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DANGEROUS CRIMINALS, THE SEARCH FOR
THE TRUTH AND EFFECTIVE LAW
ENFORCEMENT: HOW THE SUPREME COURT
OVERESTIMATES THE SOCIAL COSTS OF THE
EXCLUSIONARY RULE

John P. Gross*

I. INTRODUCTION

The Supreme Court's recent decisions in *Hudson v. Michigan*¹ and *Herring v. United States*² have been viewed as calling into question the continued use of the exclusionary rule as a means of deterring illegal searches and seizures by the police.³ Specifically, the Court's focus on what it believes to be the rule's marginal deterrent effect coupled with the perceived extremely high social costs associated with the

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rule's application, as well as the availability of other remedies to deter police misconduct, suggests that the Court may be on the verge of abandoning the exclusionary rule as a remedy for Fourth Amendment violations.\(^4\) In these decisions the Court claims that it has always been reluctant to employ the exclusionary rule due to the costs it imposes on society,\(^5\) namely the obfuscation of truth, the thwarting of law enforcement objectives and the freeing of dangerous criminals.\(^6\) The Court's reasoning in this area not only overestimates the social costs associated with the use of the exclusionary rule, but the Justices' decisions reflect a fundamental misunderstanding of how our current criminal justice system functions. First, the Court's erroneous assumption that every person charged with a crime is a "dangerous criminal" inevitably leads to the conclusion that the use of the exclusionary rule puts ordinary citizens in danger. Second, the na"ıve description of a criminal trial as a search for truth ignores the reality that criminal trials are designed to limit the ability of the state to punish individuals; they are simply not a forum for truth-seeking. And third, the idea that the threat of excluding evidence significantly harms

\(^4\) The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

\(^5\) However, the idea that the exclusionary rule imposes social costs, and that these costs should be balanced against the rule's deterrent effect, was first developed by the Berger court in the 1970s. See Sharon L. Davies & Anna B. Scanlon, Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort", 41 U.C. DAVIS L. REV. 1035, 1050 (2008).

\(^6\) Hudson, 547 U.S. at 591 ("Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates substantial social costs which sometimes include setting the guilty free and the dangerous at large. We have therefore been cautious against expanding it and have repeatedly emphasized that the rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (internal quotation marks and citations omitted)). See also Herring, 129 S. Ct. at 700–01 ("To the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs. The principle cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system. The rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (internal quotation marks and citations omitted)).
the ability of the police to fight crime ignores the unlikelihood that any individual officer will ever be called upon to justify his or her actions in court. The high number of criminal cases that are resolved through plea bargaining makes the threat of suppression incredibly remote. And in most cases, particularly when the police suspect a person may possess drugs or a weapon, the possibility that evidence might be suppressed in court will in no way alter an officer's behavior.

In this article I will discuss the development of the idea that the exclusionary rule imposes unacceptably high social costs, focusing specifically on the fear that the rule leads to the guilty being set free, that it erodes confidence in our judicial system, and that it imposes a costly toll on the search for truth and on the objectives of law enforcement. I will begin by briefly examining the Court's initial view of the rule's purpose and then proceed to look more closely at the genesis of the idea that the rule imposes unacceptably high social costs. Finally, I will explore the underlying assumptions that the Court makes in order to come to the conclusion that the rule imposes these social costs and demonstrate why these assumptions are false.

II. THE SUPREME COURT'S CHANGING ATTITUDE TOWARD THE EXCLUSIONARY RULE

A. The Court's Early Exclusionary Rule Jurisprudence

Notably absent from the Supreme Court's decision first adopting the exclusionary rule for evidence unlawfully seized in violation of the Fourth Amendment is any mention of the social costs that might be imposed by the rule. The Court based its decision to adopt the exclusionary rule on the explicit limitations the Fourth Amendment imposed upon the federal government. The Court made it clear that the Fourth Amendment placed "limitations and restraints" on the

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8. Weeks v. United States, 232 U.S. 383 (1914) (government agents, acting without a warrant, broke open the door to the defendant's home and seized a variety of evidence that was later used to convict defendant of mail fraud).
exercise of federal power and that the purpose of the Amendment was "to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law." Excluding evidence obtained in violation of the Fourth Amendment thus becomes necessary because to allow such evidence against a defendant would render the protection of the Fourth Amendment "of no value," and absent a rule that would exclude such illegally obtained evidence, the Fourth Amendment "might as well be stricken from the Constitution." Thus the exclusionary rule becomes the necessary and inevitable corollary of the rights secured by the Fourth Amendment. The failure to implement the exclusionary rule would, to put it simply, "reduce[] the Fourth Amendment to a form of words." The only social costs identified by the Court following the adoption of the exclusionary rule are those associated with unchecked executive power. The Court was of the opinion that the police had a tendency to "obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution." The idea that the judicial branch of government would condone such overreaching by those charged with enforcing the law was seen as intolerable.

