. Posner states that most crimes cause loss of utility because they involve nonconsensual transfers. Other crimes, however, such as prostitution and the drug trade, may be wealth maximizing because the parties are voluntary participants. *Id.*; see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 88–92 (1991). Unconstitutional police searches are by definition nonconsensual and thus presumptively not wealth maximizing.

71. See Laycock, *supra* note 3.

72. “Son of Sam” laws, which allow crime victims or their surrogates to recover from their attackers money made as a result of the crime, present an example of where a suit for loss, presumably from the invasion of privacy, would yield a minimal recovery given the fact that the criminal prosecution itself already lawfully accomplished that same invasion. See generally Benedict J. Caiola & Esther Oz, Note, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board—“*Crime Goes Hollywood*”—*The Striking Down of the “Son of Sam” Statute*, 14 WHITTIER L. REV. 859 (1993) (listing various state initiatives).

73. This appearance will be discussed below. See *infra* text accompanying notes 155–61.

74. See *infra* text accompanying note 167.

75. See POSNER, *supra* note 70.

Indeed, in the case of a prohibition of criminal or constitutional dimension, it may safely be supposed that the courts or Constitution Framers determined that harm substantially exceeds gain.<sup>76</sup> If it is true that harm generally exceeds gain, then a penalty measured by loss will deter adequately (assuming adequate enforcement),<sup>77</sup> and will do so even if the penalty is set somewhat too high or too low.<sup>78</sup> The greater the amount by which losses exceed gains respecting the activity, the more comfortable a judge can be with underestimating damages.<sup>79</sup>

By contrast, a gain-based remedy such as exclusion depends more heavily on accuracy. If gain exceeds loss with respect to constitutional violations, it is likely to do so only marginally. As a result, the systematic undervaluation of gain might leave police underdeterred, creating more harm than gain. Should the expected cost to the prosecution from a constitutional violation prove small, particularly if wrongfully obtained evidence is admitted by mistake or pursuant to an “exception” for unconstitutionally obtained evidence,<sup>80</sup> then “crime” pays.<sup>81</sup> Thus, the incentive for judges when ordering disgorgement is to protect against undervaluation by overvaluing the wrongdoer’s gain and thus increasing over-deterrence of lawful police activity,<sup>82</sup> for example, by defining the causative link between police illegality and discovered evidence broadly in order to guard against under-deterrence of police misbehavior.<sup>83</sup> Because of the un-

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76. *Id.*

77. *See supra* text accompanying notes 32–33.

78. *See* JEFFREY S. PARKER, CRIMINAL SENTENCING POLICY FOR ORGANIZATIONS 36–40 (1988) (U.S. Sentencing Comm’n Staff Working Paper).

79. *Id.*

80. Respecting causation, the Supreme Court has created a series of doctrines, usually thought of as “exceptions” to the exclusionary rule, that determine whether a causative link connects the evidence at issue with the unconstitutional conduct. These doctrines include attenuation, *see Taylor v. Alabama*, 457 U.S. 687, 689–693 (1982); *Rawlings v. Kentucky*, 448 U.S. 98, 106–10 (1980); *Dunaway v. New York*, 442 U.S. 200, 216–19 (1979); *Brown v. Illinois*, 422 U.S. 590, 600–05 (1975); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963), independent source, *see Murray v. United States*, 487 U.S. 533, 536–44 (1988); *Segura v. United States*, 468 U.S. 796, 804–805, 813–16 (1984), and inevitable discovery, *see Nix v. Williams*, 467 U.S. 431, 445–46 (1984). Courts must also determine which of the unconstitutionally generated evidence is the product of the “good faith” actions of police officers. *See United States v. Leon*, 468 U.S. 897, 918–25 (1984).

81. *See* PARKER, *supra* note 78.

82. *See* PARKER, *supra* note 78; Standen, *supra* note 34, at 187–89.

83. The Supreme Court’s Fourth Amendment jurisprudence in fact encourages trial judges to consider the egregiousness of police behavior and the needs of deterrence in deciding

certain relationship between gain and harm, a remedy based on gain risks both under-deterrence and over-deterrence to a greater degree than does a remedy based on loss. Systematic under-deterrence is especially problematic where the wrongdoer's costs of avoiding harm are substantial, as would be the case with any sizable enterprise, such as law enforcement, whose agents regularly engage in activities that might cause harm. To deter, expected penalties must suffice, not only to outsize expected gains, but also to induce the wrongdoer to undertake the substantial training and supervisory costs to modify the harm-producing behaviors.<sup>84</sup> To the extent that exclusion provides a weaker deterrent to unlawful action than does damages, the impetus for widespread police reform is diminished.

### *C. Measured by Externalities*

Exclusion does not appear likely to produce sufficient deterrence. On the other hand, damages have promise of producing sufficient positive externalities to render other means of controlling police behavior partially redundant. A private right of action for damages to enforce the constitutional standard against wrongful police conduct could replace extant public sanctions,<sup>85</sup> such as administrative regulation.

In theory, damages should deter perfectly.<sup>86</sup> Damages are measured by the loss defendant caused plaintiff, requiring the defendant to pay plaintiff not only compensates the plaintiff but also fully internalizes all the losses defendant has caused by his action.<sup>87</sup> Assuming that the plaintiff's losses exceed the defendant's gains, as they presumptively would given the legal prohibition,<sup>88</sup> then a simple

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whether or not to suppress evidence. *See Wong Sun*, 371 U.S. at 491 (attenuation); *Murray*, 487 U.S. at 536–44 (independent source).

84. *See* Standen, *supra* note 34, at 187–88.

85. This reasoning appears relevant as well to private causes of action more generally. *See Burnette v. Wahl*, 588 P.2d 1105 (Or. 1978) (discussing a private cause of action based on criminal prohibition of child abandonment).

86. This proposition assumes away measurement problems. To the extent that normal valuation measures cannot measure loss accurately, such as in defamation cases, damages might not provide a sufficient penalty even assuming adequate detection rates. Presumed damages or punitive damages can be justified as a response to this problem. *See generally* David Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

87. For a seminal discussion of optimal penalties, see Becker, *supra* note 32.

88. *See supra* notes 48–52 and accompanying text.

damages award will remove opportunities to profit from the prohibited activity.

Damages might not deter optimally, however, if detection occurs at a probability substantially less than unity.<sup>89</sup> In other words, where persons injured by defendant's conduct do not sue and collect because of mistake, evidence problems, or financial concerns about the cost of a suit in comparison to the value of the recovery, an award of simple damages will not provide adequate deterrence.<sup>90</sup> For example, in the area of criminal remedies where detection problems are rampant, penalties are determined by use of a "multiplier" that is the product of the loss of the victim and the inverse of the detection rate.<sup>91</sup> A penalty smaller than the product would actually make crime pay.

Were a private damages remedy to supplant exclusion as the preferred remedy for wrongful police behavior, it should be the sole remedy applied, except in response to detection problems or particular harms.<sup>92</sup> The proposition that damages will in most cases present a superior alternative<sup>93</sup> does helpfully locate the incidence of the cost of litigation on the parties who stand to gain from its collection, saving public agencies enforcement expenditures.<sup>94</sup> To the extent that damages create positive externalities, however, then arguably the public ought to subsidize them. One significant subsidy to damaged plaintiffs is the judicial system itself;<sup>95</sup> another is the availability of class actions, which help overcome financial problems and might be useful to respond to systemic police abuses.<sup>96</sup> Perhaps other means of

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89. See Becker, *supra* note 32.

90. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

91. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (1994).

92. Of course, certain police misbehaviors might be of a nature to be incommensurable with monetary fines. See Posner, *supra* note 90; see generally Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993). Likewise, exclusion as a remedy could be retained for instances where police abusively or intentionally violate the Constitution to obtain evidence that in retrospect is of evidentiary value substantially in excess of the price of the harm.

93. See Posner, *supra* note 90.

94. This assumes that fee-shifting would not be part of the damages scheme. It could be added to the public subsidies that already are devoted to the judicial system.

95. See POSNER, *supra* note 17, § 19.1; William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 271-75 (1976).

96. A class action would have been a preferable remedy for the allegedly widespread use in the 1970's of carotid or "choke" holds by the Los Angeles Police Department, predomi-

subsidizing plaintiffs, such as employing presumed damages,<sup>97</sup> would be necessary to ensure that the damages penalty is extracted in an amount equal to the marginal social benefit.<sup>98</sup> To the extent that detection problems persist despite subsidization, then other remedies, such as punitive damages, public fines, incarceration, or regulatory measures could be taken to address lingering negative externalities. Public sanctions would also be needed to deal with defendants who cannot pay their bills and who would go undeterred by the prospect

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nately against minority citizens. See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Lyons' suit asked for an injunction, which was denied on the grounds of a lack of a sufficient threat to the plaintiff of the police choking him again in the future. Had the issue arisen in the context of a criminal prosecution against Lyons, the exclusionary remedy would have been useless without evidence upon which to act. See also *infra* note 218.

97. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (stating that compensatory damages for defamation are allowed without proof of injury because defamation is presumed to cause injury); *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 1121 (7th Cir. 1974) (allowing damages for humiliation and distress caused by discriminatory refusals to lease); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974) (allowing damages for humiliation caused by discriminatory refusals to sell); *Basista v. Weir*, 340 F.2d 74, 84–88 (3rd Cir. 1965) (allowing damages for humiliation and distress caused by unlawful arrests, searches, and seizures); *Sexton v. Gibbs*, 327 F. Supp. 134, 142–43 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) (same); *Rhoads v. Horvat*, 270 F. Supp. 307 (D. Colo. 1967) (upholding \$5,000 award for illegal arrest); Roland F. Chase, Annotation, *Recovery of Damages for Emotional Distress Resulting from Racial, Ethnic, or Religious Abuse or Discrimination*, 40 A.L.R. 3d 1290 (1971). In *Basista*, the court held that nominal damages could be awarded for an illegal arrest even if compensatory damages were waived and that such nominal damages would, in an appropriate case, support an award of punitive damages. 340 F.2d at 87–88. Alternatively, the damages tariff could be measured by the saved labor costs the police enjoyed by foregoing a more costly yet legally permissible course of conduct. Setting damages according to saved labor costs is actually a form of restitution. See *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 654–55 (Wash. 1946) (awarding restitution of defendant's saved labor costs where defendant converted and put to profitable use the plaintiff's egg washing machine). See Standen, *supra* note 34, at 176–77; Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 356–57 (1984) (asserting “that, in general, it is extremely inexpensive to measure damages in terms of benefit conferred, especially in comparison to the other damage measures available to the courts”).

98. A damages action for nonsystemic police misconduct should be streamlined, featuring presumed damages, easy collection, and a non-jury decision maker, as in an arbitration. Such a process would overcome concerns about jury bias in favor of police officers and about financing the litigation. Systemic misconduct or isolated egregious misconduct could be addressed through the litigation system. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421–27 (1971) (Burger, C.J., dissenting) (proposing a statutory cause of action that would feature a waiver of sovereign immunity and a quasi-judicial tribunal).

of a private damages action but not by the possibility of a public remedy.<sup>99</sup>

Even if damages were not exacted for every constitutional violation, officers would still have incentives from the prospect of a damages award to adhere to legal limits. Indeed, in theory, damages work so well at generating the positive externality of deterrence that in certain instances whether or not damages are actually paid will be irrelevant to the creation of adequate deterrence. For instance, in deciding whether to impose a nuisance on his neighbor, a defendant will compare the gain to be made by not stopping the nuisance (measured by precautionary costs avoided) with the gain to be made by extracting a payment from the neighbor who might wish to avoid being the recipient of that nuisance. The neighbor's payment will be an amount up to that neighbor's losses from the nuisance. Every choice includes a cost. By committing the nuisance, the defendant foregoes a chance to collect from the neighbor. Thus, the potential damages remedy, which is equal to the potential payment from the neighbor, influences the defendant's conduct even where payment is not actually made. In other words, the incidence of collection of damages is not significant to their deterrent effect because the real deterrent effect does not come from the damages remedy but comes from the utility of persons who might be willing to pay the defendant more for not breaking the law than he might gain from breaking it. Foregoing this payment is an opportunity cost, and the job of the courts in this view is to help parties overcome transaction costs that might impede the accurate pricing and transmittal of those costs to relevant persons. Thus, objections as to the practicality of widespread damages collections should not in theory diminish the ability of a damages remedy to produce positive externalities. Damages are really a surrogate for the utility preferences of plaintiffs, and, absent transactions costs, the latter can and do deter all by themselves.

In the context of search and seizure, the prospect of police exacting tribute from citizens for forgoing unlawful activity is anathema, and illegal. But an officer might internalize citizens' opportunity costs in other ways: even where the department does not lose a case brought by a citizen, the officer might be subject to discipline for his actions. In any event, a streamlined damages remedy for wrongful

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99. This concern would be obviated were the municipality or police department liable in respondeat superior. *See infra* notes 138–39.

police conduct, available regardless of the fortuity of wrongfully acquired evidence, would in theory suffice to minimize detection problems and thus negate the need for multipliers.

### III. A GAME THEORY ANALYSIS: THE PRISONER'S DILEMMA

The prisoner's dilemma, the basic model of game theory,<sup>100</sup> presents a tale of how legal rules that encourage competition thereby inhibit the maximization of joint returns.<sup>101</sup> Application of this much-studied model of strategic behavior<sup>102</sup> to the interactions between police officers and suspects suggests that exclusion is less likely than damages to encourage desired cooperative behavior.

#### *A. The Payoff Matrix and Dominant Strategies*

The prisoner's dilemma is relevant to police-citizen interaction because that interaction is interdependent.<sup>103</sup> In other words, the officer knows that the actions of the citizen will impact the officer's decisions. Interdependence requires the officer to develop a strategy for dealing with the citizen's decision. The standard payoff matrix in this context would compare the payoffs from mutual cooperation with those from mutual competition and from each party doing the opposite of the other, in turn. Let "suspect cooperation" be defined as granting consent whenever the officer is presently or with reasonable additional effort would be entitled to legally conduct the requested search. "Officer cooperation" means refraining from requesting consent unless the officer is presently or with reasonable additional effort would be legally entitled to conduct the search.<sup>104</sup> If players cooperate, there will be no risk of harm from an unconstitutional search, and thus the payoff for both is zero. If the citizen defects, refusing to give consent although the officer's planned search is otherwise permissible, then the risk of harm increases. The officer, knowing his planned search is permissible, nonetheless incurs a small increase in

100. See generally DOUGLAS C. BAIRD ET AL., *GAME THEORY AND THE LAW* (1994).

101. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 512 (1994).

102. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 53-80, 119-61 (Oxford University Press 1973) (1960); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

103. See BUTLER, *supra* note 17, at 469.

104. By "reasonable additional effort," I refer to an officer's obtaining a search warrant, assuming the officer already has sufficient cause to merit one.

the risk of his search being declared unconstitutional, either by his mistaken premise as to its legality or by judicial error. The officer's payoff is set at fifteen; the payoff for suspect, less sure than the officer of the legality of the forcible search, measured by the risk of unconstitutionality, is seventy. Where the officer forces a search where the citizen would have consented to a search, then the payoffs reverse. The officer's payoff is now seventy, a high risk of unconstitutionality, due to his mis-estimation of the citizen's willingness to consent and his zeal, brought about by the suspect's recalcitrance, to pursue the search to conclusion.<sup>105</sup> The suspect's perceived harm is fifteen, as he would have consented as a result of his perception that the officer's request was legally justified. Finally, if both players defect, adopting nonconsensual postures, then the mutual chances of unconstitutional conduct occurring are greater than cooperation, in that the officer must act forcibly and the suspect "wrongfully" refuses consent, resulting in payoffs of fifty each.

		<b>Player One (Citizen)</b>	
		<u>Cooperate</u>	<u>Defect</u>
<b>Player Two (Officer)</b>	<u>Cooperate</u>	0/0	15/70
	<u>Defect</u>	70/15	50/50

In this game, both players could minimize to the point of vanishing the likelihood of a constitutional violation if they cooperated: if the officer asked for consent only when he was otherwise lawfully entitled to search and if the citizen granted that request in trustful belief of the officer's claim of lawful authority. Each is made better off individually, however, by defecting: by refusing to consent and compelling the officer to forcible action, the citizen increases to seventy the chances of unconstitutionality and exclusion of incriminating evidence. The dominant strategy for the citizen is to deny or mislead the officer in the hope of evading the search, thus inducing the officer to get a warrant or use an "exception" to complete the forcible search. Similarly, because the officer cannot be sure that the citizen will accede to a request for a consent, but instead might either refuse it or mislead the officer by indirection into searching in the wrong

105. See *infra* notes 119–20 and accompanying text for a discussion of adverse selection problems in this game.

places, the officer requesting consent has the incentive to behave as if, were consent refused, the search would proceed forcibly,<sup>106</sup> fraudulently inducing the citizen to waive his constitutional rights and risking the search being declared unconstitutional.<sup>107</sup> Along with the decision about whether or not to request and give consent, the dilemma also arises with respect to the manner of the search: because consent can be revoked at any time during the search,<sup>108</sup> the officer has the incentive to begin the consensual search as intrusively as possible, lest evidence be lost,<sup>109</sup> while the citizen has the incentive to steer the police search to away from incriminating evidence.

