

Articles

RESOLVING THE DILEMMA OF THE EXCLUSIONARY RULE: AN APPLICATION OF RESTITUTIVE PRINCIPLES OF JUSTICE

by
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I. INTRODUCTION

Discussions of the merits of the exclusionary rule usually begin and end with a dilemma not unlike the classic “prisoner’s di-

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lemma."¹ Suppression of illegally obtained, but reliable, evidence that leads to the release of a guilty defendant may constitute an injustice and a threat to the safety of innocent citizens. Admitting illegally obtained evidence, however, may encourage police officers to engage in illegal conduct to the detriment of countless numbers of citizens. The premise of the prisoner's dilemma is that the prisoner's choices have been limited by his captor to two, each of which is morally objectionable. The debate over the merits of the exclusionary rule has a similar quality, but is this necessary? Are we really faced with only two choices: abolish or weaken the rule (and risk increased police misconduct) or keep the rule (and risk increased criminal conduct)?

The ongoing discussion of the merits of the exclusionary rule is as old as the rule itself.² It would be impossible to review it here.³ The exclusionary rule has been defended as a way to preserve judicial integrity or to prevent the government from profiting from its own misconduct. This paper will not consider claims that an exclusionary rule is constitutionally mandated for such reasons.⁴ Instead

¹ The "prisoner's dilemma" is as follows: *A* is a prisoner of *B*. *B* orders *A* to kill *C* and informs him that, if he refuses, *B* will kill *D*, *E*, *F*, and *G*. What is the moral choice for *A*? Does he perform the acts that cause the death of innocent *C*? Or does he refuse with the knowledge that this refusal will result in the deaths of four other innocents?

² The exclusionary rule is a court-created rule designed to uphold the fourth amendment protection against unreasonable search and seizure. As early as 1886, the United States Supreme Court discussed the problems involved in admitting evidence obtained through illegal search and seizure. See *Boyd v. United States*, 116 U.S. 616 (1886) (decided on fourth and fifth amendment grounds). In 1914, it announced the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914), where it held that evidence obtained by federal officials in violation of the fourth amendment prohibition was inadmissible in federal criminal trials.

The Court extended the exclusionary rule to exclude from federal criminal trials evidence obtained by state officials in violation of the fourth amendment in *Elkins v. United States*, 364 U.S. 206 (1960). The Court made the coverage of the criminal area complete when it held the exclusionary rule applicable to state authorities and state courts through the fourteenth amendment. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

³ For a recent and illustrative round of the debate, see *Symposium on the Exclusionary Rule*, CRIM. JUST. ETHICS Summer/Fall 1982, at 3, and the sources cited therein. See also Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, *id.* at 16.

⁴ See e.g., Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1983); and Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations, Damage Remedies and Congressional Power*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982). For a contrary constitu-

it will focus on the question that still dominates academic and popular discussions of the exclusionary rule, viz., is it the best means of deterring illegal police conduct? The assumption that it is the best means remains the rationale of the Supreme Court.⁵

A remedy is needed that accomplishes the objectives of crime prevention and justice and that deters police misconduct as well as or better than the exclusionary rule. The growing support for a weakening of the exclusionary rule by the creation of a so-called "good faith exception" may make it a propitious time for those concerned with deterring police misconduct to pursue such an alternative vigorously.⁶ The remedy proposed here is restitution to

tional analysis see, e.g., LaPrade, *An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment*, 48 CONN. BAR J. 100 (1974); Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531 (1982).

⁵ See S. SCHLESINGER, *EXCLUSIONARY INJUSTICE* 47 (1977); Gilligan, *The Federal Torts Claims Act - An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1, 1-7 (1975); Sunderland, *Liberals, Conservatives, and the Exclusionary Rule*, 71 J. CRIM. L. & CRIMINOLOGY 343, 344, 351-53 (1980); Wilkey, *supra* note 4, at 543.

⁶ A good faith exception to the exclusionary rule has been suggested. Proponents claim that when officers act in "good faith" but their actions are in fact illegal, the exclusionary rule should not apply and the evidence should be held admissible. One federal court has adopted this exception. In *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981), the Fifth Circuit held that the exclusionary rule does not apply under certain circumstances such as when an official acts in reasonable good faith in obtaining evidence, although his acts were violative of the fourth amendment.

Proponents of the good faith exception claim that the exception should only apply to "technical" or "mild" constitutional violations. *Williams*, 622 F.2d at 843. Kamisar, a leading opponent of this view, expressed discontent with such an approach: "How does one 'barely' or 'mildly' violate what is 'basic to a free society' or 'implicit in the concept of ordered liberty'? If police action that violates Due Process is not *gross* or *aggravated* police misconduct per se, then why is it a violation of Due Process?" Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 29 (1979) (emphasis in original). See *contra* Carington, *Good Faith Mistakes and the Exclusionary Rule*, CRIM. JUST. ETHICS Summer/Fall 1982, at 35 (arguing for a good faith exception).

More than twenty years ago, the Court expressed its fear of a good faith exception. In *Henry v. United States*, 361 U.S. 98, 102 (1959), the Court noted that "good faith on the part of the arresting officers is not enough." In *Beck v. Ohio*, 379 U.S. 89, 97 (1964), the Court explained its fear that using a subjective good faith test would evaporate the protections of the fourth amendment, leaving the security of the people only in the discretion of the police.

The Court expressly rejected a good faith exception in *Taylor v. Alabama*, 457 U.S. 687, 693 (1982). Additionally, in *Illinois v. Gates*, 103 S. Ct. 2317, 2321 (1983), the Court declined to address the question of the good faith exception under the facts of the case.

Nevertheless, the Court recently has granted certiorari in three cases which could involve

victims of police misconduct. Such a proposal is not new.⁷ To date, however, it has been defended principally as a means of remedying rights violations while avoiding the release of guilty defendants. Without disputing the merits of this argument, I intend to show that this alternative should also be preferred because it will deter police misconduct as well as, if not better than, the exclusionary rule.

This article compares the deterrent effect of the exclusion of illegally obtained evidence with that of a proposed system of restitution to victims of police misconduct. Part II identifies the costs imposed on the police by the remedy of excluding illegally obtained evidence and the costs that inhibit a court's use of such a remedy. Part III identifies additional ways in which a restitution remedy will increase the costs of police misconduct and specifies some features of a restitutive system. Part IV suggests that, while a restitution system should be made available to all victims of police misconduct, some moral and utilitarian considerations suggest that the remedy of restitution should replace the remedy of exclusion only in cases involving offenses against person and property.

If it can be shown that this alternative remedy will increase the costs to police of their misconduct and reduce the costs to judges of imposing a remedy for misconduct, then the alternative will deter constitutional rights violations better than an exclusionary rule. The dilemma of the exclusionary rule will be resolved.

the good faith exception. See *Colorado v. Quintero*, 657 P.2d 948 (Colo. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); *Massachusetts v. Sheppard*, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted*, 77 L.Ed.2d 1386 (1983); *United States v. Leon*, 701 F.2d 187 (1983), *cert. granted*, 77 L.Ed.2d 1386 (1983). Should a good faith exception be established, the consequent working of the exclusionary rule would make alternative remedies both more attractive and more necessary.

⁷ See, e.g., S. SCHLESINGER, *supra* note 5, at 71-85; *An Alternative to the Exclusionary Rule for Fourth Amendment Violations*, 58 JUDICATURE 74 (1974) [hereinafter cited as *An Alternative*]; Horowitz, *Excluding the Exclusionary Rule - Can There Be an Effective Alternative?*, 47 L.A.B. BULL. 91 (1972); LaPrade, *supra* note 4; Comment, *Protecting Society's Rights While Preserving Fourth Amendment Protections: An Alternative to the Exclusionary Rule*, 23 S. TEX. L.J. 693 (1982). See *supra* note 4 for mention of other commentators who have discussed aspects of such a proposal.

A. *The Need for an Alternative to the Exclusionary Rule*

The exclusionary rule is neither unique nor objectionable simply because it excludes evidence from a judicial proceeding. Rules of evidence normally have the effect of excluding some evidence from the trier of fact. The principal purpose of most rules of evidence, however, is to "facilitate the ascertainment of the facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead."⁸ For example, because it is presumed to be suspect, hearsay evidence will not be admitted in a trial unless circumstances ("exceptions" to the "rule") rebut this presumption. Similarly, when the existence of police misconduct undermines the reliability of evidence proffered at trial, such as when a confession is obtained by the use of force, even if such a "confession" is corroborated by other evidence, a rule that prohibits the use of such evidence at trial is consistent with the rationale of most other rules of evidence.

The exclusionary rule differs from other rules of evidence, and is objectionable, only when it mandates the suppression of illegally obtained evidence that is unquestionably reliable and probative of a fact in issue, *e.g.*, physical evidence obtained as a result of a search without probable cause. Such evidence "is as trustworthy and reliable as any which may be considered in court. The evidence is kept out of the trial not because it is unworthy of belief, but because it is the product of police methods which violate the law."⁹ In such a situation, a principal purpose of the suppression is to deter future illegal police conduct of the kind that produced the

⁸ MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 152 (2d ed. 1972). Not every rule of evidence is limited to this purpose. Some rules "do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice." *Id.* For example, the attorney-client privilege excludes evidence that may be reliable and indicative of a fact at issue, but is excluded because of the pernicious effect the admission of such evidence would have on the attorney-client relationship and, thereby, the legal system. That the intended objectives cannot be achieved in any other manner except by exclusion may be what distinguishes such rules from the rule that excludes illegally obtained evidence.

⁹ Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 255 (1961).

evidence. The truth finding function of a trial dictates that all trustworthy probative evidence be available to the finder of fact absent a conflicting policy objective that is compelling.¹⁰ When the exclusionary rule excludes such evidence, it disserves this truth finding function. In choosing between means of accomplishing the same policy objective, the one that least inhibits truth finding is to be preferred. Therefore, an alternative remedy that accomplishes its deterrent purpose but does not have the effect of excluding reliable evidence would be preferable to the exclusionary rule.

B. *The Alternative: Restitution to Victims of Police Misconduct*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹¹ Chief Justice Burger, in a lengthy and impassioned dissent, argued that the exclusionary rule has not accomplished its stated objective of deterrence and that there is no reason why the exclusionary rule should be preserved if an effective alternative can be developed. He then offered such an alternative: the creation of "an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated."¹²

Chief Justice Burger suggested that such a remedy would be akin to an action in tort on the theory of respondeat superior. "If, for example, a special guard privately employed by a department store commits an assault or other tort on a customer such as an improper search, the victim has a simple and obvious remedy—an action for money damages against the guard's employer, the de-

¹⁰ Lon Fuller has argued that:

the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.

Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978). Fuller applied his model of adjudication to criminal as well as private law. *Id.* at 368-70.

¹¹ 403 U.S. 388, 411 (1971).