During this period, the Court went so far as to characterize the guaranties of the Fourth Amendment as "the very essence of constitutional liberty," stating further that these rights were "fundamental" and on equal footing with "the right to trial by jury, to the writ of habeas corpus, and to due process of law." The Court focused on the defense of these rights, and not on whatever negative effects the enforcement of these rights through the exclusionary rule might have on public safety. In fact, the fear was not that

9. Id. at 391–92.
10. Id. at 393.
13. Id. at 394 ("To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.").
“dangerous criminals” might be set free but rather that the actions of “well-intentioned, but mistakenly overzealous, executive officers,” would erode the rights guaranteed by the Fourth Amendment. The fact that the application of the exclusionary rule might afford a “criminal” the opportunity to commit other crimes was not a relevant factor that the Court considered because the “greatest dangers to liberty” were posed by law enforcement, “by men of zeal, well-meaning but without understanding.” The initial concern of the Court was not that an individual lawbreaker would escape punishment but that constitutional violations by law enforcement would go unchecked.

While subsequent decisions by the Court dealt with issues ranging from what constitutes a search under the Fourth Amendment, to the permissible scope of a search incident to a lawful arrest, the need for the application of the exclusionary rule when a Fourth Amendment violation has occurred was never in doubt. Contrary to the Court’s recent concern over the toll taken on our justice system by the application of the exclusionary rule, previously the rule was seen as necessary “in order to maintain respect for law; in order to promote confidence in the administration of justice;

15. Id. See also Trupiano v. United States, 334 U.S. 699, 705 (1948) (“In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.”); United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (“Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.” (citing Go-Bart Co. v. United States, 282 U.S. 344, 358 (1931); United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926))).


17. See generally id. (majority opinion) (considering whether a wiretap constitutes a “search” as defined by the Fourth Amendment).

[and] in order to preserve the judicial process from contamination." In the words of Justice Brandeis from his dissent in *Olmstead v. United States*:

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress.

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

The Court also displayed a willingness to apply the exclusionary rule when law enforcement violated specific provisions of a federal statute. Namely, the Court adopted the general principle that the sovereign is embraced by the general words of a statute intended to prevent injury and harm. Thus, whether the conduct by law enforcement constituted a violation of a constitutional amendment or a federal statute, the police would not be permitted to profit

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20. *Id.* at 484–85.
21. *Nardone v. United States*, 302 U.S. 379, 383 (1937) (holding the prohibition of wiretapping contained in the Communications Act of 1943 applicable to federal law enforcement, and suppressing evidence obtained as a result of an illegal wiretap). *See also* *McNabb v. United States*, 318 U.S. 332, 341–42 (1943) (holding that the failure of federal officers to bring the defendants before a magistrate judge immediately following their arrest, as required by statute, resulted in the exclusion of incriminating statements made during a lengthy period of custodial interrogation).
from their illegal conduct.

B. The Supreme Court's Shifting Construct of the "Dangerous Criminal"

More recently, in Herring v. United States, the Court did not require the suppression of drugs and a firearm that officers found in a search incident to an arrest based on a subsequently recalled warrant. In Hudson v. Michigan, police officers executed a search warrant for narcotics and weapons but admittedly violated the "knock-and-announce" rule and the defendant was subsequently convicted of drug possession charges. The Court held that the exclusionary rule was an inappropriate remedy for a "knock-and-announce" violation.

It could be argued that the Court's initial willingness to apply the exclusionary rule was influenced by the type of evidence subject to exclusion as well as the underlying offense. In the period immediately following the Court's decision in Weeks v. United States, the vast majority of the cases where the exclusionary rule was applied dealt primarily with the possession of alcohol or gambling instrumentalities and with various forms of tax evasion. The Court's two most recent decisions wherein it declined to apply the exclusionary rule dealt with the possession of illegal drugs and weapons.

24. Id. at 603–04.
26. In Hudson v. Michigan, 547 U.S. at 588, the defendant was found to be in possession of "large quantities" of drugs, including "cocaine rocks" in his pocket as well as a loaded gun, while in Herring v. United States, 129 S. Ct. at 698, the defendant was a convicted felon who was found to be in possession of
Perhaps Booker Hudson and Bennie Dean Herring were seen as "dangerous criminals" by the Court whose release into society would have imposed too great a cost. Yet the fact that a defendant may be a "dangerous criminal," however one chooses to define that term, was simply not part of the Court’s analysis when the exclusionary rule was adopted. In fact, on a number of occasions the Court dealt squarely with the notion that the application of the rule would allow "dangerous criminals" to go free and nevertheless excluded relevant evidence.27

For most of its history, the exclusionary rule has been viewed by the Court as necessary for the preservation of those

methamphetamine and a pistol.

27. In Goldman v. United States, 316 U.S. at 142 (Murphy, J., dissenting), Justice Murphy emphasized that the defendant’s culpability had no impact on the decision to apply the exclusionary rule:

The circumstance that petitioners were obviously guilty of gross fraud is immaterial. The Amendment provides no exception in its guaranty of protection. Its great purpose was to protect the citizen against oppressive tactics. Its benefits are illusory indeed if they are denied to persons who may have been convicted with evidence gathered by the very means which the Amendment forbids. Its protecting arm extends to all alike, worthy and unworthy, without distinction. Rights intended to protect all must be extended to all, lest they so fall into desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need.