For example, where a citizen refuses the officer's request to give consent for a search of the citizen's belongings,<sup>110</sup> then the officer knows that the "cost" of his decision to search without consent will yield an expected outcome from that search that differs from a consensual search. The relative cost of the evidence increases because proceeding forcibly without consent increases the likelihood that the search will be found unconstitutional. By the same token, from the citizen's vantage, the costs of a forcible search are greater than one that proceeds consensually, in that the chances for unconstitutional invasions are heightened.<sup>111</sup> As a result, the officer and the citizen would maximize joint returns, measured by reducing the likelihood of unconstitutional conduct from the interaction, if both cooperated in ensuring a consensual search that did not transgress constitutional

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106. See *United States v. Duran*, 957 F.2d 499, 502 (7th Cir. 1992) (stating that a plausible threat to obtain warrant does not negate consent); *United States v. Talkington*, 843 F.2d 1041, 1048-49 (7th Cir. 1988) (using threats may invalidate consent).

107. See *United States v. Zapata*, 997 F.2d 751, 755 (10th Cir. 1993) (describing how a Hispanic male construed request to search as threatening physical harm).

108. Consent operates as a waiver of constitutional rights but can be limited in scope, see *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), and is revocable at any time by the citizen, see *United States v. Springs*, 936 F.2d 1330, 1334 (D.C. Cir. 1991) (explaining that even after consent to search is initially given a person may subsequently limit or withdraw that consent).

109. For an extreme example, see *United States v. Blake*, 888 F.2d 795, 796-97 (11th Cir. 1989), where officers approached the defendant while he was walking through an airport terminal. Immediately after Blake gave consent to a search of his "person," one officer reached into Blake's groin region and performed a "frontal touching" of Blake's genitals. See also *United States v. Berke*, 930 F.2d 1219, 1222-23 (7th Cir. 1991) (consenting to "look" in bag allowed thorough search of the bag); *United States v. Ibarra*, 948 F.2d 903, 906 (5th Cir. 1991) (consent to search the "house" included entering attic with a sledgehammer).

110. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

111. Consent operates functionally as an exception to the Fourth Amendment. As long as consent is given without inducement or coercion, police may search without fear of transgressing the Constitution. See *id.* at 222.

boundaries. The dominant strategy, however, is to the contrary, thereby increasing the likelihood of unconstitutionality to a degree greater than mutual cooperation.

*B. Resolving the Dilemma*

The dilemma might be avoided or minimized if both parties understood that the other would act lawfully and cooperatively. Thus, if the citizen could trust the officer to disclose honestly whether or not the officer had sufficient grounds to conduct the search in the absence of consent and to limit the search to areas lawfully within the scope of the consent, then the citizen by giving consent would avoid the unnecessary harms to his constitutional rights or property interests. Similarly, if the officer could trust the citizen to accede to a lawful claim of authority and not mislead the officer or withdraw consent, then the officer would minimize the scope of and the harm from the search. By leaving the officer and the citizen to react in the midst of imperfect knowledge of the other's strategy, however, then each player has the incentive to act competitively in the hope of "winning" the game by tricking the citizen into consent on the one hand or misleading the officer on the other.

The prisoner's dilemma is not simply a problem of information costs, however.<sup>112</sup> Even if the information costs were reduced to zero and each party knew that the other would behave cooperatively, the dominant strategy would still be to "cheat": officers and citizens could trade on the other's trust to reduce their losses from the game.<sup>113</sup> Because both officers and citizens are "one-shot players" in this game, neither will be overly concerned about the reputational effects that might induce cooperative behavior.<sup>114</sup> The competitive behavior that is so dominant in police-citizen interactions is a product of the legal rules themselves. Given that the substantive rules of the game, being embedded in the federal Constitution, are unlikely

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112. See BUTLER, *supra* note 17, at 474.

113. For example, a citizen whom the officer believes will not mislead the officer in his search can maximize his return by misleading the officer.

114. See Gilson & Mnookin, *supra* note 101, at 521. The textual statement must be qualified in recognition that the officer will likely experience some reputational costs should he repeatedly flout constitutional standards when interacting with citizens. The officer then is a repeat player with judges and police department superiors. This fact will tend to induce the officer to act less competitively in seeking evidence from suspects.

to change except at the margins of criminal law enforcement,<sup>115</sup> the question becomes whether the remedy of the exclusionary rule, as compared to damages, provides the players with greater incentives toward cooperative behavior or competitive behavior.

It seems likely that exclusion promotes competitive behavior, thus inducing constitutional violations. To an officer, the penalty of exclusion appears small.<sup>116</sup> Should the officer, faced with a refusal or withdrawal of consent by a citizen, press on to complete an arguably unlawful search, then the worst that can happen is that the gain from that search will have to be returned to the citizen.<sup>117</sup> In many cases, of course, no evidence will be found at all, thus leaving the citizen with little practical remedy given the minuteness of actual damages.<sup>118</sup> An officer's incentives would appear to be to proceed with the search or, alternatively, use threats to induce consent in the hope that the unconstitutional police action can evade detection, either through its failure to culminate in evidence or through the search's fitting one of the numerous exceptions for warrantless police searches. The officer has little reason to withdraw when consent is

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115. One significant area where the rules have changed is regulatory and administrative searches, where citizen consent is presumed by statute and the scope and manner of police searching is also limited. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug testing of employees); *New York v. Burger*, 482 U.S. 691 (1987) (search of auto junk yard).

116. The remedy is not cost-free, however. The officer's search costs are lost, the prosecutor wastes effort in defending the evidence, and society marginally loses law enforcement utility. See POSNER, *supra* note 17, § 28.2. It is likely that these costs would not be very important to the officer when searching. The search costs are sunk and the other costs are borne by others. Police department discipline, however, could impose those costs directly on the miscreant officer, thus changing the officer's incentive structure. This essay does not assume a world free of police department discipline but only notes that this discipline, which presumably varies in its severity and regularity among departments, can and does reduce the incentives that otherwise propel the officer toward risking unconstitutional intrusions. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 409-37 (1974). The point in the text is to show how the officer-citizen interaction itself militates in the opposite direction, toward competition, and how the exclusionary remedy perversely exacerbates that tendency.

117. Much evidence, such as contraband or fruits of a crime, is not actually returned to its owner, although the *Federal Rules of Criminal Procedure* permit a motion to return evidence. See FED. R. CRIM. P. 41(e). A motion to suppress is directed at the use of the evidence, not its return. See *id.* 41(f).

118. Citizens do have several private civil remedies for unconstitutional police conduct, including common law tort actions for trespass and false arrest, civil rights actions under 42 U.S.C. § 1983, and constitutional torts brought under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See *infra* notes 138-39.

refused. Exclusion also provides the citizen with incentives to compete. If the suspect can induce the officer to search forcibly or to make threats to coerce consent, then the citizen has an increased chance of having incriminating evidence excluded.

Exclusion's tendency to evoke competitive behavior is exacerbated by its concomitant tendency to induce adverse selection.<sup>119</sup> The citizen's incentives to induce a constitutional violation increase as the incriminating character of the evidence he possesses increases. The citizen's best way to induce a violation is to refuse consent. The officer, suspecting correctly that those with the most to hide have the greatest reason to choose not to consent, is inclined to press on all the more in the face of the refusal.<sup>120</sup> Thus, where the citizen knows that the officer seeks and the citizen is in possession of highly incriminating evidence, then the players each assume the worst of each other and propel their way toward behavior that risks unconstitutionality. The incentives to compete create difficult evidentiary issues of constitutional dimension.

Alternatively, a damages remedy, appropriately streamlined and measured by the significance of the constitutional violation,<sup>121</sup> would encourage the players toward cooperative conduct. An officer, considering a citizen's refusal to give consent, would be less inclined to issue threats or go forward with a forcible search for fear that his actions would be deemed unconstitutional and result in a monetary fine. A fine, unlike exclusion, would be a real cost to the officer or a person or institution in the best position to correct his behavior.<sup>122</sup> The officer's incentive to adhere to the Constitution would be present regardless of whether or not incriminating evidence was likely to be or actually was obtained from the search, as damages for loss of a

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119. "Adverse selection" is defined as: "A situation in which two people might trade with each other and one person has relevant information about some aspect of the product's quality that the other person lacks." BUTLER, *supra* note 17, at 913. It is associated with the "lemon effect," in which the prices and quality of used goods are driven down because buyers cannot distinguish superior from inferior products.

120. Game theorists refer to this phenomenon as a "pooling equilibrium": although the players may have differing preferences with regard to giving consent to search, the signal that the officer infers from a refusal to give consent (that the citizen is in fact holding incriminating evidence) propels the officer to demand more consents and propels citizens to give them in order to mask their guilt. *See generally* BAIRD ET AL., *supra* note 100.

121. A system of presumed damages would suffice here and would save significant transactions costs on assessing damages for loss of a constitutional right.