¹² *Id.* at 422.

partment store.”¹³ Recognizing, however, the reluctance of juries in private actions to find in favor of plaintiffs who are also convicted felons and the problems inherent in trying to impose monetary sanctions on individual officers, he concluded “that an entirely different remedy is necessary.”¹⁴

The proposal of the Chief Justice takes the following form:

- [1.] [A] waiver of sovereign immunity as to the illegal acts of law enforcement officials committed in the performance of assigned duties;
- [2.] [T]he creation of a cause of action for damages sustained by any person aggrieved by conduct of governmental agents in violation of the Fourth Amendment or statutes regulating official conduct;
- [3.] [T]he creation of a tribunal, quasi-judicial in nature or perhaps patterned after the United States Court of Claims, to adjudicate all claims under the statute;
- [4.] [A] provision that this statutory remedy is in lieu of the exclusion of evidence secured for use in criminal cases in violation of the Fourth Amendment; and
- [5.] [A] provision directing that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of [a] violation of the Fourth Amendment.¹⁵

Similar proposals have been advocated by several commentators¹⁶ and widely discussed.¹⁷ None has yet been enacted by the Congress or by any of the states as a substitute for the exclusionary rule.¹⁸ These proposals often are opposed by those who are concerned with deterring constitutional rights violations. Their principal objection can be simply stated: restitution to victims of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 422-23. Chief Justice Burger does not discuss how damages for the violation of constitutional rights should be measured. For my views see *infra* notes 81-83 and accompanying text.

¹⁶ See *supra* note 7.

¹⁷ See, e.g., *supra* note 3.

¹⁸ It has been suggested, however, that the March, 1974, amendment to the Federal Torts Claims Act was a congressional response to Chief Justice Burger's invitation, albeit an incomplete and therefore unsatisfactory one. Gilligan, *supra* note 5, at 8-9.

police misconduct will not "adequately" deter police from violating the constitutional rights of citizens.¹⁹ The bulk of this article is addressed to this objection. Demonstration of the extent to which a system of restitution would deter police misconduct is neither possible nor necessary. All that is required is a comparative analysis. If it can be shown that such a system will deter police misconduct as well as, if not better than, the exclusionary rule, then Chief Justice Burger was correct when he concluded that "we can and should be faulted for clinging to an unworkable and irrational concept of law."²⁰

C. *The Methodology of Comparing Deterrence*

Determining the best way to deter police misconduct is no easier task than figuring how best to deter various kinds of crime. Both efforts require speculation about the motives of countless individuals, each acting upon his or her own schedule of preferences and desires, and about how these preferences may be influenced in the desired direction by one rule or another. "Most commentators have agreed that there is no good data substantiating or refuting the deterrent effect of the rule."²¹ This is unavoidable. The question of comparative deterrence is always counterfactual: how was the observed conduct different from what it would have been had not a particular rule or practice been in effect? Statistical correlations of responses to the imposition of a particular rule or practice tell us little about why conduct was or was not altered.²² Why conduct changes or remains the same is really at issue in a comparison of the deterrent effects of two remedies.

¹⁹ See, e.g., Paulsen, *supra* note 9; Schroeder, *Detering Fourth Amendment Violations: Alternatives to the Exclusionary Rule* 69, GEO. L.J. 1361, 1386-96 (1981); Comment, *The Tort Alternative To The Exclusionary Rule in Search and Seizure*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 256 (1972).

²⁰ 403 U.S. at 420 (Burger, C.J., dissenting).

²¹ Gilligan, *supra* note 5, at 3 (citing numerous authors). For a useful summary of the available studies that reaches the same agnostic position, see Sunderland, *supra* note 5, at 365-68.

²² See, e.g., Rychlak, *Concepts of Free Will in Modern Psychological Science*, 1 J. MIND & BEHAVIOR 9 (1980).

Some of these problems are avoided in this article by assuming what in any event is most likely quite true: that the exclusionary rule does deter police misconduct. The relevant issue then becomes whether a new system based on principles of restitution can deter misconduct as well if not better. This can be determined best by examining how a change from one remedy to the other would affect the decisions of police and judges. Two factors will be explored: first, the comparative costs imposed by the threat of the two remedies on police who are considering whether or not to violate someone's constitutional rights; and second, the costs imposed on a judge who is considering granting a legal remedy.

The term "cost" may be used to refer to a variety of concepts, so it is important to be clear about the meaning employed here. The "objective" cost is

The market value of the alternate product that might be produced by rational reallocation of resource inputs to uses other than that observed. This market value is reflected in the market prices for resource units; hence, cost is measured directly by prospective money outlays.²³

In contrast, the "subjective" cost is

that which the decision-maker sacrifices or gives up when he makes a choice. It consists in his own evaluation of the enjoyment or utility that he anticipates having to forego as a result of selection among alternative courses of action. . . . If cost is to influence choice, it must be based on anticipations; it cannot be based on realized experience—at least directly.²⁴

²³ J. BUCHANAN, *COST AND CHOICE* 42 (1969). An example of an objectivist cost (and benefit) approach is Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54-55 & n.17. Posner's analysis leads him to speculate about the "optimum" level of deterrence. His novel conclusion is that the rule "systematically overdeters, because it imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and seizures." *Id.* at 56.

²⁴ J. BUCHANAN, *supra* note 23, at 42-43. Buchanan elaborates:

The following specific implications emerge from this choice-bound conception of cost:

- (1) Most importantly, cost must be borne exclusively by the decision-maker; it is not possible for cost to be shifted to or imposed on others.
- (2) Cost is subjective; it exists in the mind of the decision-maker and nowhere else.

Buchanan's theory of subjective (and incommensurable) costs that influence choice is an attempt to explain why individuals make certain choices. Speculations about deterrence are attempting a similar explanation, *i.e.*, does the exclusionary rule "cause" police to choose to violate constitutional rights in fewer instances than they would without such a rule? Consequently, the subjective, *ex ante* concept of cost is used here. No attempt is made to weigh "costs" against "benefits." A subjectivist theory suggests that such comparisons are not possible, particularly when the group enjoying the benefits is not identical to the group incurring the costs.²⁵ Rather, the analysis focuses solely on reducing or raising costs, not on measuring how much they may be raised or lowered. If a restitutive remedy will increase the costs to police of misconduct and reduce the costs to the judiciary of employing a remedy for police misconduct, then a restitutive remedy should provide greater deterrence of police misconduct, even though the extent to which costs to the police will be raised or costs to judges will be lowered is unknown.²⁶

(3) Cost is based on anticipations; it is necessarily a forward looking, or *ex ante* concept.

(4) Cost can never be realized because of the fact of choice itself: that which is given up cannot be enjoyed.

(5) Cost cannot be measured by someone other than the decision-maker because there is no way that subjective experience can be directly observed.

(6) Finally, cost can be dated at the moment of decision.

Id. at 43.

²⁵ Buchanan provides a brief historical and conceptual overview of this subjectivist approach to economics, the initial development of which he credits to Ludwig von Mises and F.A. Hayek. He contrasts this approach to the objectivist or "predictive" concept of cost, *see, e.g.*, Posner, *supra* note 23, employed by orthodox neoclassical economics. *See J. BUCHANAN, supra* note 23, at 1-37.

²⁶ Another aspect of the concept of subjective cost must be distinguished. Once an individual has made a choice, certain burdens must be assumed that are inherent in, and a consequence of, the choice. This cost, labeled choice-influenced costs by Buchanan, is the cost that the layman usually means when the term is employed. An example will illustrate this concept. If a businessperson is deciding whether to produce good A or good B, the subjective (or true) cost of choosing one rather than the other is the expected profit foregone from the renounced alternative. After the person chooses, for example, A, then there are money outlays that must be incurred to produce A. Although these outlays were subjectively considered at the time of evaluation of the alternatives, once the choice is made, they must actually be paid. Thus the choice imposed burdens on the decision maker that will be felt long after the initial choice is made. Moreover, it is possible that some of the burden may be borne by other individuals, *e.g.*, in the case of pollution.

Finally, while references to such research will be made, statistical studies and interviews are not the only, nor perhaps even the best, way to gain the type of information required in this area. As Judge Richard Neely recently stated:

The people who write about government or teach the subject in universities are usually not the people who run government. Consequently, a great deal goes on in any governmental institution that is obscured from public view because it cannot be discovered in recorded statistics or even in recorded interviews—the basic tools of political science.²⁷

Consequently, a good part of this article is based on the author's personal experience in the criminal justice system as well as on discussions between the author and criminal justice participants from other jurisdictions.²⁸

II. THE COSTS OF SUPPRESSION

An analysis of whether a restitutive system is more likely to deter police misconduct than is the current exclusionary rule system

As regards the alternative remedies proffered in this paper, the reader should consider which groups are not directly involved in the choice, *e.g.*, future victims, criminals, and the general citizenry that must bear higher burdens as a consequence of the choice of remedy. Although, as discussed below, judges will often consider these burdens in their decision making, it is an important implication of the subjective cost analysis that they cannot know what these burdens (costs) will actually be when imposed on the groups enumerated. For this reason one cannot rely totally on a judge to correctly perceive and allocate these burdens when deciding whether or not to exclude evidence that, except for the police misconduct, is probative of the defendant's guilt. In choosing which remedy to make generally available, these burdens should be considered even if they can neither be explicitly quantified nor explicitly brought within the court's choice calculus in particular cases. See J. BUCHANAN, *supra* note 23, at 92-94, for a more detailed discussion of these different concepts of cost. My thanks to Steven M. Crafton for suggesting this point.

²⁷ R. NEELY, *WHY THE COURTS DON'T WORK* 32 (1983).

²⁸ I spent four years as an Assistant State's Attorney in the Criminal Prosecutions Bureau of the Cook County State's Attorney's Office in Chicago, Illinois. My assignments included felony arraignments, misdemeanor trial courts, specialized units such as auto theft, narcotics, homicide/sex and felony review, and the felony trial division. Certain observations of behavior and attitudes I make are reasonably well-known and acknowledged within the system (though some of the implications drawn from them are not). While I did not "run the government," I was elbow deep in the operation of the criminal justice system for a significant period of time. I should like to think that I learned some things that are true about its operation.

must begin with an identification of the perceived (subjective) costs of suppression to three key groups. This section of the article will focus on the police, the judge, and the prosecutor to determine for each the costs of suppression in comparison with the costs of a restitutive system.

A. *The Police*

Because of the manner in which the exclusionary rule operates, any attempt to obtain deterrence by this means will be inherently limited. The deterrent effect of the exclusionary rule is based on the premise that police officers will modify their conduct because of their awareness that their misconduct may jeopardize a conviction in a criminal case. However, whether suppression will be perceived by the police as a cost *ex ante* will depend on the presence of certain key factors. The fewer factors that are present when a particular choice is made by an officer, the less likely that the remedy of exclusion will be perceived *ex ante* as a cost of the officer's choice. As the perceived cost of misconduct is reduced, so also is the deterrent effect of the exclusionary rule. The key factors are the following:

1. Police departments and their officers must be motivated to obtain convictions (as distinct from arrests);
2. Police officers must be aware of what constitutes illegal conduct;
3. A police officer must be reasonably certain that his or her misconduct will affect the disposition of the case;
4. The evidence suppressed must have been available to the police by constitutionally permissible means.