The benefits that accrue from this and other articles of the Bill of Rights are characteristic of democratic rule. They are among the amenities that distinguish a free society from one in which the rights and comforts of the individual are wholly subordinated to the interests of the state. We cherish and uphold them as necessary and salutary checks on the authority of government. They provide a standard of official conduct which the courts must enforce. At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose vitality through legal interpretations that are restrictive and inadequate for the period in which we live.

Id. (internal citations omitted). The following year, in McNabb v. United States, 318 U.S. 332 (1943), the failure of federal officers to bring the defendants before a magistrate judge immediately following their arrest resulted in the exclusion of incriminating statements made while defendants were in the officers’ custody. The Court did not feel the need to try and justify the imposition of the exclusionary rule; there was no mention of what social costs might be imposed through its application. See generally id. This omission of the social costs analysis occurred despite the fact that McNabb involved a murder of a federal officer during a raid on a family of suspected bootleggers where illegal alcohol was recovered and where one of the defendants confessed to firing a shot at the officers. Id.
rights guaranteed by the Fourth Amendment. While the Court’s recent decisions in Hudson and Herring would lead one to believe that the Court has always feared applying the exclusionary rule because doing so leads to the release of dangerous criminals into society, that concern was first articulated by the Court seventy years after the exclusionary rule was adopted in Weeks.\(^\text{28}\) For most of its history, the truly “dangerous criminal” was not the bootlegger, the bookie, or the drug dealer, but was instead the government agent who exceeded his or her authority. A private individual who breaks the law is simply not as dangerous as the government agent who ignores the legal prohibitions contained in the Fourth Amendment. The former breaks a single law, while the latter imperils our liberty.

C. The Post-Leon Conception of the Exclusionary Rule as “Punishment”

Beginning in 1984 with the Court’s decision in United States v. Leon, the Court repudiated the notion that the exclusionary rule was a “necessary corollary of the Fourth amendment”\(^\text{29}\) and stated that the “substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights ha[d] long been a source of concern.”\(^\text{30}\) As the Court points out in Leon, a number of exceptions to the application of the exclusionary rule for a violation of the Fourth Amendment had already been carved out in previous decisions.\(^\text{31}\) And beginning in 1976 with the Court’s decision

\(^{28} \)See United States v. Leon, 468 U.S. 897, 907–08 (1984); Herring, 129 S. Ct. at 701 (“The principal cost of applying the rule is, of course, letting guilty and possible dangerous criminals go free—something that ‘offends basic concepts of the criminal justice system.’” (citing Leon, 468 U.S. at 908)); see also Hudson, 547 U.S. at 595 (referencing “the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society)” as the type of “substantial social cost” previously identified by the Court in Leon).

\(^{29} \)Leon, 468 U.S. at 905.

\(^{30} \)Id. at 907.

\(^{31} \)Stone v. Powell, 428 U.S. 465 (1976) (federal habeas corpus review of state convictions); United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceedings); Alderman v. United States, 394 U.S. 165 (1969) (holding that co-conspirators and co-defendants whose rights were not violated by illegal eavesdropping have no standing to object to the admission of evidence obtained as a fruit of such eavesdropping); Wong Sun v. United States, 371 U.S. 471 (1963) (attenuation doctrine); Walder v. United States, 347 U.S. 62 (1954)
in *Stone v. Powell*, the Court stated that one of the problems with the exclusionary rule is that "the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." This idea, namely that the implementation of the exclusionary rule interferes with the truth-finding function of judge and jury in a criminal case, was reiterated in several decisions prior to the Court's statement in *Leon* that "this interference with the criminal justice system's truth-finding function" is an "objectionable collateral consequence" of the exclusionary rule. The fact that the exclusionary rule precludes the consideration of reliable, probative evidence is viewed by the current Court as problematic. These substantial social costs—the freeing of dangerous criminals, the erosion of confidence in our system of justice, and the thwarting of law enforcement objectives—can only be justified if imposing the rule results in deterrence of illegal police conduct, and if deterring illegal police conduct and protecting individuals is valued as highly as deterring crime.

The exclusionary rule is no longer wielded by the Court as a weapon to combat what it previously identified as the

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34. *Leon*, 468 U.S. at 907.
35. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truth-finding process and allows many who would otherwise be incarcerated to escape the consequences of their actions.").
36. *Hudson v. Michigan*, 547 U.S. 586, 594–95 (2009) ("Quite apart from the requirement of unattenuated causation, the exclusionary rule has *never* been applied except where its deterrent benefits outweigh its substantial social costs." (internal quotation marks and citations omitted) (emphasis added)).
37. *Herring v. United States*, 129 S. Ct. 695, 700 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth amendment violations in the future. In addition, the benefits of deterrence *must* outweigh the costs." (internal citations omitted) (emphasis added)).
natural tendency of law enforcement to violate the Fourth Amendment in an effort to combat crime. Rather, it is viewed as a kind of punishment, which not only discourages well-intentioned law enforcement but also frees dangerous criminals. In a sense, the Court's pronouncement in Leon that the social costs exacted by the exclusionary rule "have long been a source of concern" is correct, although it would seem that the perception of what exactly those social costs are has changed considerably.