122. *See infra* notes 138–41 and accompanying text.

constitutional right would be available in all cases of violations. On the other side, the citizen would not have a moral hazard to adversely select refusal when he has incriminating evidence to hide: the citizen cannot gain disproportionately from the search being characterized as unconstitutional. Instead, because the aim of the damages remedy would be to make the citizen whole through substitution of money and not through restoration of the seized evidence, the citizen would not view the inducement of an unconstitutional police search as an opportunity to profit. In short, the damages remedy, by separating the gain from a search and the loss from a search, circumvents the “interdependence” of the officer’s and citizen’s decision-making.<sup>123</sup> A damages remedy for unconstitutional police conduct unties the prisoner’s dilemma.

#### IV. AGENCY COSTS

A principal can limit the tendency of his agent to divert from acting in the principal’s interests by incurring monitoring costs.<sup>124</sup> The standard justification for exclusion highlights its tendency to encourage principals to incur monitoring costs.<sup>125</sup> Exclusion does not punish the wrongdoing officer directly; instead, because the state must forfeit unlawfully obtained evidence, the costs of the rule are borne at the organizational level, by the state and derivatively by law enforcement officials and public prosecutors. The officer’s misbehavior may be corrected by department censure or other employment action; future wrongdoing can be minimized by the imposition of policies and regulations aimed at eliminating constitutional violations.<sup>126</sup> By visiting the costs of wrongful conduct on those persons best able to institute corrective measures, the exclusionary rule places incentives to monitor on precisely those persons, departmental superiors, who are in the best position to reform police behavior.<sup>127</sup> The exclusionary rule thus encourages superiors to expend resources to minimize agent divergence in order to reduce costly violations. The ex-

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123. See *supra* note 103 and accompanying text.

124. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). Jensen and Meckling also include “bonding expenditures by the agent” and “residual lost” along with “monitoring expenditures” as the components of agency costs. *Id.* at 308.

125. See, e.g., Mertens & Wasserstrom, *supra* note 14, at 394–401.

126. See Amsterdam, *supra* note 116, at 420–29.

127. *Id.*

clusionary remedy might also help align officer conduct with social costs.<sup>128</sup> Officers properly following departmental preferences in deciding how close to the line of illegality they might risk going will then consider both the social benefits and social costs of their conduct, as both the gain in the form of evidence and the costs in the form of exclusion are borne by the same party.

The standard account of damages is less optimistic. In contrast with exclusion, a damages remedy would not align officer incentives with social efficiency. An officer faced with personal liability for illegal conduct<sup>129</sup> would have to undertake the full costs of an illegal search, in the form of a personal damages judgment, without concomitantly enjoying the social or organizational benefits of enhanced prosecutorial advantages and concomitant crime suppression.<sup>130</sup> As a result, officers would prefer to steer well short of the line of illegality, even to the point where legally permissible searches, particularly those conducted without the protection of the warrant, were avoided. This problem of over-deterrence<sup>131</sup> would be exacerbated because the officer is paid on salary and not by a successful apprehension and prosecution.<sup>132</sup> Indeed, an officer facing only the downside risk might even reduce his activity level to avoid entire categories of searches that tend to be the riskiest at incurring personal penalties.<sup>133</sup>

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128. To use Jensen and Meckling's terminology, exclusion might encourage officers to incur "bonding costs" to help assure the principal that they will adhere to departmental regulations. See *supra* note 124. Such costs for police officers would be comprised of signaling fidelity to codes of conduct, contractual limitations in the range of the officer's power, and bonding or insurance.

129. See *infra* text accompanying notes 164–71.

130. See Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635 (1982). Posner writes:

Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance. At the same time, if their zeal leads them occasionally to violate a person's constitutional rights, then the tort remedy will impose on these officers the full social costs of their error. There is thus an imbalance: zealous police officers bear the full social costs of their mistakes through the tort system but do not receive the full social benefits of their successes through the compensation system.

*Id.* at 640.

131. See Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1263–72 (1983).

132. See Posner, *supra* note 59, at 65.

133. See Levmore & Stuntz, *supra* note 2, at 490.

It is not clear that exclusion better resolves agency problems.<sup>134</sup> Respecting over-deterrence, exclusion also likely induces police to avoid arguably unlawful behavior for fear it be recharacterized as unconstitutional.<sup>135</sup> Exclusion in some cases might constitute a large penalty, as evidence that could have been obtained legally with greater effort will be lost to the prosecution. Large penalties tend to discourage legal activity if it lies close to the line of illegality. Moreover, agent divergence can be exacerbated to the extent that the penalty is disproportional to the gain. Compared to exclusion, damages are precise. Even ballpark assessments of damages, measured by harm to the suspect or saved labor costs by the police, marginalize deterrence: a graduated range of penalties would provide officers who contemplate potentially unconstitutional activity with the incentive to select the least intrusive means of accomplishing the activity, in order to minimize the expected penalty. At the border between

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134. For an argument that the agency problem leads officers to ignore certain costs of exclusion, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 376–78 (citing sociological literature for the proposition that the officer cares primarily about making the arrest and not about trial outcomes).

135. One notable example can be derived from the O.J. Simpson prosecution. The facts are related in AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 280–81 (Stephen A. Saltzburg & Daniel J. Capra eds., 5th ed. 1996). Upon arriving at Simpson's house in the aftermath of the discovery of the bodies of the murder victims, officers had to decide whether or not to scale Simpson's fence and enter his house without a warrant. The possible justification for this police intrusion was that of exigency: that the potential danger to human life, were Simpson or some other person in the house injured, allowed police to enter without magistral approval. The officers, as they considered whether or not to enter the house, believed that Simpson himself was a prime suspect in the murders; presumably, the officers also were aware of the fact that the house could potentially contain significant evidence incriminating Simpson. If the officers concluded that an exigency existed but the search was subsequently held unconstitutional, then important incriminating evidence possibly would have been irretrievably lost to the prosecution. The Supreme Court has devised certain "exceptions" to the rule of exclusion that potentially could have allowed the introduction of the Simpson evidence, even had it been unconstitutionally obtained. See *Nix v. Williams*, 467 U.S. 431, 440–50 (1984) (admitting unconstitutionally obtained evidence because its discovery by police was inevitable). In this case and others, any police officer who comes to believe he is facing an exigency must balance that belief against the possible loss of evidence from exclusion and, to be safe, might take the conservative approach and avoid activity that, although legal, carries a risk of recharacterization. Exigency arises in a variety of cases and situations. See *Michigan v. Clifford*, 464 U.S. 287 (1984) (fire scene investigation provides exigency); *Mincey v. Arizona*, 437 U.S. 385 (1978) (exigent circumstances involving murder scene preservation); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *O'Brien v. City of Grand Rapids*, 23 F.3d 990 (6th Cir. 1994) (same); *United States v. Salava*, 978 F.2d 320 (7th Cir. 1992) (risk to public safety); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (risk of evidence destruction); *United States v. Riccio*, 726 F.2d 638 (10th Cir. 1984) (risk to resident or family).

constitutional and unconstitutional conduct, the quantum of harm if the conduct be deemed unconstitutional should be small: conduct that causes large and egregious harms is probably clearly illegal. If so, then the amount of over-deterrence from damages should itself be small, as the small penalty at the border will not cause much trepidation in the officer approaching it. Exclusion, conversely, features no gradation in penalty: it requires disgorgement, regardless of the magnitude of the value of the evidence and regardless of the degree of harm inflicted.<sup>136</sup> The distribution of exclusion's penalty to officers is likely distributed randomly across the continuum of harms.<sup>137</sup> If so, the officer acting in the borderland of unconstitutionality risks losing all the gain should his conduct be characterized as unconstitutional. This potentially substantial penalty risks discouraging lawful police activity.

To the extent that organizational liability is thought preferable for deterring unconstitutional police action, moreover, a damages remedy could be shaped to replicate exclusion.<sup>138</sup> Police departments and municipalities could be held liable in respondeat superior for officer misconduct.<sup>139</sup> Alternatively, municipalities could indemnify officers for damages judgments.<sup>140</sup> Either approach would induce superiors to monitor or train subordinate officers in order to minimize constitutional violations. Either would induce officers to consider, as much as would exclusion, the social costs of their conduct prior to risking an unconstitutional action. Thus, exclusion does not seem to

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136. The magnitude of the penalty of exclusion likely results in variations in the substantive standard of liability, here in definitions of the Fourth Amendment, in an attempt to mollify the effects of an otherwise over-penalizing remedy.