1. *Factor 1: Motivation to Convict*

If police departments and their officers are not as concerned with convictions as they are with arrests, then the costs imposed on a police department by the threat of exclusion may be perceived by the department as less significant than those imposed by the failure to make arrests, even if some of those arrests are made illegally. Internal incentives and discipline can be expected to reflect this assessment. Under these circumstances, a remedy for

misconduct that depends for its deterrent effect on reducing the likelihood of conviction by excluding evidence will impose fewer costs and, therefore, provide comparatively less deterrence than one which more directly penalizes illegal arrests and searches. "There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions" ²⁹

In fact, "arrests, not convictions, constitute the primary indicia of success in police work."³⁰ For example, supervisors may be pressured to "clear" cases, *i.e.*, dispose of them in some manner, either by arrest or by discontinuing the investigation.³¹ They in turn may demand "results" from their officers without providing adequate supervision of the techniques the officers employ.³² Notably absent are incentives based on a ratio of convictions to arrests.³³ Such incentives would tend to reduce the number of arrests and, for this reason, are undesirable to police departments.

The reasons for police emphasis on arrests rather than convictions are diverse. First, as will be discussed below, the vagaries of the criminal justice system normally make it quite difficult or impossible for an outsider (or insider, for that matter) to discern whether police misconduct occurred and, if so, whether that conduct influenced the eventual outcome of a criminal case.³⁴ Given judicial discretion in findings of fact and law, the judge who excludes evidence is perceived to be the person most directly responsible for sustaining a constitutional challenge. Because of this, the judge and not the police will most often be blamed by both the

²⁹ Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 655, 755 (1970).

³⁰ Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 9 ANGLO-AM. 238, 249, n.10 (1980). See also Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L. J. 33, 42 (1978).

³¹ For examples of such pressure, see Hyman, *supra* note 30, at 42; J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 164-81 (1966).

³² "Police routinely exercise enormous discretion in the exercise of their duties under scant supervision by those charged with the responsibility of ensuring that the force as a whole complies with constitutional limitations on the scope of police work." Hyman, *supra* note 30, at 55.

³³ *Id.* at 42.

³⁴ See *infra* at 44-49

public and the prosecutor for scuttling the prosecution. As a result, the police usually are shielded from political responsibility for a failure to obtain a conviction.

Second, due to the physical and temporal separation between arrest and conviction, the prosecutor's office attempts to obtain the public credit for obtaining convictions and usually succeeds in the attempt. It also gets the blame for failing to convict. Police conduct usually is not detailed in press reports of trial proceedings or their outcomes. The public rarely concludes that the police department is effective because a conviction was obtained or ineffective because a defendant was acquitted. When people speak of the "revolving door" on the criminal court house, the police generally are not blamed for its existence.

Third, and most important, community and political interests lead the police to view their primary function as one of street safety, which translates into street control. The police department takes political responsibility and gets public credit for getting persons perceived as dangerous or bothersome off the street by an arrest. How and why such persons may return to the street is the responsibility of the courts and prosecutors.

In most cases, the police are not concerned with convictions or even prosecutions, but rather with case clearances, the removal of contraband items such as narcotics from circulation, *satisfying a public outcry for visible police enforcement, and controlling potentially dangerous situations.*³⁵

This analysis helps explain why flagrantly illegal arrests are commonplace, particularly for drug, handgun, and prostitution offenses, even when the police have full knowledge that the illegally obtained evidence will be suppressed and the charges swiftly dismissed. The police view their responsibility to be getting the drugs, handguns, and prostitutes "off the streets," regardless of whether a conviction results.³⁶ Failure to engage in such practices would sub-

³⁵ Gilligan, *supra* note 5, at 3-4 (citations omitted and emphasis added). See also Oaks, *supra* note 29, at 721-22.

³⁶ While I was assigned to a misdemeanor branch court, every morning began by bringing out as a group all the men and women arrested for prostitution the night before and

ject the department to the serious cost of political pressure, which may jeopardize jobs in the department or in the supervising political structure and, in turn, may threaten future appropriations. Conversely, engaging in such practices imposes little or no cost on the offending officers because the practices impose little or no cost on their department. "The rule does not, in effect, operate directly against the police officer, but rather against the prosecutor, who rarely, if ever, has any control over the officer's activities in the field."³⁷

2. Factor 2: Awareness of Illegality

If police officers are unaware that their conduct is illegal, they will not perceive *ex ante* the future exclusion of evidence to be a cost of their choice to act in any way that an omniscient or *ex post* observer would define as illegal. "Obviously, the officer cannot follow guidelines he does not comprehend."³⁸ Therefore, for the ex-

lining them up before the judge. Charges against everyone were then dismissed by the judge. The police, who were not present, never intended to pursue prosecution. Their function was to clear the streets. Some of these practices are currently being challenged in a federal court suit. *Nelson v. Chicago*, No. 83-C-1168 (N.D. Ill. 1983).

³⁷ Gilligan, *supra* note 5, at 4. While these institutional pressures lead police departments to create incentives for their officers that emphasize arrests, as opposed to convictions, other factors that are unaffected by suppression significantly affect the conduct of individual police officers as well. Perhaps the most important influences on police officers are those of their immediate supervisors and of their peers. The pressure of fellow officers on the individual to comply with some image of appropriate police conduct (that may include police misconduct) cannot be discounted. It may be the most significant factor influencing the behavior of any given officer. The "primary guides for a patrolman's behavior were the felt needs of the situation and the expectations of his colleagues on the beat." *Oaks*, *supra* note 29, at 728. For a brief discussion of police solidarity, see J. SKOLNICK, *supra* note 31, at 52-54. See also, Hyman, *supra* note 30, at 41.

³⁸ Gilligan, *supra* note 5, at 4. This is the principal argument offered in favor of a "good faith" exception to the exclusionary rule. *But see* Posner, *supra* note 23, at 66: "That is not a persuasive argument. If the penalty for a violation of the Fourth Amendment is large enough, officers will take steps to reduce the probability of committing even innocent violations. Such violations are not unavoidable; they can be avoided by steering far clear of the forbidden zone." The objections that might be made to a "good faith" exception to the exclusionary rule are beyond the scope of this paper. Undeniably, however, such an exception will legitimize otherwise improper police conduct and, therefore, lessen the deterrent effect of the rule while providing no alternative remedy, like restitution, to take up the slack. Moreover, it is unclear whether police actions that violate the fourth amendment under the lessened standard of *Illinois v. Gates*, 103 S. Ct. 2317 (1983), could be accurately

clusionary rule to influence the choices of police officers, they must be aware of what constitutes illegal conduct in particular circumstances. Because most police officers have not received a formal legal education prior to joining a police department, this type of legal knowledge must come from the on-the-job experience of the individual officer or from training provided by the department.

On-the-job experience as a source of legal knowledge is extremely limited.³⁹ "Seldom will individual officers learn of trial problems occasioned by their faulty searches and seizures."⁴⁰ When a case has been disposed of without a suppression hearing, *e.g.*, by a dismissal or a plea of guilty, no reliable mechanism exists to inform officers or their departments of the effect their conduct might have had on the subjective calculations of the prosecutor, defense attorney, defendant, and judge that ultimately determined the disposition of the case.⁴¹ If the prosecutor were to inform the officer that he had agreed to a plea in return for a lesser sentence or dismissed the charges because of the risk of suppression, the officer probably would object that the prosecutor should not have been

characterized as being done in "good faith." Loewenthal, however, believes that overcautiousness may result if direct sanctions of the sort proposed here are placed on the police. "A substantial amount of evidence would therefore be lost which could have been legally obtained." Loewenthal, *supra* note 30, at 248. Notice that this is the opposite of the usual criticism that restitution will provide an inadequate deterrent. While this possibility cannot be disproved with certainty, experience makes it difficult to imagine any remedy that would have this effect being awarded by the judiciary, who are generally supportive of the objectives of law enforcement. Should it occur, the upper range of liquidated awards could be reduced.

³⁹ See Hyman, *supra* note 30. His study revealed

that the average officer did not know or understand proper search and seizure rules and that an increase in education, experience, age, rank, and the habit of reading did not effect achievement of significantly higher scores. What is equally surprising is that supervisors or senior officers only achieved slightly improved scores. A logical assumption might have been that the patrol division would fare better than any other division, but the results do not support this conclusion. We may ask whether these results are attributable to an incomplete and sporadic training, or whether the decisional rules are confusing to those whose behavior the rules are designed to control.

Id. at 47 (citations omitted).

⁴⁰ Hyman, *supra* note 30, at 42.

⁴¹ "Neither the judge nor the prosecutor adequately explains a court ruling on the exclusionary rule so that it might be understood by the police officer." Gilligan, *supra* note 5, at 4.

“afraid” to proceed or that the prosecutor was incorrect in concluding that the police conduct was illegal. Because the prosecutor seeks to maintain a good working relationship with the police, such a conversation rarely is initiated.

Even those few officers who actually participate in a suppression hearing may not be made sufficiently aware of how they erred to enable them to modify their future conduct. Officers who testify in suppression hearings may not be present in court when the judge gives his ruling and even if they are informed of the outcome, they may not be told of the judge’s rationale. When a case is reversed by an appellate court because of the trial judge’s failure to suppress evidence, offending officers are even less likely to be told of their responsibility for the reversal, unless the case goes to trial after remand.

Another source of on-the-job information is a prosecutor’s office that provides legal advice to the police before they act.⁴² This approach is limited, however, by practical constraints upon the frequency of consultations with prosecutors, the unwillingness of many officers to involve prosecutors in their investigations, and the impossibility of consultation when quick street action is required

⁴² A good example of this approach is the “Felony Review Unit” of the Cook County State’s Attorney’s Office in Chicago, to which I was exclusively assigned for six months. To bring felony charges against a suspect or a search warrant to a judge, the police are required to obtain the approval of an Assistant State’s Attorney. Due in large part to the numbers of cases involved, the Felony Review Unit handles the approval only of felonies, excluding drug offenses. It therefore has its largest influence on investigations of crimes in which coercion of confessions is most likely. It is least effective in supervising arrests in which fourth amendment violations are most likely: possessory crimes, which are usually the product of street action; drug offenses, which are excluded from the program; and gun offenses that are misdemeanors. The required review of search warrants obviously will have no effect on street stops, except to the extent that such a review, by making the process of obtaining a warrant more costly to police, may discourage them, at the margin, from obtaining a warrant.

Why drug offenses and misdemeanors are excluded is a matter of some speculation. Without question the sheer volume of such cases would make prosecutorial supervision extremely, and possibly prohibitively, expensive. As important, perhaps, is the fact that most misdemeanor and possessory arrests do not result from investigations, but from instantaneous street actions of police. Unlike many felonies where further evidence may be obtained, most reviews would be entirely *ex post*. Further, in the case of possessory crimes, any “review” would consist almost exclusively of evaluating the credibility of the police officer, who is usually the only witness, and thus there would be little evidentiary justification for withholding approval. The increased likelihood of corruption may also be an inhibiting influence.

and mistakes are most likely to occur. Its effectiveness also depends on the ability of the officer to present the problem accurately to the prosecutor and the competency of the prosecutor to analyze the issues and give advice.

An alternative to police officers obtaining their legal knowledge before joining their department or while on the job would be training provided by the department. "An efficient way to eliminate fourth amendment violations would be to require both continuous roll call training and pretraining and posttraining testing. Officers should take promotional tests which require them to demonstrate competence in the search and seizure area."⁴³ The availability of training is limited, however, by the cost to the department in budgetary resources that might be used for other things and the cost to the officer in lost time. Further, the effectiveness of training is limited by the level of interest the officer has in absorbing the information offered. The exclusionary rule may provide some incentive to educate police officers. Because the exclusion of evidence imposes little or no cost on the department, however, the costs of training may be viewed by the department as a net loss and if so training is less likely to be provided.