III. DANGEROUS CRIMINALS

A. The Court's Overbroad Definition of "Dangerous Criminals"

Let us examine the Court's fairly recent concern that the exclusionary rule imposes substantial social costs because it allows dangerous criminals to escape punishment. The fact that the Court fears letting guilty and potentially dangerous defendants go free displays a view of a defendant in a criminal case that is so simplistic that it borders on ignorance. The Court does not view a defendant as a person who may, or may not, have committed a specific crime, but rather as a potentially dangerous "criminal," a phrase which brings to mind murderers, rapists and robbers. Instead of viewing a defendant as a person who is alleged to have broken a specific law on a specific date at a specific time, the Court's choice of language clearly implies that it views a "criminal" as someone who is engaged in an ongoing effort to break the law. When we consider the emphasis given in Hudson and Herring to the idea that the person freed might be "dangerous," then we can see even more clearly the Court's assumption that anyone who is a defendant in a criminal case is, at the very least, potentially a dangerous criminal.


38. Leon, 468 U.S. at 907.

39. Herring, 129 S. Ct. at 701 ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free . . . "); Hudson, 547 U.S. at 591 ("The exclusionary rule generates substantial social costs, which sometimes include setting the guilty free and the dangerous at large." (internal quotation marks and citations omitted)).
However, statistics indicate that over 50% of defendants charged with a felony have never been previously convicted of a felony and that approximately 40% have no prior convictions. Only 4% of arrests nationwide are for violent crimes and only 12% are for property crimes. Arrests for possessor offenses, such as the possession of guns or drugs, which are the type of cases where we would expect the exclusionary rule to have the greatest impact, do not exceed 15% of arrests nationwide. It is worth noting that in both

40. In 2000, in the seventy-five largest counties in the United States, 42% of felony defendants had no prior convictions; an additional 18% had never previously been convicted of a felony. Table 5.53: Prior Felony Convictions of Felony Defendants in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t553.pdf (last visited Nov. 6, 2010). In 2002, 41% of felony defendants had no prior convictions; an additional 16% had never been convicted of a felony. Table 5.53.2002: Prior Felony Convictions of Felony Defendants in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t5532002.pdf (last visited Nov. 6, 2010). In 2004, 38% of felony defendants had no prior convictions; an additional 16% had never been convicted of a felony. Table 5.53.2004: Prior Convictions of Felony Defendants in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t5532004.pdf (last visited Nov. 6, 2010). See also Patrick A. Langan, Ph.D. & David J. Levin, Ph.D., Recidivism of Prisoners Released in 1994, NCJ, June 2002, available at http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf (indicating that while 67.5% of prisoners released in 1994 from state prisons in fifteen states were rearrested within three years, only 47% were actually convicted of a new offense and only 25.4% were returned to prison with a new sentence).

41. In 2008, 4% of arrests nationwide were for murder, non-negligent manslaughter, forcible rape, robbery and aggravated assault ("violent crimes"); 12% of arrests were for burglary, larceny, motor vehicle theft and arson ("property crimes"). See Table 4.1.2008: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412008.pdf (last visited Nov. 6, 2010). In 2007, 4% of arrests nationwide were for violent crimes; 11% of arrests were for property crimes. See Table 4.1.2007: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412007.pdf (last visited Nov. 6, 2010). In 2006, 4% of arrests nationwide were for violent crimes; 11% of arrests were for property crimes. See Table 4.1.2007: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412008.pdf (last visited Nov. 6, 2010). See Table 4.1.2007: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412008.pdf (last visited Nov. 6, 2010).

42. In 2008 the percentage of arrests for carrying or possessing weapons was 1% and for drug abuse violations was 12%. See Table 4.1.2008: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412008.pdf (last visited Nov. 6, 2010). In 2007, the percentage of arrests for carrying or possessing weapons was 1% and for drug abuse violations was 13%. See Table 4.1.2007: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412007.pdf (last visited Nov. 6, 2010).
Hudson and Herring, the defendants were charged with the possession of drugs and a weapon, so perhaps characterizing them as "dangerous" might be warranted. But the characterization of the defendants in Weeks, who were convicted of a type of mail fraud, and the defendant in Mapp v. Ohio, who was found to be in possession of "obscene" materials, as "dangerous defendants" is hardly credible. In essence, invoking the "dangerous defendant" justification is simply a scare tactic to inflate the supposed social costs of the exclusionary rule. Viewed another way, the Court's emphasis on the possibility that the exclusion of evidence will free dangerous defendants is a very subtle way of saying that the law should not apply to everyone; it is choosing to apply the penal law to defendants over applying the Constitution to law enforcement officers.