137. See *supra* notes 61–63 and accompanying text.

138. Various tort remedies exist for officer misconduct in connection with arrests, imprisonment, searches, and seizures, including 42 U.S.C. § 1983 and the common law torts of false arrest, false imprisonment, trespass, assault, and battery. See SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 4:17 (4th ed. 1999). These remedies are sometimes unavailable, however, due to the difficulty of proving actual damages. See *Norwood v. Bain*, 43 F.3d 843 (4th Cir. 1998) (no physical damage from unconstitutional search). The Supreme Court has also implied a cause of action for damages against federal officers who violate the Fourth Amendment. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

139. Local governments, but not states, may be sued without violating the Eleventh Amendment. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Such liability, however, is limited to where the constitutional violation resulted from an official policy, custom, or training practice. See generally NAHMOD, *supra* note 138, at Chapter 6.

140. See POSNER, *supra* note 17; Posner, *supra* note 90.

have a necessary advantage over a flexible damages remedy. Indeed, comparing institutional processes,<sup>141</sup> damages assessed against the police agency might in fact generate superior monitoring incentives as compared to exclusion. Exclusion creates deterrence of police misconduct indirectly, relying on the prosecutor complaining about lost evidence to his superior who in turn complains to police department officials who then attempt to alter the behavior of subordinate officers. Complaints about lost evidence that travel directly from prosecutor to police officer probably do not carry much weight, especially in large cities where individual officers are likely to be one-time players who will not deal repeatedly with particular prosecutors. A damages remedy assessed directly against the police department budget, however, might more directly give department officials incentives to monitor subordinate officers. It also helpfully eliminates the office of the prosecutor from participating in monitoring police officers, thus reducing the transaction costs of producing deterrence.

Damages would appear to have one other advantage over exclusion in encouraging effective monitoring: diminished variance. In theory, compensatory or presumed damages geared to the nature and severity of the constitutional invasion could be collected in every instance of unconstitutional conduct, unlike exclusion, where the remedy for unconstitutional conduct depends on the fortuity of the discovery of incriminating evidence. Because the assessment of the damages penalty would be more consistent, not depending on the discovery and successful suppression of evidence, damages would reduce the variance in penalties from the illegal search. Reducing the variance inhibits risk-taking, particularly for those officers who might be risk-seekers in the domain of gain. Making a damages penalty more of a sure thing minimizes the chances of gain and frames the outcome as a loss, thereby utilizing the general risk-avoidance of persons toward losses.

Narrowing the variance in outcomes also cheapens the expense for the municipality or the officer to obtain insurance, as the risk pool for certain kinds of officer behaviors can be better defined.<sup>142</sup> Encouraging the provision of insurance assists claimants in obtaining

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141. See generally NEIL K. KOMESAR, CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

142. See generally George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

recovery while minimizing the costs to the government. By contrast, the social costs from exclusion appear impossible to insure against directly, in part due to the wide variance in the “value” of suppressed evidence. The value or costs take the form of diminished punishment of offenders and potentially an increase in crime, both from lessened deterrence and recidivism, neither of which appears to provide insurers with a sufficiently defined risk pool to permit insurance.<sup>143</sup>

#### V. ADMINISTRATIVE COSTS

Exclusion does not appear to have clear advantages over damages in terms of administrative simplicity, as some have argued.<sup>144</sup> Clearly the successful implementation of a damages remedy for wrongful police conduct presents conceptual and practical obstacles.<sup>145</sup> But once again the attack on damages overlooks the fact that choices are comparative. Exclusion presents implementation problems that appear as serious as those respecting damages.

The primary weakness cited by commentators with regard to the damages remedy is the problem of measurement.<sup>146</sup> The problem of measurement refers to the difficulty of assigning a monetary figure to the loss of a constitutional right, an item generally without a readily available market price.<sup>147</sup> A system of damages that graduated monetary penalties according to harm, even if theoretically appealing as a way to create optimal deterrence, could not practically be implemented because harms of this variety could not easily nor accurately be quantified. Consequently, the remedy of exclusion, which straightforwardly suppresses evidence without the need to translate

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143. To the extent the government fails to minimize agency costs, resulting in more constitutional violations, more excluded evidence, and thus more social costs of crime, then the burden of undertaking precautionary costs falls to citizens at large. People can guard against such events through expenditures on public safety and private security or through specific insurance against certain crimes, such as burglary. *See Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co.*, 366 N.W. 2d 271 (Minn. 1985).

144. *See* Levmore & Stuntz, *supra* note 2, at 490–95 (arguing that practical or administrative advantages provide the primary advantage of exclusion over damages); Meltzer, *supra* note 2; Mertens & Wasserstrom, *supra* note 14.

145. *See* Mertens & Wasserstrom, *supra* note 14, at 406–10; Meltzer, *supra* note 2.

146. *See* Levmore & Stuntz, *supra* note 2, at 490–95.

147. This problem is essentially one of transactions costs impeding the efficient allocation of goods or even a problem of proper definition of property. *See* Coase, *supra* note 29; Harold Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13, 25–28 (1972); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

its value into some other medium, presents a simpler and more easily applied method of responding to police misconduct.<sup>148</sup>

This contention ignores the fact that measuring the evidence gained from wrongful police conduct presents difficulties as serious as those respecting damages. Both involve assessing the results of violations of constitutional rights, a notably difficult enterprise.<sup>149</sup>

Damages presents two essential difficulties of measurement: establishing the portions of harm that are attributable to the violation (causation) and determining a value for those portions of harm (valuation). Respecting damages for unconstitutional police activity involving the Fourth Amendment, to determine causation, the judge must decide which constitutionally protected interests were violated,<sup>150</sup> a problem that requires information about standing,<sup>151</sup> “reasonable expectations of privacy,”<sup>152</sup> and the particular facts of the police activity.<sup>153</sup> In order to assess the value of harm, the trier of fact would presumably need to know something about the officer’s state of mind in committing the violation, the difficulty of pursuing lawful means, the victim’s reaction, and the exact extent of the intrusion. Such inquiries would be expensive and presumably would yield highly disparate outcomes among trials, somewhat frustrating the production of graduated penalties necessary for marginal deterrence.<sup>154</sup>

Exclusion involves difficult problems of causation and valuation too. It is not always clear whether or not a certain piece of evidence, among the significant body of evidence that might be gathered during a large investigation, was discovered as a result of a prior illegality. Even where the “but-for” causal link has been established, de-

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148. See Levmore & Stuntz, *supra* note 2, at 490–95.

149. See *Carey v. Phipus*, 435 U.S. 247, 257–59 (1978).

150. An intrusion into the privacy of a suspect constitutes a constitutional violation only if it impinges on the suspect’s “reasonable expectations of privacy.” *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

151. See *Rakas v. Illinois*, 439 U.S. 128, 133–38 (1978).

152. See *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

153. The Supreme Court has increasingly made the focus of Fourth Amendment law the behavior of police officers and not the officer’s subjective motivation nor the suspect’s individualized reaction to the officer’s conduct. See *Whren v. United States*, 517 U.S. 806, 809–13 (1996); see also William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7–15 (1996).

154. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970).

termining “proximate causation” remains problematic. The Supreme Court has created a series of doctrines, usually thought of as “exceptions” to the exclusionary rule, that aim to determine if a causal link sufficiently connects the evidence at issue with the unconstitutional conduct. These doctrines include attenuation,<sup>155</sup> independent source,<sup>156</sup> and inevitable discovery.<sup>157</sup> They essentially provide that certain unconstitutionally obtained evidence should not be excluded because the unconstitutional act did not lead to or cause the finding of the evidence. Application of these doctrines involve the courts in difficult doctrinal line-drawing and factual decision-making.<sup>158</sup> Determining causation in the realm of gain should presumably mirror the same determination in the realm of loss, both in scope and difficulty.

Unlike exclusion, damages also present a distinct valuation problem. Exclusion does, however, entail a factual issue that might be commensurate with valuation in difficulty. Under the exclusionary doctrine, not all gain by the prosecution that stems from an unconstitutional activity is excluded: as in the civil remedy of disgorgement, only “unjust enrichments” are deemed wrongful to acquire or retain.<sup>159</sup> Here, an “unjust enrichment” is one that has not been attained through the officer’s exercise of “good faith.”<sup>160</sup> As a result, along with resolving the causation issue, trial judges must determine

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155. See *Taylor v. Alabama*, 457 U.S. 687 (1982); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963).

156. See *Murray v. United States*, 487 U.S. 533 (1988); *Segura v. United States*, 468 U.S. 796 (1984).

157. See *Nix v. Williams*, 467 U.S. 431 (1984).

158. For example, in the “attenuation” cases, trial judges must determine if “an intervening independent act of a free will” on the part of the suspect took place in order to “purge the primary taint of the unlawful invasion.” *Wong Sun*, 371 U.S. at 486. In resolving this question, the courts are to avoid a simple test, such as whether or not *Miranda* warnings have been issued. “No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test.” *Brown*, 422 U.S. at 603. Along with the effect of warnings, courts are to consider “[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct.” *Id.* at 603–04. Only if these factors together add up to a conclusion of attenuation is the causal chain from the constitutional wrong broken and suppression refused.