When political and legal constraints are diffused, financial constraints assume a comparatively greater influence over policy formation. When deficit spending is unavailable to bureaucracies, they are extremely sensitive to financial constraints. A restitutive system, whereby police departments would be forced to compensate victims of misconduct more extensively, would impose an increased budgetary cost on the department. Thus, police departments would have a greater incentive than they do at present to provide legal training to, and ongoing internal supervision of, their

⁴³ Hyman, *supra* note 30, at 58. See also Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). Spiotto describes the extensive training and initial supervision given new officers by the Chicago Police Department and concludes that "if there is a violation of the law of search and seizure, it cannot be attributed to a lack of training . . ." *Id.* at 274. He also reports significant training programs in 14 large cities. *Id.* at 275. Spiotto thinks a violation may result from confusing rules or "a perception of the police role which is different from that of the courts." *Id.* at 274. My experience suggests the latter explanation as the most important of the two.

officers. If added training and supervision can increase their employees' awareness of what constitutes prohibited conduct, and their willingness to adhere to appropriate behavior, the budgetary drain of restitution awards will be reduced. The extent of the incentive will be related to the number and average amount of restitution awards imposed. That such a remedy would be imposed with greater frequency than is the exclusion of evidence will be discussed below.

3. *Factor 3: Awareness of Effect on Prosecution*

Assuming that police officers care about obtaining convictions and that they know their conduct is constitutionally proscribed, the exclusion of evidence can deter misconduct only if police officers are reasonably certain that their misconduct will affect the disposition of the case. If a police officer does not believe *ex ante* that his or her illegal conduct will affect the outcome of a criminal case, the choice to act unconstitutionally will impose little or no cost (*ex ante*) on the officer.⁴⁴ As indicated previously, police officers generally are not made aware of the effect that the likelihood of suppression has on decisions to drop or reduce charges already filed. If the effect of the exclusionary rule is ever visible to the offending officer, it is only when the rule actually is applied during criminal proceedings. Thus, for the exclusionary rule to deter an officer who is otherwise willing to proceed in an unconstitutional manner, that officer must anticipate that all of the following events will occur:

1. An arrest will be made;
2. Charges will be filed;⁴⁵
3. The case will not be disposed of by plea bargain;⁴⁶

⁴⁴ This is one reason why a "good faith" exception will reduce deterrence of police misconduct.

⁴⁵ Although police misconduct can influence the filing of charges, prosecutors prefer to make such a decision at a later stage, when they are more confident that all the circumstances are known. The minimal risk that charges will not be filed, however, may impose a cost (*ex ante*) on the officer.

⁴⁶ The purpose of a plea bargain is to obtain a conviction. It is occasionally employed because of weaknesses in the prosecution's case. Assuming police care about convictions, a plea bargain satisfies this concern. Some officers may engage in illegal conduct, secure in

4. The defendant will assert a constitutional rights violation;
5. A hearing on the rights violation will be held;
6. The judge will rule adversely to the prosecution;
7. The evidence suppressed will be of such a nature as to affect the prosecution adversely.

In many cases the officer avoids the misconduct because he or she anticipates the occurrence of all these events. However, given the enormous uncertainty *ex ante* that all of the above events will occur, police are more likely to respect a citizen's constitutional rights out of genuine respect for constitutional rights or because of the internal controls that do exist (possibly resulting from incentives created by successful civil lawsuits) than from any fear that the exclusionary rule will be invoked successfully. "Police officers are not controlled more rigorously by the exclusionary evidence rule than they are by the force of their own respect for the law."⁴⁷

In contrast, only two or three events need occur for imposition of a restitutive remedy. By reducing the number of events the officer must anticipate from seven to two or three, a restitutive system increases the officer's perception that a remedy will be imposed for misconduct. Because a restitutive remedy is imposed in a separate hearing where any aggrieved citizen may file a complaint, it does not require that an arrest be made, that criminal charges be filed, that a criminal case not be disposed of by a plea bargain, or that the evidence improperly obtained be of such a nature as to affect a criminal prosecution adversely. If there is a monetary settlement, then a judge need not rule adversely to the police. Thus, the events that an officer must anticipate in order for a restitutive remedy to have a deterrent effect are the following:

their belief that most defendants will plead guilty (though many pleas are taken after the defendant's motion to suppress has failed).

Some cases where suppression of evidence might have threatened successful prosecution will be disposed of by a plea bargain that does not reflect this uncertainty because the plea takes place before either the prosecutor or the defense attorney learns of any police misconduct. Where a plea agreement does reflect this uncertainty in a lower sentence, it is extremely rare for the police officer responsible for the error to be informed of his or her responsibility for the reduced sentence. Without such notice, the exclusionary rule can have no deterrent effect on the future conduct of the officer.

⁴⁷ Paulsen, *supra* note 9, at 255.

1. The victim of misconduct will assert a constitutional rights violation;
2. A hearing on the violation will be held or the claim will be settled;⁴⁸
3. If there is a hearing, the judge will rule adversely to the police.

The effect of a restitution remedy on the factors influencing a police officer's perception of the likelihood of each of these events occurring will be discussed below.⁴⁹ Briefly, by expanding the pool of potential litigants, a restitution remedy makes the assertion of a constitutional rights violation more likely. There are many reasons to conclude that under such a system the costs to judges of enforcing constitutional rights will be reduced, making a ruling adverse to the police more likely.

4. *Factor 4: Possibility of Obtaining Evidence Legally*

With an exclusionary rule, unless the police might have obtained the evidence in a legally proper manner, the fact that the evidence has been suppressed will have no effect on future conduct. Where there is no legally permissible means of obtaining vital evidence, the police presently have little or nothing to lose by violating a suspect's rights and taking their chances, especially given the low probability that any constitutional rights violation will affect the outcome of a criminal case adversely and the absence of an effective alternate remedy. The worst that can happen is that the evidence will be suppressed. Ironically, if a conviction would not be possible without the evidence, the illegal conduct can only make a conviction more likely. Therefore, for the threat of suppression to impose any costs on the police, the evidence in question must have been available to the police by constitutionally permissible conduct.

⁴⁸ Unlike a plea bargain, even a settlement will impose costs on the department and raise the costs of misconduct.

⁴⁹ See *infra* text accompanying notes 67-76.

5. *Judge Will Rule Adversely to Prosecution*

By misrepresenting in the official report the circumstances of any misconduct and, if necessary, testifying consistently with the sanitized version, the officer personally and very effectively can influence whether a constitutional rights violation will affect a particular case adversely.

In this way, as one district attorney expressed it, "the policeman fabricates probable cause." By saying this, he did not mean to assert that the policeman is a liar, but rather that he finds it necessary to construct an *ex post facto* description of the preceding events so that these conform to legal arrest requirements, whether in fact the events actually did so or not at the time of the arrest. Thus, the policeman respects the necessity for "complying" with the arrest laws. His "compliance," however, make take the form of *post hoc* manipulation of the facts rather than before-the-fact behavior. Again, this generalization does not apply in all cases. Where the policeman feels capable of literal compliance (as in the conditions provided by the "big case"), he does comply. But when he sees the case law as a hindrance to his primary task of apprehending criminals, he usually attempts to construct the appearance of compliance, rather than allow the offender to escape apprehension.⁵⁰

And should this effort eventually prove unsuccessful *ex post*, unless this is generally the case, it will not affect the calculation of the officer *ex ante*, *i.e.*, at the time the officer makes the decision to proceed unconstitutionally. While the need to commit perjury

⁵⁰ J. SKOLNICK, *supra* note 31, at 215. See also Loewenthal, *supra* note 30, at 250; Oaks, *supra* note 29, at 739; Skolnick, *Deception By Police*, CRIM. JUST. ETHICS Summer/Fall 1982, at 40, 42-43. Unfortunately this phenomenon need not be limited to the police. Prosecutors and judges are also quite capable of such "compliance" and are particularly motivated to "comply" in this way when their roles place them in a similar conflict. See *infra* text accompanying note 59.

Skolnick might have added that, like the investigator working the "big case," federal authorities may be more capable of literal compliance than local police officers. This may account for the relatively greater respect for constitutional rights that is allegedly observed at the federal level. See, *e.g.*, Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS Summer/Fall 1982, at 28, 30-32.

will deter some police officers from committing illegalities,⁵¹ the issue is the comparative deterrent effects of the two proposed remedies. As will be indicated below, courts that specialize in considering police misconduct will have fewer costs imposed upon them should they reject police testimony as perjured than criminal judges do at present, and greater institutional incentives for doing so.⁵²

A restitutive remedy that imposes costs on the police where none exist at present may not in every case alter the outcome of police decision making. A deterrent effect is not a guaranty of deterrence in every instance. But where, for example, evidence is not available to the police in a constitutionally permissible manner, a restitutive remedy will still impose costs on police departments who choose to proceed in face of the illegality. Under these circumstances, exclusion imposes no costs *ex ante* (and few costs, if any, *ex post*) and, therefore, provides little or no deterrence.

B. *The Courts*

What are the costs imposed on a judge who decides to exclude evidence? As discussed below, a subjective cost to a conscientious judge is the likelihood that a decision against the police might be erroneous.⁵³ Other costs exist as well. The expectation that the community will perceive his or her actions to be wrong, or to be a threat to public safety, or both, is also a cost to a judge who chooses to suppress evidence. If judges have no lifetime tenure, as is typical on the state trial court level, such perceptions may adversely affect the judge's chances of remaining on the bench.

Judges may face costs no matter which course of action they contemplate. A decision not to suppress evidence may also impose costs on a judge. One such cost is the judge's expectation that a failure to suppress illegally obtained evidence will contribute to a society where more police misconduct will occur. Another is an expectation that he or she will be perceived by the public as having

⁵¹ See Loewenthal, *supra* note 30, at 250-51.

⁵² See *infra* text accompanying notes 53 & 55.

⁵³ See *infra* text accompanying note 56.

failed to protect citizens from abuses of the police. Depending on the makeup of his or her constituency, this might also threaten the judge's chances of retention.

Certain aspects of the operation of the exclusionary rule, however, cause costs imposed on a judge who suppresses evidence ordinarily to exceed the costs of refusing to suppress; thus police misconduct often is not penalized. As a result, the police will anticipate a lower likelihood of exclusion when making their choice of whether or not to act illegally, and the deterrent effect of excluding evidence will be weakened. These aspects of the exclusionary rule increase in two ways the cost to a judge who decides to suppress evidence: first, by making a finding that illegal police conduct has occurred more likely to be perceived by the judge and the public as factually erroneous; and second, by increasing the likelihood that the judge and the public will care about such an error. These key aspects may be summarized as follows:

1. Only citizens who are accused of a crime may employ the exclusionary rule in litigating violations of their constitutional rights;
2. The nature of a suppression motion unavoidably will compare the credibility of the police officer with that of the defendant and, perhaps, the defendant's friends;
3. If a court finds that a rights violation has occurred, the only remedy available is one that may jeopardize or preclude a successful prosecution, thereby creating conflicting judicial responsibilities for a criminal court judge;
4. Appellate review of a court's refusal to suppress evidence only comes after the defendant's conviction.