1. The Vanishing Presumption of Innocence

Perhaps even more disturbing is the way in which the Court's reasoning undermines the presumption of innocence. Admittedly, the Court is reviewing cases where a defendant has been convicted of a crime and thus the veil of innocence which cloaked the defendant during his or her trial has been stripped away. Nevertheless, when the Court is calculating whether or not to apply the exclusionary rule in a given situation, it is important to remember that the application of

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Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412007.pdf (last visited Nov. 6, 2010). In 2006 the percentage of arrests for carrying or possessing weapons was 1% and for drug abuse violations was 13%. See Table 4.1.2006: Estimated Number of Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t412006.pdf (last visited Nov. 6, 2010).

43. Booker T. Hudson was arrested following the execution of a search warrant for narcotics and weapons and was subsequently convicted of drug possession. Hudson v. Michigan, 547 U.S. 586, 588 (2006). Bennie Dean Herring was charged with being a convicted felon in possession of a firearm and knowingly possessing methamphetamine. Herring v. United States, 129 S. Ct. 695, 698 (2009).


46. See Brinegar v. United States, 338 U.S. 160, 181 (1949) ("We must therefore look upon the exclusion of evidence in federal prosecutions if obtained in violation of the Amendment as a means of extending protection against the central government's agencies. So a search against Brinegar's car must be regarded as a search of the car of Everyman.") (Jackson, J., dissenting).
the rule will take place before a trial commences. The fear that a dangerous criminal might escape punishment is then used by the Court to justify not applying the exclusionary rule at a point in time when a defendant is still presumed to be innocent.

To be certain, there are instances where the supposed "dangerous defendant" would be freed by the imposition of the exclusionary rule; but there are also countless defendants whose release would hardly be a scourge on society. Take, for instance, the case of a teenage college student who has never been arrested, who is stopped by the police for failing to come to a complete stop at a stop sign and then searched illegally. The police recover a small bag of marijuana. Under the current method of analysis, the court would presume that the application of the exclusionary rule would entail substantial social costs. I find it hard to imagine what "substantial" social costs would be imposed if a court granted suppression in this particular case. In addition, I hardly suspect that anyone would argue that suppression of the marijuana recovered in this case would result in the release of a "dangerous criminal."

Or take the case of an Iraqi War veteran who possesses an unregistered handgun, which under an applicable state law, is a crime. Suppose the police come to his house because his neighbors complain about the noise from a party. The police then proceed to enter his home without his consent and conduct an illegal search which results in the recovery of the aforementioned unregistered handgun. What "substantial" social costs are imposed by the suppression of this evidence? Why would the court automatically conclude that this defendant is a "dangerous criminal."

What about a defendant who had already been convicted of several drug possession charges, who is again charged with drug possession but was searched illegally? Assume that the quantity of drugs in this defendant's possession is entirely consistent with personal use and there is no other evidence suggesting that the defendant was attempting to sell drugs. As the case against this defendant progresses, the defendant enters a drug rehabilitation program. Eventually a suppression hearing is held and the court applies the exclusionary rule and the case against the defendant is dismissed. At the time the court grants suppression, the
defendant happens to have been clean for six months. Once again, I fail to see the "substantial" societal costs imposed in this case and I find it hard to imagine that anyone would characterize such a defendant as a "dangerous criminal."

If we remove the assumption that every defendant who gains the benefit of the exclusionary rule is potentially "dangerous," and if we view a defendant as simply someone charged with a crime rather than a "criminal," then the conclusion that the application of the rule entails substantial societal costs becomes suspect. Undoubtedly, there will be times when the application of the rule will free a defendant who can fairly be described as a dangerous criminal, someone who is engaged in and has every intention of continuing to engage in illegal activity that poses a serious threat to others. Gang members who are engaged in narcotics trafficking come to mind. However, this fact isn't an unintended social cost of the rule as the Court has been arguing; it is simply the price we pay to maintain the rule of law.47

2. The Court’s Misconceptions Regarding “Dangerous Criminals” Have Been Fueled By Incorrectly Assuming a High Rate of Criminal Recidivism.

An additional assumption inherent in the fear that dangerous criminals will be unleashed on society by the application of the exclusionary rule is that those who escape punishment will be emboldened. If this is to be believed, we must assume that the defendant who is facing a lengthy prison sentence who escapes punishment due to the exclusion of evidence concludes that he or she is immune from prosecution. Using this logic, we would likewise conclude that police officers who stop individuals for speeding and then only give them a verbal warning, as opposed to a ticket, are simply encouraging the individual to disregard the posted speed limit.

We might also consider the fact that many defendants who eventually reap the benefit of the suppression of evidence

have been in custody for a significant period of time prior to having their Fourth Amendment rights vindicated. While Justice Scalia may feel that the exclusionary rule amounts to a "get out of jail free card," a defendant who is charged with a felony may spend a significant amount of time in pre-trial detention before he or she has the opportunity to have a hearing on the legality of a search that led to incriminating evidence.