159. See *supra* note 3.

160. See *United States v. Leon*, 468 U.S. 897, 922 (1984).

which of the unconstitutionally generated evidence is the product of the “good faith” actions of police officers.<sup>161</sup>

This inquiry into the officer’s state of mind in order to determine the amount of the evidentiary gain is likely not as difficult as valuing damages, especially to the extent that inquiry is objectified.<sup>162</sup> But the valuation problems with damages could be rendered no worse in degree than good faith if the damages remedy were set according to a preformulated tariff for a certain style or type of unconstitutional police action.<sup>163</sup> Indeed, the law of remedies sometimes uses presumed damages, and nominal damages combined with punitive damages, to redress torts involving harms to a person’s dignity,<sup>164</sup> a type of harm that appears analogous to the harm from an unconstitutional search.<sup>165</sup> The damages tariff could alternatively and perhaps more simply be set according to the labor costs saved by the decision of police officers to forego a more troublesome constitutional route to the desired activity.<sup>166</sup> In any event, precision is not needed: a ballpark damages figure that approximates harm should be adequate to deter.<sup>167</sup> Damages need not be rejected as the preferred remedy for Fourth Amendment violations on account of an easily resolvable problem of valuation, one that the law has overcome in other areas

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161. “Good faith” is currently available as a defense to the suppression motion in cases where evidence was seized, albeit wrongfully, under the authority of a warrant, *see Leon*, 468 U.S. at 922, statute, *see Illinois v. Krull*, 480 U.S. 340 (1987), or because of an error by court clerks, *see Arizona v. Evans*, 514 U.S. 1 (1995).

162. It is unclear to what extent that inquiry involves examination of the officer’s subjective state of mind or a more objective “reasonableness” standard. *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad Faith “Exception” to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21 (1993). *Leon* contemplates objective elements in that test: “the officer’s reliance on the magistrate’s probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.” 468 U.S. at 922–23.

163. *See infra* note 173.

164. *See supra* note 97.

165. Both dignitary torts and constitutional torts sometimes cause harm without legal redress, or *damnum absque injuria*. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978) (holding that no remedy is warranted for denial of due process without accompanying “actual injury”).

166. Setting damages according to saved labor costs is actually a form of restitution. *See Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946) (awarding restitution of defendant’s saved labor costs where defendant converted and put to profitable use the plaintiff’s egg washing machine); Standen, *supra* note 34, at 176–77; Ulen, *supra* note 97.

167. *See supra* notes 73–78 and accompanying text.

of tort. Other problems with the damages remedy, such as the added costs of civil actions and their unlikely success,<sup>168</sup> could be met by removing the need for a civil action as a vehicle for enforcement and collection. Mirroring the exclusionary remedy, damages in the form of a fine payable to the defendant could be ordered by the judge after a simple hearing during a criminal trial.<sup>169</sup> Similar summary procedures, such as nonlawyer claims arbitration,<sup>170</sup> could be established for nonindicted victims of unconstitutional searches.<sup>171</sup>

Thus, practical considerations do not favor exclusion over damages. Both remedies have difficult causation and valuation problems. At worst, the damages remedy can be structured to duplicate whatever practical advantages accompany exclusion.<sup>172</sup> A damages remedy could provide for easy collection, payment by the state, and presumed damages or fines that approximate the measure of damages.<sup>173</sup>

## VI. USE OF EVIDENCE AT TRIAL

Many have voiced fear that exclusion at bottom allows the guilty to go free<sup>174</sup> or otherwise constitutes a disproportionate penalty against the interests of law enforcement.<sup>175</sup> Several commentators have refuted this claim, arguing that the constitutional rules themselves, and not the remedy, set the boundary for lawful police con-

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168. See Levmore & Stuntz, *supra* note 2, at 490–95.

169. In principle and in practice, this approach seems no different than a judge ordering monetary restitution to the victim of a crime after a criminal trial.

170. See *infra* note 173.

171. Some damages remedies are currently available to the victims of unconstitutional searches, including a civil suit against state officers under 42 U.S.C. § 1983 (1988), or against federal officials pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). These remedies do not tend to attract a sufficient number of plaintiff's attorneys to the cases to warrant sufficient deterrents. See Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500 (1955); Meltzer, *supra* note 2, at 283–86.

172. *But see* Maclin, *supra* note 13, at 59–66 (casting doubt on idea that legislatures ever would in fact create what they could in theory create respecting a damages remedy for unconstitutional police conduct).

173. Several proposals have been offered to create a damages remedy that mirrors the virtues, such as entity liability and ease of administration, of the exclusionary rule. See *Bivens*, 403 U.S. 388 (Burger, C.J., dissenting) (proposing a legislatively created damages remedy that would include waiver of sovereign immunity and non-Article III hearings adjudication); Amar, *supra* note 13, at 811–16 (proposing entity liability, abolition of immunity, and punitive damages); Barnett, *supra* note 2, at 922–23.

174. See, e.g., Amar, *supra* note 13, at 799.

175. See POSNER, *supra* note 17, § 28.2.

duct.<sup>176</sup> Any remedy that has the effect of inducing police to act constitutionally will restrict available evidence.<sup>177</sup> As a result, even if exclusion is not a superior remedy in terms of deterrence or practicality, at worst it does not change the outcomes of trials, and therefore the worries about exclusion are unfounded.<sup>178</sup>

This argument, however, overlooks the dynamic relationship between right and remedy. Different remedies elicit different responses, thereby forming the boundaries of the legal rules to which those remedies attach.<sup>179</sup> Exchanging a damages remedy for exclusion could create significantly different outcomes in trials where the evidence that was seized unconstitutionally becomes important to the determination of guilt. Damages would allow the prosecution to pay for the unconstitutional act of the officer and keep the fruits of his search; exclusion in theory would not.<sup>180</sup> Disgorgement aims to prohibit wrongful actions by eliminating the expected profit from those actions.<sup>181</sup> Damages, in contrast, provide optimal deterrence for an activity if harm generally exceeds gain. If the latter supposition is correct and police generally cause more harm by unconstitutional conduct than they produce good in the form of otherwise unobtainable evidence or saved labor costs,<sup>182</sup> then damages would appear to provide the better remedy to discourage wrongful conduct.<sup>183</sup> The payment of damages will be large enough to discourage the smaller gains. But even with this superior discouragement, occasionally cases will occur where gain, particularly in the form of evidence, clearly ex-

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176. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984) (Brennan, J., dissenting); *Levmore & Stuntz*, *supra* note 2, at 490–95; *Loewy*, *supra* note 131.

177. *See* *Levmore & Stuntz*, *supra* note 2, at 490–95.

178. *See id.*

179. One recognition of this dynamic relationship between remedy and right is evident in the argument that a damages remedy could over-deter otherwise lawful police conduct. *See* *Posner*, *supra* note 90.

180. *But see supra* notes 155–61 and accompanying text (discussing causation and valuation problems with exclusion).

181. *Standen*, *supra* note 34, at 218–19.

182. *See supra* text accompanying notes 48–53.

183. The contention that police, when they choose to act unconstitutionally, in most cases will cause more harm than they will gain does not mean that police tend to act inefficiently. Assigning to police some degree of rationality would suggest that they usually act to maximize gain. The gain they maximize, however, is not necessarily the same gain that exclusion disgorges. Exclusion isolates one type of gain, evidentiary gain. Officers might often act with other types of gain in mind to which the rule of exclusion does not respond: gains such as crime prevention, officer safety, or local deterrence.

ceeds loss. In those cases, the police could elect to act unconstitutionally,<sup>184</sup> pay damages for the harm, and use the gained evidence at trial. This option is not so obviously available with the remedy of exclusion.<sup>185</sup> Whether “high gain-low harm” cases are few or many in number, in all those instances where gain to the prosecution exceeds harm to the suspect (or saved labor costs), the officer could conceivably act unconstitutionally to gather evidence for use at trial.<sup>186</sup>

Damages differ in kind from restitution; while restitution seeks to prohibit transactions, damages price them.<sup>187</sup> It is this point that seems to have led so many commentators, including the Supreme Court, to mistakenly conclude that exclusion is the more punitive or better deterring remedy. In general, disgorgement appears to be a more serious penalty than mere payment of damages only because gain likely exceeds harm in the cases in which disgorgement is sought.<sup>188</sup> But it is misleading to generalize from the isolated case. Aggregated restitution extracts a greater penalty from the wrongdoer only if, across the run of cases, gain generally exceeds loss. If in fact

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184. It is very unlikely in most cases that police have the prescience at the investigatory stage to make such a determination. *See* Barnett, *supra* note 2, at 947–60 (offering experiential argument to the effect that police will be unlikely to foresee value of evidence at trial). Nonetheless, an argument that favors the idea of courts using ill-gotten evidence must consider the possibility that, through experience or simply a good guess, in some cases police will elect to violate the Constitution for supposed substantial evidentiary gain.