A closer look at each of these aspects of the operation of the exclusionary rule sheds light on why judges will be less likely to suppress evidence than to impose a restitutive remedy.

First, if those asserting police misconduct generally are not perceived to be credible witnesses or sympathetic complainants, a judge may be less inclined to believe that a constitutional rights violation has occurred, and, because of this, he may be less likely

to exclude evidence.⁵⁴ The only citizens who may seek the exclusion of evidence as a remedy for violations of their constitutional rights are those who are accused of a crime. Their credibility may be affected adversely in at least three ways. First, their stake in the outcome of the hearing may be their freedom, providing them with an obvious and likely motive to fabricate. Second, judges considering suppression are made aware of the defendant's probable guilt during the course of the hearing. Finally, they may have a criminal background that undermines their credibility as truthful witnesses. The resultant perception of probable guilt will affect adversely any defendant's credibility as a witness and predispose a judge to deny the motion. Should any public attention be focused on the case, these circumstances also make more likely the public's perception that a judge acted wrongly in suppressing evidence. Because of this, when public scrutiny is perceived by the judge to be a possibility, the costs (*ex ante*) of suppression will be increased.⁵⁵

A second factor endemic to the criminal process that makes judges more skeptical of claimants' testimony and makes adverse public opinion more likely is the nature of a motion to suppress. The hearing on the motion unavoidably will force a comparison of the credibility of a police officer with that of the defendant and, perhaps, the defendant's friends. Because independent corroboration of illegality rarely exists,⁵⁶ unless the police admit the acts complained of, a judge who sustains a motion to suppress must usually do so solely on the basis of testimony given in court. Under such circumstances, sustaining a motion implies that the police officers have perjured themselves. While it is true that police can be expected to testify in a manner that would justify their conduct, the burden of persuasion in such hearings is on the criminal defendant. A tie, therefore, goes to the police. Within a system based on

⁵⁴ The same difficulty with victims that are unsympathetic or not credible occurs in the prosecution of street crimes as, for example, when a prostitute is raped.

⁵⁵ It is well-known that wholesale suppression of evidence occurs in specialized misdemeanor gun courts and narcotics preliminary hearing courts. See Spiotto, *supra* note 43. This may be explained in part by the absence of public scrutiny, except during the occasional exposé. Or, as has just occurred in Chicago, a federal investigation.

⁵⁶ See Note, *Grievance Response Mechanisms for Police Misconduct*, 55 VA. L. REV. 909, 910 (1969) ("Normally, few witnesses are available to corroborate a victim's allegation of abuse.").

suppressing evidence, this is the proper stance because reversing the burden of persuasion would cause the wholesale suppression of probative evidence.

A system of restitution that separates the adjudication of police misconduct from the adjudication of the defendant's misconduct would serve to neutralize, if not reverse, the practical presumption of police truthfulness that now exists in suppression hearings. By pitting a mix of innocent citizens and criminal defendants against police officers who generally can be expected to protect themselves and their department, the "common sense" of the situation should shift. Moreover, by eliminating the avoidance of criminal punishment as a motive to fabricate, the adoption of a restitutive form of remedy would marginally enhance the credibility of even criminal defendants.

By including any claimant whose constitutional rights have been violated, a system of restitution would provide redress to persons who have never been charged with a crime and cannot, therefore, benefit by the suppression of any evidence.⁵⁷ A new judicial or quasi-judicial court system that specialized in such actions and that included both defendants and nondefendants would be expected to increase the general credibility of the pool of claimants asserting police misconduct. Further, the repetitious denials of the police would tend systematically to reduce the credibility of the police. If the comparative credibility of the parties can be affected in this way, then the perception by a judge that a finding against the police is generally in error should be weakened, if not neutralized or reversed. In this way the costs (of error) imposed on a judge who finds against the police will be lowered. Lowered costs will

⁵⁷ While a civil lawsuit is now possible, and may very well be responsible for deterring some police misconduct, its use is made difficult by the fact that offending officers may be personally liable for damages and by the numerous inefficiencies of the civil justice system. See generally Comment, *supra* note 19; cf. Gilligan, *supra* note 5 (examines the strengths and weaknesses of the Federal Tort Claims Act). Further, a good faith exception partially shields defendants from civil liability. See S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO SECTION 1983, at 229-63 (1979). In the absence of overwhelming evidence of illegal police conduct, these factors may systematically tip the balance against the claimant.

mean a higher rate of imposing a remedy, thereby increasing costs to police departments of police illegality.

The third key aspect of the exclusionary rule's operation is that the only means available to the courts to remedy a rights violation is the suppression of reliable evidence that is the fruit of the illegality. This will have the probable and perceived effect of making an ultimate acquittal, if not a dismissal, of the charges much more likely. But a judge who frees a criminal defendant in this way runs at least three major risks. First, such a ruling may alienate the prosecutor upon whom the judge may rely for efficient management of his or her docket. Second, by releasing a defendant perceived to be guilty and possibly dangerous, the judge risks incurring adverse publicity that may be both personally and professionally embarrassing. Such publicity may be generated by the wounded prosecutor.⁶⁸ Finally, the ruling may be reversed by an appellate court after an appeal by the prosecution, while in the interim the defendant has been at liberty and the evidence against him or her has grown stale.

Moreover, a criminal court judge may be seen to have at least three responsibilities: to do justice, to protect the public from those persons perceived to be dangerous, and to protect the fourth amendment and other constitutional rights of defendants and the public. A judge who takes all three responsibilities seriously is faced with a conflict of these interests if he or she believes that the police have in fact acted illegally. When deciding whether to suppress evidence, whatever ruling the judge makes will be inconsistent with one or more of these responsibilities. What balance is to be struck will depend upon the preferences of the judge. A judge who chooses to exclude will have to place the protection of constitutional rights above his responsibility to rectify criminal conduct or protect the public safety. Given commonly held sentiments, however, a judge is likely to place the protection of constitutional rights in a subordinate position. The methods by which this conflict is "resolved" are much the same as that engaged in by police

⁶⁸ See *infra* text accompanying note 61.

who are faced with similar conflicts.⁵⁹ The judge may be less likely to believe that the police erred, thereby minimizing any conflict. Or a judge may become less sensitive to the wrongness of police misconduct as compared to the wrongness of releasing the guilty defendant. In either event, fewer findings against the police will occur, and this will reduce the costs to police departments of police misconduct over what it might otherwise be.

The exclusion of reliable evidence creates the dilemma of enforcing constitutional rights at the expense of justice and public safety. A system in which a specialized branch of the judiciary heard cases of police misconduct would eliminate or greatly reduce this conflict of interests facing criminal court judges. A restitutive remedy resolves this dilemma by enabling courts to impose sanctions on both police and criminal defendants. Judges hearing complaints of police misconduct would no longer be forced to choose between public safety and justice on the one hand and the protection of constitutional rights on the other. Without the conflict, the conscientious judge may more freely rule against the police, and the less than conscientious judge may be more afraid of appearing too one-sided. Such a system will enhance deterrence by reducing the costs imposed on a judge who imposes a remedy for police misconduct. The more likely it is that judges will rule adversely to the police, the more costly police misconduct becomes to the department and the greater is the incentive to take actions against it.

Perhaps most importantly, a restitutive sanction reduces the danger, ever present with the exclusionary rule, that public support for the protection of constitutional rights, upon which a constitutional order depends, will be undermined by the perception that these protections merely shield the guilty from the legal consequences of their acts. As this climate of opinion grows, constitutional protections become increasingly less secure. Moreover, the effect of this public perception may not stop at the threshold to the jury room.

Indeed, to the extent that increasingly sophisticated juries, increasingly fearful of crime, realize that because of a legal

⁵⁹ See *supra* note 50 and accompanying text.

“technicality” they may not be hearing all the evidence against the defendant, they may be willing to convict on less evidence admitted at trial, perhaps in a case where there is really no more evidence—a dangerous guessing game.⁶⁰

Fourth, if the trial court fails to suppress evidence that should have been suppressed, what costs face an appellate court considering a reversal of the trial judge? The only appellate review of a court’s denial of a motion to suppress comes after the defendant’s conviction. Compared to the trial court, the appellate court may anticipate three additional costs should it find that the conduct of the police was improper. First, the defendant has been proved guilty beyond a reasonable doubt, so the risk of negative publicity and adverse political consequences upon the defendant’s release increases. Second, in cases other than those involving possessory crimes, a reversal may result in a new trial and another conviction. If the court believes that the failure to suppress was “harmless” error by the trial judge, it may not be willing to impose the burden of a retrial on the trial court simply to deter future police misconduct. Finally, the standard of review constrains an appellate court to respect the trial court’s judgment absent the most egregious of errors. For these three reasons, an appellate reversal of a trial court’s refusal to suppress may be less likely than would otherwise be the case.

A system of complaint and remedy that would be independent of the criminal justice process and that would include innocent citizens and defendants who have been found not guilty in addition to convicted defendants, would greatly reduce the perceived costs of reversing a trial court’s refusal to grant relief for police misconduct. The importance of the defendant’s guilt would be greatly reduced, since the conviction would not be jeopardized by a reversal. The concept of harmless error could not prevent a remedy, if the appellate court concluded that a violation of constitutional rights had occurred. Finally, while the standard of review might not be altered in theory by a new system, the elimination of the first two factors might serve to lower the standard of review in practice.

⁶⁰ LaPrade, *supra* note 4, at 103.

By increasing the likelihood of reversal, a restitutive remedy makes an erroneous refusal to impose a sanction more costly to a judge hearing complaints of misconduct and therefore makes an initial finding of a rights violation more likely. This in turn, as with each of the other factors discussed, will increase the costs to the police department of police misconduct and thereby increase deterrence of constitutional rights violations.

C. The Prosecutor

Suppression of important evidence in a case can demoralize a prosecutor, but this demoralization alone will have little impact on the rule's deterrent effect on the police. In one important aspect, however, the exclusionary rule can have an insidious effect that raises the costs to the judge of employing the exclusionary rule and, thereby, eventually will result in lowering the costs to the police of their misconduct. The costs to the judge of employing the exclusionary rule include the risks of reversal on appeal and adverse publicity. Obviously, the prosecutor who appeals a judge's decision is partly responsible for the effects of reversal. Less apparent, though no less a fact, is that prosecutors inform reporters of a judge's decision to suppress evidence in cases where suppression would be newsworthy. The prosecutor who threatens press exposure, by inviting reporters to be present during hearings or by establishing a reputation for press exposure, can increase the risks and, therefore, the costs to a judge who is contemplating the suppression of evidence.

A more fundamental danger is present in this legal environment. The nature of an exclusionary remedy for police misconduct puts even the most civil libertarian of prosecutors on the same side as the police officer who acts illegally. True, most prosecutors take their responsibility to prosecute only those defendants they believe to be guilty very seriously.⁶¹ However, when faced with a case where a police officer has violated the constitutional rights of a

⁶¹ For a description of the prosecutor's ethical responsibilities, see MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 (Discussion Draft 1983); and D. NISSMAN & E. HAGEN, THE PROSECUTION FUNCTION 7-12 (1982).

guilty defendant who has committed a serious crime, a prosecutor's law enforcement responsibilities create for him or her an even greater conflict than is created for a judge.