To be sure, there are some defendants who, having avoided punishment, will engage in other criminal activity. But under the Court's current analytical method, the assumption is that every defendant who avoids punishment as a result of the suppression of evidence will re-offend. It is just as logical to assume that a defendant who narrowly avoids a lengthy prison sentence due to the suppression of evidence will view any future criminal activity as too risky. While the application of the exclusionary rule may enable a

48. In 2000 and 2002, in the seventy-five largest counties in the United States, 38% of felony defendants were detained until the disposition of their case. Table 5.54: Felony Defendants Released Before or Detained Until Case Disposition in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2003), http://www.albany.edu/sourcebook/pdf/ts554.pdf (last visited Nov. 6, 2010); Table 5.54.2002: Felony Defendants Released Before or Detained Until Case Disposition in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/ts5542002.pdf (last visited Nov. 6, 2010).

In 2004, in seventy-five largest counties in the United States, 43% of felony defendants were detained until the disposition of their case. Table 5.54.2004: Felony Defendants Released Before or Detained Until Case Disposition in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/ts5542004.pdf (last visited Nov. 6, 2010).

In addition, the median time between arrest and sentencing for felons convicted in state Courts in 2000 was 153 days with 86% sentenced within one year. Table 5.50: Time Between Arrest and Sentencing for Felons Convicted in State Courts, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2003), http://www.albany.edu/sourcebook/pdf/ts550.pdf (last visited Nov. 6, 2010).

The median time between arrest and sentencing for felons convicted in state Courts in 2002 was 184 days with 78% sentenced within one year. Table 5.50.2002: Time Between Arrest and Sentencing for Felons Convicted in State Courts, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/ts5502002.pdf (last visited Nov. 6, 2010).


50. See U.S. Department of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1994, 7 (2002) (noting that within three years from their release, 67.5% of prisoners were rearrested for a new offense while 46.9% were convicted of a new crime with 25.4% back in prison as a result of another prison sentence).
defendant to avoid a more serious punishment, it is not logical to conclude that the rule interferes with rehabilitation, another purported goal of our criminal justice system.

B. The Mischaracterization of Trials as a "Search for Truth" has Wrongfully Narrowed the Exclusionary Rule's Scope

The exclusionary rule's "costly toll upon truth-seeking" is also cited by the Court in Hudson and Herring as one of the substantial social costs that the application of the rule entails.51 In 1927, shortly after adopting the exclusionary rule, the Court expressed concern that a criminal prosecution should amount to more than a "game" where evidence proving the defendant's guilt should be ignored because the police exceeded their authority.52 Nevertheless, for many years the Court steadfastly applied the rule regardless of how reliable or probative the evidence might have been in a given case.53 The underlying understanding of the rule's function was to encourage compliance with the Fourth Amendment by the only means available, namely the exclusion of evidence.54 There was recognition that the restrictions placed on the government by the Fourth Amendment would, by design, hamper law enforcement to a certain degree.55 The goal of the


52. See McGuire v. United States, 273 U.S. 95, 99 (1927) ("A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule.").

53. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Berger, J., dissenting) ("For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment." (citing Weeks v. United States, 232 U.S. 383 (1914))).

54. "Beyond doubt, a main objective of the rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.'" Herring, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). See also Stewart, supra note 47.


If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence will inevitably go
exclusionary rule was simply to compel law enforcement to obey the Fourth Amendment; the fact that its application would diminish, to some degree, the reliability of a verdict in a criminal case was viewed as irrelevant.56

In Alderman v. United States, the Court declined to extend the exclusionary rule to defendants who lacked standing to contest an illegal search.57 The Court was “not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.”58 This concern for discovering the truth counseled against extending the exclusionary rule to grand jury proceedings in United States v. Calandra,59 especially when the historically broad investigatory power of the grand jury is taken into consideration. Undoubtedly, society has an interest in discovering the truth and the exclusion of reliable evidence does come at a cost. But beginning with the Court’s decision in Stone v. Powell,60 the Court begins to characterize the exclusion of evidence in a criminal case as a kind of distraction that ignores the ultimate question in a criminal trial, that of the guilt or innocence of the defendant.61 The Court goes on to suggest that the indiscriminate application of the rule may actually generate “disrespect for the law and administration of justice.”62 It is worth noting that the Court fails to cite any prior decisions to support this assertion. For

undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the “price” our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment.

Id.

56. See Kaufman v. United States, 394 U.S. 217, 238 (1969) (“The purpose of the exclusionary rule, unlike most provisions of the Bill of Rights, does not include, even to the slightest degree, the goal of insuring that the guilt-determining process be reliable.”) (Black, J., dissenting).


58. Id. at 174–75.


61. Id. at 489–90 (“The costs of applying the exclusionary rule . . . are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.”).