185. Exclusion does allow for a form of monetization. Officers can decide at the outset to risk exclusion of evidence, a cost, for the substantial gain from an unconstitutional act. All remedies at some point can be “priced,” even criminal sanctions. In some cases, the payment demanded by exclusion could be high if the evidence seized is lost to the prosecution where it could have been used had correct constitutional procedures been followed. The monetization afforded by exclusion, however, appears different in kind from that obviously available with damages. With exclusion, the “payment” of cost buys only a chance at admission to be decided by the court; with damages, the payment buys admission of the evidence.

186. In essence, damages provide a “liability rule” to contrast with the “property rule” of exclusion. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

187. *See* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194–95 (1991).

188. In the civil arena, where the plaintiff may frame the cause of action in a way that maximizes the potential monetary recovery, a suit founded in restitution would per force only be brought where the defendant’s gain from the wrongdoing exceeded the loss the plaintiff suffered. *See* *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946) (stating that when a damages claim is likely for rental value a restitution claim is measured by the costs defendant saved in excess of rental value); *Boomer v. Muir*, 24 P.2d 570 (Cal. Ct. App. 1933) (noting that plaintiff’s claim on the contract, measured by loss, was limited by negative expectancy; claim for restitution not limited; plaintiff recovered value of expenditures made pursuant to a losing contract).

loss tends to exceed gain, as argued above,<sup>189</sup> then use of restitution will create smaller expected penalties, thereby lessening deterrence.

Thus, a damages remedy could both create a more serious deterrent to police wrongdoing than does exclusion while simultaneously allowing for the occasional use of unconstitutionally obtained evidence. Remedies only deter; they do not prohibit, although they may aim to prohibit.<sup>190</sup> Although damages may effectively discourage a greater amount of unconstitutional police activity than does exclusion, nevertheless there will be cases where the discouragement fails. In those cases, the damages remedy would permit the prosecution to use the evidence, impliedly altering trial outcomes; exclusion would in theory prohibit the admission of such evidence.

Once it is understood that damages can allow the prosecution and police to price unconstitutional activity and thus use otherwise unavailable evidence,<sup>191</sup> two problems remain. First, in addition to the need to ensure adequate deterrence, the Supreme Court justified the imposition of the exclusionary remedy on the grounds that courts should not participate in the illegality of police conduct by using ill-gotten evidence.<sup>192</sup> If a damages remedy replaced exclusion and prosecutors and police began to monetize unconstitutional conduct, then courts would find themselves a party to wrongdoing on a more frequent basis.<sup>193</sup> The second problem stems from the first. If it is true that a damages remedy, although a superior deterrent as compared to exclusion, would in some subset of cases allow the police to violate the Constitution and profit, then the remedy of exclusion

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189. See *supra* notes 48–53 and accompanying text.

190. See Standen, *supra* note 34, at 148.

191. Several other hypotheticals about police behavior also suggest that a change in remedy from exclusion to damages would affect trial outcomes. See Amar, *supra* note 13, at 793–95 (providing examples and arguing that exclusion leaves the defendant “better off”).

192. This second rationale, expressed in *Mapp v. Ohio*, has been referred to as the “judicial integrity” principle. It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness.” *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This rationale has an uneven history. Although not disavowed, the Court has relegated the judicial integrity principle to a “limited” role. See *United States v. Leon*, 468 U.S. 897, 907–08 (1984); *Stone v. Powell*, 428 U.S. 465, 492–95 (1976). In addition, the Court has recognized that the converse of the principle appears equally valid: that a refusal to admit probative evidence also creates disrespect for the judicial system. See *Leon*, 468 U.S. at 907–08.

193. This argument by its own terms assumes that different trial outcomes would result due to different evidence depending on whether the Court employed damages or restitution as the remedy for Fourth Amendment violations. Thus the “judicial integrity” argument seems to contradict the argument that exclusion does not affect trial outcomes.

might be combined with a damages remedy to account for all possible cases.

### *A. Judicial Integrity*

The argument about judicial integrity seems unconvincing, both on its face<sup>194</sup> and from an economic perspective. First, the Supreme Court has authorized federal courts to use unconstitutionally acquired evidence in a variety of circumstances, particularly under the exceptions to exclusion.<sup>195</sup> Limitations on standing permit the prosecution to use evidence wrongfully acquired against defendants who were technically unharmed by the unconstitutional search.<sup>196</sup> Federal courts can generally use evidence in criminal cases that was obtained in contravention of state law<sup>197</sup> or even in violation of federal statutes,<sup>198</sup> regulations,<sup>199</sup> and rules of procedure.<sup>200</sup> Federal courts can even use evidence obtained in violation of the Fourth Amendment in trials and proceedings other than criminal trials,<sup>201</sup> even if those pro-

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194. Amar, *supra* note 13, at 792–93.

195. See *supra* notes 155–58 and accompanying text.

196. See *Akas v. Illinois*, 439 U.S. 128, 133–50 (1978); see also *United States v. Padilla*, 508 U.S. 77 (1993) (per curiam) (rejecting co-conspirator standing); *United States v. Payner*, 447 U.S. 727 (1980) (rejecting standing of “target” of federal investigation); *United States v. Carter*, 14 F.3d 1150 (6th Cir. 1994) (rejecting standing of passenger in a car not belonging to him).

197. See, e.g., *United States v. Bell*, 54 F.3d 502, 503–04 (8th Cir. 1995) (stating that an arrest by state officers in violation of state law does not require exclusion in federal prosecution); *United States v. Chavez-Vernaza*, 844 F.2d 1368 (9th Cir. 1987) (evidence seized by state officers in violation of state law, but not in violation of federal Constitution, is admissible in federal prosecution).

198. See *United States v. Blue Diamond Coal Co.*, 667 F.2d 510 (6th Cir. 1981) (concerning violation of statute requiring administrative warrant for seizure).

199. See *United States v. Caceres*, 440 U.S. 741 (1979) (concerning violation of Internal Revenue Service regulations limiting recording of conversations); *United States v. Hensel*, 699 F.2d 18 (1st Cir. 1983) (concerning violation of international law and coast guard regulations).

200. See *United States v. Charles*, 883 F.2d 355 (5th Cir. 1989) (admitting evidence obtained in violation of FED. R. CRIM. P. 41); *United States v. Schoenheit*, 856 F.2d 74 (8th Cir. 1988) (same).

201. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that exclusion does not apply in immigration proceeding); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax litigation); *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985) (military discharge proceeding). *But see* *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) (stating that exclusionary rule applies in forfeiture proceeding, otherwise government rewarded directly for illegal search).

ceedings are part of a criminal case.<sup>202</sup> Such evidence can also be used for impeachment.<sup>203</sup> Finally, because the Court refused to give the exclusionary rule retroactive effect,<sup>204</sup> scores of convictions were obtained or upheld on the basis of unconstitutionally obtained evidence. Whatever integrity the federal courts may have would not be much further eroded by the substitution of damages for exclusion.

But again, the choice between damages and exclusion must be comparative, and exclusion presents no less of a moral dilemma. If it is true that a damages remedy would render courts a party to wrongdoing by allowing the state to use wrongfully acquired evidence, then it is also true that the refusal of courts or legislatures to fashion a damages remedy to supplant exclusion renders courts a party to wrongdoing of a different kind: denying many victims of unconstitutional police searches a practical remedy. Exclusion can be employed only where evidence has been obtained; moreover, exclusion can be employed effectively only where the loss of such evidence imparts a substantial penalty on the prosecution.<sup>205</sup> In all other cases, the Court's reliance on exclusion as the primary remedy for unconstitutional police conduct in practical terms precludes victims from the bar of justice.<sup>206</sup> Exclusion, moreover, seems socially wasteful: it requires that victims who become entitled to the remedy by virtue of being named a criminal defendant receive compensation in the form of reduced risk of conviction and shortened criminal punishment. To the extent that defendants value other goods that money can buy, such as family support, more than they value their personal liberty at the margin, then exclusion is socially wasteful, resulting in irretrievable deadweight loss. As a result, the ability of exclusion to preclude the occasional monetization of the Fourth Amendment is purchased in the form of a net loss in social deterrence and in compensation to victims, both of which have a moral dimension as well.

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202. See *Stone v. Powell*, 428 U.S. 465 (1976) (exclusionary rule does not apply in habeas corpus proceedings); *United States v. Calandra*, 414 U.S. 338, 354–55 (1974) (grand jury proceedings); *United States v. Tejada*, 956 F.2d 1256 (2d. Cir. 1992) (sentencing).

203. See *United States v. Havens*, 446 U.S. 620 (1980).

204. See *United States v. Peltier*, 422 U.S. 531, 535–39 (1975).

205. See *supra* notes 43–72 and accompanying text.

206. Exclusion is unavailable for victims of unconstitutional searches who are not made criminal defendants. Even for those who are, exclusion might be a poor remedy if the incriminating value of the evidence is slight.