The job of even the most conscientious prosecutor is to attempt to legally justify police conduct within the boundaries of legitimate legal debate. Two undesirable effects, one personal and the other institutional, may result. On the personal level, cognitive dissonance theory suggests that, as the prosecutor persists in justifying police misconduct, over time his or her pre-existing moral sensibilities against such conduct will be undermined. Illegal conduct will become less and less emotionally objectionable. Eventually, changes in belief will follow the changes in emotion and eliminate the dissonance.⁶² Institutionally, the arm of the government whose function is to prosecute illegal conduct is called upon, in the name of law enforcement, systematically to justify police irregularities. If these arguments are successful, the definition of illegal conduct will be altered. Instead of prosecuting the police for their illegal conduct, the prosecutor's office becomes an insidious and publicly subsidized source of political and legal agitation in defense of illegal conduct. Refusal to consider the long run effect of this phenomenon on the stability of constitutional protections would be dangerous and unrealistic.

A system that separated the prosecution of defendants from the remedying of constitutional rights violations, if it accomplished nothing else, would sever the connection between police illegality and public prosecution of criminals. This would completely eliminate the prosecutorial agitation, both legal and political, for weakening constitutional guaranties. Further, if the model of public prosecution were carried over into the new system,⁶³ the prosecutor

⁶² For a brief description of cognitive dissonance theory and various studies of the phenomenon, see H. TRIANDIS, *ATTITUDE AND ATTITUDE CHANGE* 78-84 (1971) ("Subjects who were induced to engage in role playing that was inconsistent with their private attitudes tended to change their attitudes to make them consistent with their behavior.") (Quote at 79).

⁶³ For reasons that are beyond the scope of this paper, such a proposal might not be desirable, except, perhaps, in the case of indigent claimants. If such a program were adopted, however, the close personal and professional ties between criminal prosecutors and local police would suggest the need for a special prosecutor's office for this function.

would be on the appropriate side of the dispute.

In light of these costs of an exclusionary rule, the fact that evidence is ever suppressed is remarkable. The possibility that the exclusionary rule is invoked by a judge for a variety of reasons other than to remedy police misconduct cannot, therefore, be discounted completely. The exclusionary rule permits judges, attorneys, or police officers to free a defendant without having to judge adversely in public the credibility of the prosecution's case in chief (which may be quite strong). Such hearings usually are not conducted in the presence of the victim.

The motivations for such a use of suppression may vary. The desire to obviate victimless crime laws, particularly those that impose a mandatory prison sentence, may be one such motive. Less noble ones also exist. Prosecutors may wish to dispose of weak cases without losing them at trial. "The prosecutor is now in a position to seize on a doubtful exclusionary question surrounding the suspect's apprehension and to drop the matter on grounds the court may suppress controlling evidence."⁶⁴ Police can affect the outcome of a prosecution for monetary or political reasons, while appearing to pursue conviction seriously. "The rule gives an ordinary policeman the power to confer immunity upon an offender."⁶⁵ Judges can sabotage a prosecution for the same reasons, without the risk of acquitting a defendant at trial in the face of overwhelming evidence of guilt.⁶⁶ How often it is employed for such purposes,

⁶⁴ Hyman, *supra* note 30, at 41.

⁶⁵ Paulsen, *supra* note 9, at 256. This phenomenon is well-recognized. See Oaks, *supra* note 29, at 749; and Gilligan, *supra* note 5, at 6. One trick I have seen used by narcotics officers is to report the circumstances surrounding the arrest and search ambiguously in their report, so that they can determine the outcome of the case by what they tell the prosecutor when they go to court. This may be done to induce defendants to become informants, to protect certain favored persons from prosecution, or to obtain money from a defendant.

⁶⁶ A favorite technique of some defense attorneys is to file motions to suppress before certain preliminary hearing court judges. If the particular judge is not sitting, the motion will be withdrawn and the case will be transferred to a trial court. Some attorneys who do this are merely forum shopping for a judge who is generally more sympathetic to motions to dismiss. This is not the case, however, when a judge who ordinarily is unsympathetic to such motions is regularly more sympathetic to motions of certain attorneys. New prosecutors learn quickly who engages in this technique, and they attempt to circumvent it by obtaining an indictment before the case first appears in preliminary hearing court.

of course, can never be proved.

III. THE RESTITUTION ALTERNATIVE

A. *Effects of a Restitutive Remedy on the Costs of Police Misconduct*

The costs of constitutional rights violations to police departments are dependent upon the frequency with which sanctions are imposed as compared to the number of violations that occur. Any system that penalizes misconduct at a comparatively greater rate than at present will, all things being equal, achieve a comparatively higher level of deterrence. In addition, if the form or type of sanction imposed will itself impose greater costs on police misconduct, fewer constitutional rights violations will occur. Given this analysis, there are three effects of a restitutive remedy that may increase the deterrence of constitutional rights violations. A separate system based on restitution may:

1. Increase the total number of cases of police misconduct that are litigated (assuming a constant or increased rate of successful litigation), *i.e.*, increase the number of throws of the dice;
2. Increase the rate of successful litigation (assuming a constant or increased number of cases litigated), *i.e.*, increase the odds of each throw;
3. Provide a remedy that is more effective in deterring misconduct (assuming a constant or increased number of cases litigated and rate of successful litigation), *i.e.*, increase the stakes.

1. *Increasing the Number of Cases Litigated*

Currently the litigation of constitutional rights violations by means of the exclusionary rule is limited to persons charged with crimes. Increasing the number of cases of misconduct that are litigated may be accomplished by increasing either the number of defendants who litigate police misconduct, or the number of persons with standing to litigate police misconduct, or both.

Defendants who litigate violations of their constitutional rights

presumably do so to the extent that they (and their lawyers) perceive that such a motion is likely to succeed and likely to effect an acquittal of the defendant. If this is true, then any net reduction in the costs described above⁶⁷ will, by providing a defendant with a marginally greater chance of success, increase the number of defendants who will initiate litigation of a constitutional rights violation. This can be expected to increase the number of sanctions imposed for police misconduct and increase deterrence.

This effect will be offset by the failure of a restitutive system to delay the prosecution of the criminal charges, one significant tactical objective of pretrial motions. More significantly, any change in the form of the remedy that eliminates the possibility that the litigation will result in an acquittal will lessen the incentive for a defendant to litigate a constitutional rights violation. To the extent that either of these two effects occur, however, the credibility of defendants complaining of police misconduct should improve, thereby somewhat increasing the likelihood of success still further. Given this tension between the likelihood of success and the likelihood of obtaining delay or acquittal, the impact of a restitution system on the number of cases litigated by those who are criminal defendants is uncertain.

If the total number of persons with standing to litigate police misconduct is increased and any number of the additional persons choose to litigate, however, the rate of sanctions imposed upon the police per instance of misconduct will increase.⁶⁸ Therefore, a system which enabled nondefendants more easily to litigate instances of police misconduct, or increased their ability to do so meaning-

⁶⁷ See *supra* text accompanying notes 53-60.

⁶⁸ A direct comparison of any alternative remedy with the exclusionary rule on the basis of the relative rates of imposition is made uncertain by the possibility that the proposed remedy will impose on the police fewer costs than the exclusionary rule. To take an extreme example, suppose that the penalty for violating constitutional rights were to have the officer say "I'm sorry" to the offender. Even if this remedy were to be imposed in every criminal case, deterrence would be less under such a system than at present. For an increase in the numbers of sanctions imposed for misconduct to affect favorably the deterrence of misconduct, this new form of remedy must provide at least as many costs as the exclusionary rule. However, if the analysis presented here is correct, a restitutive remedy will increase the costs to the police of their misconduct, compared to the costs imposed by excluding evidence. Such a comparison will then be valid.

fully, would increase the number of cases of police misconduct that are litigated, thereby increasing the total number of cases where sanctions are imposed this would increase the costs to the police department of police misconduct, and consequently increase deterrence.

Given the expense of civil suits in the present civil justice system, citizens who are not already in court as defendants may have little net incentive to bring a civil suit against the police for misconduct.⁶⁹ The number of such actions would be likely to increase to the extent that a new remedy would be imposed in a system set apart from the sluggish civil court system and devised to permit streamlined and speedy procedures similar to those of a small claims court.

2. *Increasing the Rate of Successful Litigation*

The rate of successful prosecution of police misconduct per case of police misconduct litigated can be increased in essentially two ways. First, the costs of imposing judicial relief can be reduced as discussed above.⁷⁰ Second, the costs to a judge of not imposing relief for constitutional rights violations can be increased.

An effort to increase the cost of failing to enforce constitutional rights must take into account that the civil and criminal justice systems are bureaucracies. As such, they respond to the same pressures and incentives that other bureaucracies respond to. Because their jobs exist as a result of taxation and not demonstrated consumer preferences,⁷¹ bureaucrats tend to believe that, to maintain

⁶⁹ See Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Note, *supra* note 56, at 916-25. See also *supra* note 57. Civil suits, of course, do occur. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), itself was such a case. Such actions most likely are at present deterring police misconduct to some extent.

⁷⁰ See *supra* text accompanying notes 53-60.

⁷¹ While this is true at present, it need not be the case. The current bureaucratic character of the judicial process arises from the monopolistic nature of its jurisdiction that, like the post office, prohibits or severely restricts by force any competition. No such system is mandated by a proper conception of law. See generally L. FULLER, *THE MORALITY OF LAW* 122-29 (1969) ("Law" is properly understood in terms of the activity that sustains it rather than only in terms of the formal sources of its authority. Multiple systems of law "do exist

their funding, they must continually "demonstrate" that they have a beneficial function to serve and are fulfilling it.⁷²

In the case of judges, this process of self-justification may take the form of enhancing certain statistical measures of performance, *e.g.*, numbers of cases disposed of, length of sentences imposed, rate of convictions or acquittals, etc. Where such statistics are available, most judges are acutely aware of this and are likely to respond accordingly.⁷³ If a system were created in which judges heard only cases of police misconduct, for better or worse, judges would feel constrained to rule against the police in (what they think will be) a socially approved proportion of the total cases litigated. If they failed to rule against the police at all or did so only rarely, they would risk reassignment or even the abolition of their court. Given this impetus, their secondary concern would be to identify the appropriate cases in which to rule against the police.

This argument depends upon the collection of statistical measurements of judges' findings and their availability to the press and the public. Even more than other bureaucrats, judges who are elected abhor adverse publicity. If judges know that statistics are gathered and made available to the press, then they (unlike jurors who only hear one case of misconduct) could reasonably be expected to rule against the police in a significant proportion of the cases heard. Further, a not inconsiderable distrust of the police exists in society. By eliminating the current dilemma created by the exclusionary rule, the public would be free to channel its distrust to that branch of the judiciary charged with protecting the public from the police. These judges would have a mandate to enforce constitutional rights that criminal court judges, who may only release guilty defendants, currently lack.

This result may not be all to the good, should it occur. Police officers may be guilty of fewer misconduct charges than it is re-

and have in history been more common than unitary systems." (quote at 123).

⁷² Unfortunately, without a way for consumers to exercise their true preferences, such "demonstrations" prove nothing whatever about whether consumers have in fact been satisfied.