62. Id. at 490–91.
the first time, the Court suggested that the application of the exclusionary rule, a rule that from its origins was designed to “compel respect” for the Fourth Amendment, may actually generate “disrespect for the law.” But even more significant is the Court’s characterization of a criminal trial as one where the “ultimate question” is the “guilt or innocence” of the defendant.64

The assertion that the ultimate question in a criminal trial is the “guilt or innocence” of the defendant is simply a misstatement of basic criminal procedure. No defendant in the United States may be found innocent by a jury of his or her peers. The only options given to the trier of fact are “guilty” or “not guilty.” The Court’s assertion that the application of the rule takes a toll on the search for truth, which began in Stone v. Powell,65 and has continued unchallenged for nearly thirty-five years,66 is only relevant if a criminal trial is, in fact, a search for truth. It is astonishing that this assertion has gone unchallenged for so long.

Simply put, criminal trials are not a search for the truth. If they were, then the jury would be called upon to make findings of fact, or at the very least, they would have the option of declaring that a defendant was “guilty,” “not guilty” or “innocent.” It is important to remember that a jury in a criminal trial is only being asked to decide whether or not the prosecution has proven its case beyond a reasonable doubt, thus they can only find a defendant “guilty” or “not guilty.” It is one thing to recognize that there is a “public interest in prosecuting those accused of crime and having them acquitted

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64. Stone, 428 U.S. at 489–90.
65. Id. at 489–91.
66. See Herring v. United States, 129 S. Ct. 695, 701 (2009) (“[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998))). The Court goes on in Pennsylvania Board of Probation and Parole to say, “[a]lthough we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.” 524 U.S. at 364–65 (citing Payner v. United States, 447 U.S. 727, 734 (1980)). Further, the Court pointed out in Payner v. United States that “cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury.” 447 U.S. at 734.
or convicted on the basis of all the evidence which exposes the truth, and that there is a "strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." But the claim that the "ultimate question" in a criminal trial is the "guilt or innocence" of the defendant and that a criminal trial is a "search for truth" is something very different. By falsely claiming that the truth is being deflected by the exclusionary rule, the Court is able to inflate the costs of the exclusionary rule.

If a criminal trial is a way of limiting the state's authority to punish suspected law breakers then the exclusion of evidence obtained by the government in violation of the Constitution seems entirely reasonable. But if one characterizes the criminal trial as a search for the truth, then the rule is no longer one of many that limit the state's authority. Instead, it works to undermine the supposed goal of our criminal justice system: the discovery of the truth. To be blunt, the truth doesn't always matter in a criminal case; the search for truth is often held in check by the Constitution. Undoubtedly, compelling a defendant to testify at a criminal trial would assist the trier of fact in determining the truth, but the Fifth Amendment forbids it. Evidence is regularly kept from the jury so as not to prejudice them when they attempt to decide the very narrow issue of whether or not the prosecution has proven their case beyond a reasonable doubt. For example, a defendant's prior criminal convictions may or may not be admissible, depending on the circumstances of the case, and a complainant's prior

69. See Oregon v. Hass, 420 U.S. 714, 722–23 (1975) ("We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution.").
70. The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.
sexual history in a rape case may or may not be admissible due to "rape shield" laws. The court regularly balances the relevancy of certain types of evidence for fear that certain evidence, even if it is reliable or probative, might unduly prejudice the jury.

The other question that arises when we consider the Court's assertion that the application of the exclusionary rule impedes the "truth-finding functions of judge and jury" is what "truth" are we more concerned about: the truth that a defendant may have been in possession of incriminating evidence or the truth that government agents violated the Constitution in an effort to recover that evidence? This question is perhaps best answered after considering the standing requirements first articulated by the Court in Jones v. United States. If a defendant is required to assert a legitimate expectation of privacy in the area searched by the police, then in cases where the defendant is alleged to have been in possession of some type of contraband, the defendant will essentially be admitting to possession of the illegal item to assert his or her Fourth Amendment rights. If that is the case, how does the application of the exclusionary rule deflect the truth? The truth is that a defendant was in possession of contraband and has admitted such in requesting a hearing on the legality of the police conduct. The application of the exclusionary rule doesn't prevent society from knowing the truth; it prevents the government from punishing someone who possessed contraband. In Herring, it was undoubtedly true that Bennie Dean Herring was in possession of drugs and a gun. And it was equally true that the warrant the officer relied upon to make the arrest was no longer valid. If the Court were to have deemed that evidence inadmissible due to a Fourth Amendment violation, would the fact that the defendant was in possession of drugs and a gun be any less true?

In United States v. Payner, when declining to apply the exclusionary rule, the Court noted that "it is the defendant, and not the constable, who stands trial." The Court is

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71. Payner, 447 U.S. at 734.
73. Payner, 447 U.S. at 734.
clearly referencing Judge Cardozo’s famous opinion in *People v. Defore.* But the oft-quoted adage that the criminal is to go free because “the constable has blundered” is itself a subtle mischaracterization of the truth; the truth is that when the rule is applied, a defendant avoids conviction because the government broke the law.