*B. Exclusion and Damages Combined*

Combining exclusion and damages would have the virtue of appearing to leave no conduct inadequately redressed. Exclusion, as has been shown, works well for those cases where evidentiary gain exceeds harm inflicted, and damages adequately responds to cases in which harm exceeds gain;<sup>207</sup> each gives rise to practical concerns that limit implementation;<sup>208</sup> and each potentially place judges in the uncomfortable role of either using bad evidence or ignoring unconstitutional conduct.<sup>209</sup> Given these mirror image problems, it would seem plausible to decline to adopt either remedy exclusively but instead to stipulate that the defendant who successfully claims to be the victim of an unconstitutional police action is to recover either money in the form of damages for his injury or to be entitled to the suppression of the evidence in the criminal prosecution against him. In short, the victim should recover the gain or loss, whichever is greater.<sup>210</sup>

This approach is surprisingly feasible. The apparent incommensurability between the value of evidence and the value of an infringed constitutional right<sup>211</sup> could be resolved by compelling the victim/defendant to elect the remedy: a decision to pursue a damages remedy would preclude the right to request suppression, and, conversely, a decision to pursue exclusion would preclude damages. Problems of coordination between separate criminal and civil suits could be resolved by appropriate legislation or judicial abstention. In theory, the defendant's choice between the remedies should create the strongest possible deterrence of unconstitutional actions: if the police chose to cause harm without much derivative gain, they would be vulnerable to a damages judgment; if they caused little harm but gained substantial evidentiary advantages, they would likely have to forego such advantages when exclusion was applied. All incentives to violate the Constitution would be diminished.

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207. See *supra* notes 43–72 and accompanying text.

208. See *supra* notes 144–73 and accompanying text.

209. See *supra* notes 194–204 and accompanying text.

210. This is the approach taken in many sections of the federal sentencing guidelines, albeit in the context of imposing a penalty on the offender, ostensibly to ensure that the penalty adequately deters in all cases. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 8C2.4(a) (1994).

211. See Radin, *supra* note 92.

The problem with this approach is not one of practicality, although there may be more difficulties with implementation than the foregoing brief treatment allows. Remedying unconstitutional police conduct by allowing the victim an option of damages or exclusion appears to grant the criminal defendant too great a remedy, one that is unnecessary to the functioning of deterrence. Suspects who are victims of unconstitutional searches but who are not prosecuted criminally are limited to a damages remedy; it seems difficult to justify why, in certain cases, those victims who are prosecuted criminally should have the option of a more valuable remedy for the constitutional violation.<sup>212</sup>

But the utilitarian deterrent rationale is indifferent to claims of desert: as long as the wrongdoer is penalized sufficiently, then deterrence is accomplished regardless of to whom the payment is made. A remedy of the greater of gain or loss misapprehends the proper functioning of a damages remedy. In theory, if damages are set equal to harm and detection rates are adequate, then the expected penalty contemplated by a potential wrongdoer will be sufficient to deter illegal activity.<sup>213</sup> Rarely will a police officer know *ex ante* that the value of potential evidence from unconstitutional activity will exceed the expected penalty. A penalty large enough for the general case will by definition render the great majority of unconstitutional searches unappealing.<sup>214</sup> Most instances where evidentiary gain exceeds loss from the unconstitutional search will not be evident until after the police activity, when all of the evidence is gathered and its relative importance can be assessed.<sup>215</sup> If it is true that gain will not appear to exceed loss prior to police activity, then granting the criminal defendant the option of exclusion of evidence simply bestows upon the defendant a gift, unwarranted by the social need to deter improper police conduct.

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212. One possible reason that the person who was the object of the search may deserve a better remedy is that he finds himself in a worse position than the un-indicted victim. In a case where the evidence obtained from the constitutional violation was central to the victim's indictment, then arguably the defendant has been harmed more from the constitutional violation than has the unindicted victim and thus deserves a greater remedy.

213. The textual proposition assumes that "illegal activity" indicates activity the net social harm from which exceeds the net social gain.

214. *See* Barnett, *supra* note 2.

215. *See id.*

In addition, this gift will not be costless to the giver. The routine use of exclusion as an option to damages will diminish the graduated or marginal deterrence created by damages set equal to loss. Marginal deterrence requires that less egregious conduct be treated more leniently than more egregious conduct in order to encourage wrongdoers to minimize the harm from their conduct.<sup>216</sup> While damages give the wrongdoer the incentive to minimize costs by minimizing harm, exclusion is binary: either the evidence is admitted or it is not. Without liability for damages, the police officer who decides to violate the Constitution might as well cause as much harm doing so as expedience might dictate, as no greater penalty will result.

Although no reason presents itself to make exclusion routinely available as an alternative to damages, exclusion could be employed occasionally, much like the remedy of restitution is in civil law, to respond to egregious situations where the customary deterrence provided by damages seems to fail,<sup>217</sup> for example, where the police knowingly and maliciously violate constitutional rights for evidentiary gain when they could have followed constitutional processes without extraordinary difficulty. Injunctions might also be considered to address repeated violations, although the context of criminal enforcement might prove a particularly difficult setting for injunctive relief.<sup>218</sup>

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216. See Stigler, *supra* note 154; see also Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389–90 (1997).

217. See Standen, *supra* note 34, at 216–25.

218. See Amar, *supra* note 13, at 815–16. Professor Amar expresses optimism at the prospect of injunctions as a tool to remedy unconstitutional police conduct. He writes:

Early prevention is often better than after-the-fact remedy. The Fourth Amendment says its right “shall not be violated.” When judges can prevent violations before they occur, they should do so—especially if after-the-fact damages could never truly make amends. Damages cannot bring back African-American males killed as a result of the unreasonable chokehold policy of the Los Angeles police department in the 1970s and 1980s. And yet in 1983, the Supreme Court in *Los Angeles v. Lyons* [461 U.S. 95 (1983)] prevented federal courts from enjoining various forms of racially discriminatory police brutality. . . . *Lyons* was a sad entry in the annals of the Fourth Amendment. One can only wonder how much of the racial tragedy visited upon Los Angeles in recent years might have been avoided had the Supreme Court done the right thing a decade ago and sent a different signal to the LAPD.

*Id.* (citations omitted.) The *Lyons* decision does not appear, however, to present a strong case in favor of the argument Professor Amar proposes. The fact is that the plaintiff in *Lyons* was denied injunctive relief for a very sound reason: his case was moot. He was unable to allege plausibly that he himself would again be the victim of unconstitutional conduct. This “irreparable injury” element is essential to the injunction claim, as it allocates social resources optimally. See Standen, *supra* note 34, at 153–64. Moreover, even had the defect in pleadings been

## VII. CONCLUSION

The point of this selection is to demonstrate that the exclusionary remedy does not promise to fulfill the tasks established for it. Exclusion does not provide a plausible vehicle to generate deterrence against unconstitutional police action, at least not when compared to damages. Damages are based on harm; exclusion on gain. If the total quantum of harm caused by unconstitutional police action exceeds the total quantum of gain, then by inference a penalty that is set according to harm would be larger than one set according to gain. Exclusion does not necessarily portend to elicit higher enforcement rates sufficient to supplant this inadequacy. Exclusion also exacerbates the problem of the prisoner's dilemma in police-citizen interactions and does little to overcome agency problems.

Nor do practical concerns militate in favor of exclusion; a damages remedy can be fashioned to mirror all of the essential attributes of exclusion, if those attributes are thought desirable. Thus, damages can be paid by the government, not the officer, mimicking the way exclusion creates a social penalty. In addition, damages do not appear to present significantly different difficulties of valuation as compared to exclusion: both involve difficult issues of causation and valuation. Finally, despite many contentions to the contrary, it seems patent that the exclusionary rule produces different outcomes at some trials than would a damages remedy. Exclusion attempts to prohibit conduct; damages price it, and so by implication the police could theoretically be willing to violate the Constitution and pay damages for the chance to use important evidence at trial. Such occurrences would likely be few, given the unpredictability of the results of police activity and the shifting value of evidence at trial. Even so, the prosecution should, where the occasion presents itself, be allowed to use unconstitutionally obtained evidence. As long as the criminal defendant has access to a suitable damages remedy, the defendant is being treated as well as any other victim of unconstitutionality; no reason, at least none grounded in the need for

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corrected, perhaps through a class action, it is doubtful that an injunction would have had the beneficial consequences Amar envisions. Injunctions require highly difficult guesses about future conduct and causation and often fail to achieve their purposes, even purposes much more attainable than righting race relations in Los Angeles. *See Standen, supra* note 34, at 153-64.

deterrence, suggests that the victim should gain a premium because he has been charged with a crime.