⁷³ Such a response, again, may not actually improve a judge's performance, but may merely increase the statistical measurement of performance.

spectable to find in their favor, in which case justice, to the police, is ill served. The preceding analysis is offered, however, in response to the not uncommonly expressed argument that judges will impose too few sanctions on the police to deter their misconduct. Of course such an argument itself proves too much. "A judge should be no more reluctant to assess an appropriate fine against the government than he previously was to suppress helpful prosecution evidence."⁷⁴ For if judges are inherently reluctant to impose sanctions on the police, this reluctance should be manifested at a higher rate in suppression hearings, given the costs described above.

The creation of a specialized court awarding a restitutive remedy would make increasingly feasible the development of a specialized and competent section of the bar to litigate such lawsuits. This development could increase both the total number of cases litigated, by virtue of the lower costs of handling large numbers of cases in a few specialized courts and entrepreneurial activities of the bar, and the rate of successfully litigated complaints, due to the greater skill and judgment that specialization may provide.

The form of the remedy available would also influence the rate of findings against the police. Judges may be reluctant to impose even monetary sanctions directly on police officers who may be thought to have been simply responding to the institutional demands placed upon them. Therefore, it is important, as suggested by Justice Burger and most others proposing such a system, that this new remedy be imposed upon the police department. The further advantages of this will be discussed next. Finally, as the rate of successful complaints against the police increases, an increase in the number of complaints against the police can be anticipated. As the odds get better, more players will come forward.

3. *Increasing the Effectiveness of the Remedy*

A monetary sanction levied against a police department may be an inherently better deterrent than the suppression of evidence for

⁷⁴ LaPrade, *supra* note 4, at 108.

several reasons. Assuming that the central police goal will remain arrests and not convictions, improper arrests will be far more costly to a police department than at present. Disciplining officers is more likely when there is a financial incentive to do it and when more complaints are made by innocent victims of police misconduct. Currently such internal discipline would jeopardize an ongoing prosecution, by making available to the defense evidence of police misconduct that might lead to suppression of evidence. Should the official policy of a police department systematically sabotage criminal cases in this way, a prosecutor's office would be sure to bring pressure to bear to change the policy.

Moreover, there is no formal mechanism by which a police department learns of the suppression of evidence because of the misconduct of its officers. Without such information, it becomes extremely difficult, if not impossible, to discipline those officers whose actions most frequently result in the suppression of evidence. If police departments, currently, pay any price for the suppression of evidence, they do not know who among their officers are chiefly responsible for it.

A system that routinely levied substantial fines against the police department for the misconduct of its officers would impose an immediate and perceptible budgetary constraint on that department. Under a restitutive system, the internal investigation and disciplining of an officer would not sabotage a criminal prosecution; thus, the costs to a police department that attempted to control the conduct of its officers would be reduced. Training in constitutional police conduct will be perceived as more cost effective, because the cost of misconduct will be borne by the department and not the victims of misconduct.⁷⁵ Finally, to the extent that the police administration is sensitive to its budget, supervisors down the line will be compelled by their superiors to control the behav-

⁷⁵ As long as police departments are tax-funded, the net taxpaying public will still "pay" for the blunder of the constable, though even governmental budgets are not completely elastic. The public will pay, however, with money and not with their personal safety. Further, a restitutive system of justice will not thwart the right of a victim to be compensated by the criminal. See *infra* notes 85-87 and accompanying text.

ior of their officers.⁷⁶

B. *Features of a Restitutive System*

Some features of the proposed system have already been described. The comparative analysis presented here suggests that certain features would be desirable in the legal system that would enforce such a remedy.

1. *Who Shall be the Trier of Fact? A New Approach*

Giving defendants the right to a jury is the most effective protection against unjust prosecutions available today. The very threat of a jury trial affects even the decision of whether to charge a person with a crime. The main problem of enforcing constitutional rights in the proposed new scheme, however, is not protecting the police department and the offending officers. The offending police officer ordinarily would not be personally responsible for satisfying the judgment, since police departments would operate in the role of the insurer of their officers' liability.⁷⁷ The protections afforded to defendants by a right to a jury are less necessary when the "defendant" is a police department.

The real problem of enforcing constitutional rights is the re-

⁷⁶ Personal experience confirms this. In Chicago longstanding policy was to compensate officers for the time they spend in court by giving them as many hours off work as they had lost. A court sergeant or a prosecutor signed a voucher form known colloquially as a "time due slip." This practice was widely abused, but because the police department did not in practice fully compensate the officers, no steps were taken to curb the abuses. When the police officers unionized and demanded full compensation, stern and effective measures were immediately instituted to discern who really went to court and even control who would be permitted to go to court (sometimes to the detriment of the prosecution). The only incentive for this "reform" was budgetary.

⁷⁷ Whether police departments could hold officers financially responsible for conduct that is, flagrantly *ultra vires* is an interesting question that will not be addressed here. Such a feature is, however, commonly advocated. See, e.g., *An Alternative*, *supra* note 7, at 76. "If the trier of fact finds that the violation was intentionally committed, the state, county or municipality shall recover from the officer the damages paid to the claimant . . ." *Id.* If police officers were to face such liability, a right to a jury trial would be both constitutionally required and desirable. The extreme nature of the acts and intentions that would give rise to the personal liability of an individual officer is likely to counter the normal pro-police bias of jurors.

verse. Triers of fact can be expected generally to have a pro-defendant, *i.e.*, pro-police bias. And this bias may be justified by the typical absence of corroborating evidence. Denying the police department a right to a jury trial would lessen, though not eliminate, the effects of this bias. If only judges served as the triers of fact in these specialized courts, deterrence of police misconduct would be enhanced.⁷⁸ This is generally the proposal.⁷⁹

Giving the *complaining* party a right to a jury trial might be desirable, however. Such an option, though novel, would use the right to a jury to perform its traditional function: the protection of citizens from possible abuses of the judicial system. The complainant's lawyer can calculate (as defense attorneys always do at present) whether, given the facts of the particular case and the identity of the complainant, the biases of the assigned judge or those of jurors would be the most detrimental to the claimant's chances of success. As today in criminal courts, the threat of a jury trial should effectively keep the judiciary within acceptable boundaries of fairness and make fewer jury trials necessary.

Other details must also be settled, but not here. Certainly attorney's fees and court costs should be recovered by the successful claimant. Whether a losing claimant should compensate the government is another (and quite problematic) matter. Whether public or private prosecution is to be the prevailing model must also be decided. One argument in favor of private prosecution, funded by pre-paid and contingent fees, is that the inability to obtain counsel functions as a check against frivolous claims. The truth of this assertion would depend upon the costs of prosecution and the measure of recovery, including the amount that may be recovered for legal fees. Restitution actions must be delayed in the case of criminal defendants to avoid potential fifth amendment problems with asserting the violation of constitutional rights.⁸⁰ Finally, mecha-

⁷⁸ See *supra* text accompanying notes 70-74.

⁷⁹ See, *e.g.*, *supra* text accompanying note 15 for a quotation of Chief Justice Burger's proposal.

⁸⁰ Currently, suppression hearings give the prosecution limited, but quite valuable information about the defendant's story that may be used in rebuttal should the defendant testify at the trial. Adjustment of cross-examination technique based on the defendant's demeanor on the witness stand is often useful. Since the suppression hearing is likely to be the

nisms must be devised that would permit effective access to the new courts by those complainants who are incarcerated. None of these considerations, however, appears to be beyond a satisfactory resolution.

2. *The Measurement of Restitution*

One final aspect of the proposal can now be addressed: the measure of monetary relief. The calculation of damages for the breach of any right is problematic. It is all the more problematic when the right is intangible and not generally exchanged so no "market" value can be established. This has not prevented courts from fashioning a damage award of some kind in many other types of cases. If a system of restitution is to provide a deterrent effect superior to that of suppression, the amount of damages must not be so high as to inhibit a finding against the police. Neither can it be so low as to amount to merely saying "I'm sorry." Since the exclusionary rule is largely a utilitarian device imposed upon a governmental agency, there is no reason in principle why the severity of a replacement remedy cannot be calculated to achieve maximum deterrence. This standard will provide upper as well as lower boundaries on recovery.

The imposition of a restitution award on a private (nonmonopolistic) law enforcement agency would require a demonstration that a particular scale of compensation was not only efficient, but just. So, too, if it is reparations we are requiring a police department to make, then the measurement of damages must bear some relationship to the gravity of the rights violation and the costs of enforcing these rights. In discussing similar problems of measuring reparations in cases of violent crimes, I concluded elsewhere that "[s]urely some restitution is more just than none."⁸¹ This gives rise to the need to determine the appropriate basis by which damages should be calculated. Two possibilities may be rejected: first, that compensation should be made for any incarceration that results

first time the judge hears the defendant speak, the hearing can influence subsequent plea negotiations as well. Of course, it is also used extensively by the defense to discover and "lock in" police testimony.

⁸¹ Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117, 129-30 (1980).

from the use of illegally obtained evidence; second, that damages must be limited to property and personal injury incurred during an unlawful search.

In many cases the use of illegally obtained evidence might be a necessary condition of conviction; however, the conviction is not "caused" by the illegal conduct. Many things are necessary conditions for a conviction. A prosecutor must do a good job presenting the case. Jurors must follow their oaths to convict if the evidence proves guilt beyond a reasonable doubt. A judge must be willing to enter judgment against the defendant. None of these things is the reason for conviction. A person is not convicted of battery because he left the house that day, though had he remained at home, he would not have struck the victim.

Rather, it is the conclusion of guilt that justifies the conviction. Guilt, not the illegality, is the reason for (and, therefore, the relevant "cause" of) the conviction. A demonstrated lack of guilt would break the causal connection between the defendant and a conviction, as would a demonstrated defect in the process of adjudicating that guilt that renders the conclusion of guilt suspect (the latter, however, usually resulting in a retrial and not a dismissal). Whether the police obtained evidence by having probable cause for a search does not enter into the analysis. "Indeed, a person can be guilty of a crime and the victim of an unconstitutional act at the same time. These are entirely distinct matters which should be separated as much as possible."⁸² Another way of expressing the same point is that the police have violated the defendant's right to be free from unreasonable searches, not an immunity from the use of certain evidence at trial. Had the evidence been obtained by a reasonable search it would have been admitted and the defendant's guilt established.

A defendant (like any victim of tortious conduct) is only entitled

⁸² *An Alternative*, *supra* note 7, at 80. See also Posner, *supra* note 23, at 53 ("The Fourth Amendment was not intended to give criminals a right to conceal evidence of their crimes."); Comment, *supra* note 7, at 716 ("While such a [constitutional] violation may be a 'but for' cause of a person's incarceration, it is not the 'proximate' cause. The proximate cause of a person being incarcerated is his commission of acts that constitute an offense under a penal statute.").

to compensation for the damages caused by injury to the right that was violated. If the illegal search did injury to person or property, certainly such injury is compensable. This does not mean, however, that damages must be limited to compensation for physical injury to person or property. What the defendant (or any victim of police misconduct) was deprived of was the right to be free from unreasonable search and seizure, regardless of whether physical injury results from an unreasonable search.

Most proponents of a restitutive system favor liquidated damages provisions.⁸³ The question thus becomes, what is such a right worth? The answer to this question, however difficult it may be, does not turn entirely on an *ex post* analysis of how much physical injury was actually done by *this* rights violation. The problem is determining what a right to be free of unreasonable searches is worth beforehand or *ex ante*.

That a defendant knows that evidence may be discovered that will be used to obtain a conviction should not be included in the calculation because the defendant did not have a right to be free from all searches or a right to hide evidence. The defendant's only right is to be free from unreasonable searches. The appropriate time of valuation is before the crime was committed when there is no evidence to hide and the inquiry into valuation can be focused exclusively on the right of which the defendant was deprived, *i.e.*, the right to be free from *unreasonable* searches. The value placed on this right at that time (*ex ante*) by any particular defendant cannot be distinguished objectively from its value to any other citizen: it is the subjective value a person places on the right to be free from unreasonable searches.

One of the tragedies of justice is the necessity of objectifying the worth of subjectively valued rights, when rights are expropriated and not bargained for. The problem is no different here, however, than in any other area of damages in which calculations must be made for rights that are not traded on a market. Attachment of a monetary value that is of necessity somewhat arbitrary, but that honors the right that was appropriated is therefore, essential. A

⁸³ See, *e.g.*, Horowitz, *supra* note 7, at 122; *An Alternative*, *supra* note 7, at 80.

calculation similar to that derived under the utilitarian analysis above thus results: the damages must not be so low as to trivialize the right that was violated, nor so high as to overcompensate a victim of a rights violation (and also deter its imposition).

3. The Necessary Components of a Restitutive System

The analysis offered above suggests that, to maintain or increase current levels of deterrence of police misconduct, an alternative to an exclusionary rule must have the following components:

1. It must be a system of judicial or quasi-judicial review of police conduct independent of the present civil courts, the criminal justice system and, of course, the police department itself.
 - a. It must recognize the standing of all victims, regardless of whether they have been arrested for a crime, to complain of police misconduct.
 - b. To minimize anticriminal or pro-police bias, the trier of fact probably should be a judge, not a jury, but complainants should be given a right to elect a jury.
 - c. The dispositions of this system must be compiled and made available to the public.
2. The remedy employed must be restitution.
 - a. Restitution must flow to the victim of police misconduct.
 - b. It must derive from the police department that employed the offending officer(s), except, perhaps, in the case of willful rights violations.
 - c. The amount of restitution must be more than nominal damages, but not so much as to inhibit courts from granting relief (or to overcompensate the victim).

IV. LIMITING THE PROPOSAL

The analysis presented thus far has been, strictly, a utilitarian one. Strong reasons support the belief that a system of relief based on restitution to victims of police misconduct will provide a greater

deterrent than a remedy based on the exclusion of illegally obtained but reliable evidence. For some categories of offenses, retention of the exclusionary rule in addition to a restitutive system may be desirable, while for other categories of offenses the system based on exclusion should be replaced with one based on restitution.

Foremost among the reasons for retention of the exclusionary rule is the dubious moral status of laws which prohibit possession of certain items, such as drugs and guns, even though such possession does not violate the rights of a specific individual. If, as many believe, the enforcement of such laws is itself an injustice against the "offender," then an exclusionary rule that frees such persons, albeit for constitutional reasons, is to be preferred over one that does not. For this reason alone, abolition of the exclusionary rule may be desirable only for those categories of crimes where individual rights violations have unquestionably occurred, *e.g.*, rape, robbery, murder, property offenses, preserving it in all other instances, *e.g.*, drug laws, tax prosecutions, and other regulatory prohibitions.⁸⁴

Restitution as a general approach to problems of criminal remedies has many merits.⁸⁵ A restitutive approach to justice undercuts the legitimacy of "crimes" without victims, or, more precisely, the practice of punishing persons who have violated no other person's rights. "So-called victimless crimes would in principle cease to be crimes."⁸⁶ Moreover, if such an approach were adopted widely, the release of a criminal known to be guilty would constitute a violation of the victim's rights because it would prevent the innocent victim from obtaining restitution to which the victim is entitled. A rule that had this effect would, according to the theory of restitutive criminal justice, be morally as well as practically objectionable. Couched in somewhat different terms, the operation of an exclu-

⁸⁴ I shall say more about this distinction in a future essay.

⁸⁵ I have considered them elsewhere. See Barnett, *Restitution: A New Paradigm of Criminal Justice* 87 *ETHICS* 279 (1977) [hereinafter cited as Barnett, *Restitution*]; and Barnett, *The Justice of Restitution*, 25 *AM. J. JURIS.* 117 (1980).

⁸⁶ Barnett, *Restitution*, *supra* note 85, at 300.

sionary rule would constitute an improper "taking."⁸⁷

The current criminal justice model based on punishment and rehabilitation systematically denies victims a right to restitution. As a result, the only costs imposed on others that can today be attributed solely to the exclusionary rule are the increased risks to others of future criminal conduct by released offenders and the feelings of outrage at and alienation toward our legal institutions. Extra-legal acts of retribution by citizens may be another consequence and cost of such a system. In a system of restitution, the fact that an exclusionary rule imposes costs on some persons (victims) for the offenses of others (police officers) would be conceptually much clearer.

Some independent utilitarian support also exists for making a distinction between victimless crimes and crimes with victims, when cautiously considering a proposal to abolish the exclusionary rule. First, the exclusionary rule is disproportionately invoked in prosecutions for crimes without rights violations. "Search and seizure is rarely relevant to the successful prosecution of victim crimes. It is generally agreed that systematic searches take place almost exclusively in the so-called contraband crimes of narcotics and gambling where a successful search and seizure is usually necessary to justify an arrest and conviction."⁸⁸ The reason is readily apparent. Enforcement of laws against possession is difficult in the absence of widescale searches without probable cause; thus, such abuses are likely to occur. Fears about the possible consequences of replacing the exclusionary rule with a different form of relief can be alleviated by retaining it for these crimes because they represent the bulk of those instances in which fourth amendment violations in fact occur.⁸⁹

⁸⁷ A similar argument is made by Wilkey in discussing the anomalies that would be created by the exclusionary rule if it were applied consistently so as to thwart the recovery of a victim's stolen property. *See* Wilkey, *supra* note 3, at 21-22. A restitutive theory recognizes the victim's right to receive compensation from a criminal for bodily harm and property damage as well as recovery of stolen goods.

⁸⁸ Loewenthal, *supra* note 30, at 252. For empirical confirmation of this see Oaks, *supra* note 29; and Spiotto, *supra* note 43.

⁸⁹ My thanks to Lewis Collens for suggesting this point.

Further, when a criminal court judge concludes that the police have acted improperly, the analysis above showed how he or she is inescapably faced with conflicting responsibilities.⁹⁰ On the one side is a judge's responsibility to "do justice" by convicting the guilty and to protect the public from the release into society of those who have violated the rights of others and are likely to do it again. On the other side is a judge's responsibility to protect the constitutional rights of the guilty. Restitutive relief resolves this tension. There is a good deal less tension to begin with, however, when the evidence suppressed is relevant to a statutory violation in which no citizen's rights have been violated. Judges (and citizens) are much less concerned that such defendants, if released, are likely to be dangerous (though not everyone will agree). The comparatively reduced concern makes the exclusion of evidence less costly to judges in victimless cases than in prosecutions for other categories of offenses, in part, because they are less newsworthy. Further, the moral uncertainty that surrounds such laws and the absence of a victim eases the tension between "doing justice" and protecting constitutional rights and further lowers the cost to the judge of excluding evidence.

Moreover, as compared with a prosecution for a victim crime, suppression will be more likely, if not certain, to scuttle the prosecution of a possessory offense.⁹¹ What is suppressed is the evidence of possession itself. As a result of this, and of the fact that judges are less reluctant to suppress evidence in such cases, if police are making an arrest to secure a conviction, the costs imposed by suppression *ex ante* are much higher in the case of victimless crimes than in crimes with real victims. In such cases, therefore, the exclusionary rule will have its greatest deterrent effect. When police are interested in obtaining convictions and not just street control, they routinely, and oftentimes with a good deal of exertion, obtain search and arrest warrants. On the other hand, police engage in arrests that they know are improper, not to obtain a conviction, but to effect street control or the confiscation of contraband. Ab-

⁹⁰ See *supra* text accompanying note 59.

⁹¹ "[I]n every single one of these cases in which a motion to suppress was granted, the charges were then dismissed." Oaks, *supra* note 29, at 746.

sent corruption, such is almost never the case with a victim crime. When the police do not seek a successful prosecution, any conviction that results from police misconduct would be a windfall and the release of the defendant that results from exclusion is the morally appropriate remedy, regardless of its lack of deterrent effect.

For these reasons, while a restitutive remedy should be available to any victim of police misconduct, no matter what crime the victim may be charged with having committed, the exclusionary rule should be abolished only in cases involving the violation of the personal or property rights of another citizen. A system of "dual remedies" for constitutional rights of defendants accused of crimes with victims should be rejected because (1) preservation of the exclusionary rule in such cases is unnecessary to obtain deterrence; and (2) any attempt to preserve the exclusionary rule would preserve the prevailing conflicting interests facing judges. A complete analysis would require a return to all of the earlier identified costs imposed on police departments, police officers and judges to show how many of the advantages of a restitutive system would be defeated by a dual system that preserved the exclusionary rule in all cases. One example would be the cost to the police of internally disciplining officers, when doing so is likely to jeopardize a criminal prosecution of a suspect. A complete discussion of this is not possible in this space and could be accomplished readily by the reader.

Finally, a system that retained the exclusionary rule for crimes with victims would perpetuate the current practice of freeing persons who are guilty of such violations. Whatever benefits are obtained by convicting those who are guilty of violating the rights of others would be increased by a system based on restitution and defeated by retaining the exclusionary rule in such cases. This article has dealt entirely with the costs of suppression as a means of comparing the relative deterrent effect of the two systems. It has made no mention of any benefits offered by a restitutive system independent of increased deterrence because such benefits cannot be measured and compared with the costs (if any) of such a system. However, an important category of benefits of a restitutive remedy that would be lost by the preservation of the exclusionary rule in cases where defendants have violated the rights of others is

the increased chances of convicting the guilty.

V. CONCLUSION

A restitutive remedy for the violation of constitutional rights does not require, for its deterrent effect, that the basic structure of law enforcement be changed. It does not require that the police cease to be concerned with arrests and become concerned with convictions. It does not require an officer to speculate correctly as to whether a contemplated violation will or will not affect the future disposition of a criminal case. It imposes legal responsibility for controlling police conduct on the appropriate party, the police department, while removing impediments that presently make this a more difficult task than it needs to be. A system based on restitution to victims of police misconduct will not end this misconduct, but it will provide a comparatively greater deterrent effect than the present reliance on the exclusionary rule.

If one is sensitive to the deterrence of unconstitutional conduct by police, the analysis presented here indicates the desirability of implementing the sort of system suggested by Chief Justice Burger, at least for those crimes in which the defendant is guilty of violating the rights of another person. Unfortunately, this proposal offers no guaranty that the police never will violate constitutional rights. But neither does the exclusionary rule. What this proposal does offer is a resolution of the dilemma posed by the exclusionary rule. By ceasing to be prisoners to a choice between the exclusionary rule and no meaningful protection of our constitutional rights, we can free ourselves to pursue more effectively a society free of crimes committed by any person, whether that person is in uniform or not.