C. The Court’s Drastic Oversimplification of “Law Enforcement Objectives”

In both *Herring* and *Hudson* the Court references the exclusionary rule’s costly toll on “law enforcement objectives.” This sentiment is a far cry from the Court’s pronouncement in *Mapp v. Ohio* that we cannot assume that “as a practical matter, adoption of the exclusionary rule fetters law enforcement.” The question then must be asked, what are the objectives of law enforcement? The objective of police officers is to apprehend those suspected of crimes while the objective of the prosecutor is to convict those accused of crimes. While these two objectives are not mutually exclusive, they are hardly identical. The Court seems to assume that the objective of all “law enforcement” is to punish those who commit crimes through conviction and incarceration. The previously discussed emphasis placed on “substantial social costs” attributed to the exclusionary rule, the greatest of which the Court declares is “letting guilty and possibly dangerous defendants go free,” would seem to indicate that the sole objective of law enforcement is to

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74. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) ("The criminal is to go free because the constable has blundered.").

75. *See* *Herring* v. United States, 129 S. Ct. 695, 701 (2009) ("[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998))); *Hudson* v. Michigan, 547 U.S. 586, 591 (2006) ("We have therefore been cautious against expanding it and have repeatedly emphasized that the rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application." (citing Pa. Bd. of Prob. & Parole, 524 U.S. at 364–365; *Colorado v. Connelly*, 479 U.S. 157, 166 (1986)) (internal quotation marks omitted)); Pa. Bd. of Prob. & Parole, 524 U.S. at 364–65 (“Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule.” (citing *Payner*, 447 U.S. at 734)).

punish the guilty. While arguably the ultimate objective of law enforcement is to see that the guilty are punished, the suggestion that the application of the exclusionary rule thwarts "law enforcement objectives" is a drastic oversimplification used by the Court to suggest that the costs of applying the rule are unreasonably high.

Let us consider for a moment the "objectives" of the typical law enforcement officer. The primary objective of a police officer is to arrest those who violate the law. The officer may hope to see the arrestee prosecuted, convicted and then sentenced; but his primary focus is on the arrest. The Court has previously referenced this fact when considering the effectiveness of the exclusionary rule.77 In fact, once the arrest is made, the likelihood of the defendant entering a plea of guilty and the improbability of the case ever going to trial would suggest that law enforcement objectives, if we assume that objective is a conviction, are hardly impacted at all by the exclusionary rule.78 The criminal justice system's current

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77. "The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant." Irvine v. California, 347 U.S. 128, 136 (1954).

78. The conviction rate for defendant charged with felonies in the seventy-five largest counties in the United States in 2004 was 68%. Table 5.57.2004: Adjudication Outcome for Felony Defendants in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t5572004.pdf (last visited Nov. 6, 2010). Of those convicted, 98% plead guilty while 2% were convicted following a trial. Id. While 23% of those charged with felonies had the charges dismissed only 1% were acquitted after trial. Id.

The conviction rate for defendants charged with felonies in the 75 largest counties in the United States in 2002 was 68%. Table 5.57.2002: Adjudication Outcome for Felony Defendants in the 75 Largest Counties, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t5572002.pdf (last visited Sept. 29, 2010). Of those convicted, 96% plead guilty while 3% were convicted following a trial. Id. While 24% of those charged with felonies had the charges dismissed only 1% were acquitted after trial. Id.

In New York State, 68.9% of adult felony arrests resulted in conviction in 2008 and only 0.4% of defendants were acquitted after trial. New York State Department of Criminal Justice Statistics, Disposition of Adult Arrests (Nov. 16, 2009), available at: http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf. For adult drug felony arrests, the conviction rate was 73.3% and only 0.3% of defendants were acquitted after trial. Id. The fact that the conviction rate for felony drug charges is higher than that for felonies in general would suggest that the exclusionary rule does very little to interfere with law enforcement objectives.
reliance on plea bargaining significantly reduces the chance that an officer's conduct will ever be scrutinized by a court, which means that law enforcement objectives would almost never be impacted by the infrequent application of the exclusionary rule.79

In addition to the unlikelihood that an officer would ever be required to testify in court regarding an arrest, there are several other factors which undercut the Court's assumption that the exclusionary rule frustrates the objectives of law enforcement. One is the concern that police officers would have for their safety. In the vast majority of street encounters and vehicle stops it can be argued that an officer's immediate concern for his or her safety trumps any remote fear that evidence might someday be excluded. It is simply irrational to assume that the fear of the exclusionary rule will discourage a police officer from searching a person or a vehicle for a weapon. Ultimately, any rational officer would choose to err on the side of caution and not on the side of the Constitution.80

because we would expect the application of the rule to have the greatest impact on possessory offences such as drug or weapons charges. See id. National statistics also seem to indicate that there is a greater likelihood of conviction for drug offenses than for other violent offenses or for types of property crime. See Table 5.0002.2004: Felony Convictions and Sentences and Rate Per 100 Arrests, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t500022004.pdf (last visited Nov. 6, 2010).

In California, 59% of felony defendants entered pleas of guilty before trial during the 2007-2008 fiscal year while only 2% of felony arrests were resolved with a trial. See 2009 Court Statistics Report: Statewide Caseload Trends, JUDICIAL COUNCIL OF CALIFORNIA, http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf (last visited Nov. 6, 2010). Overall, 61% of felony defendants were convicted of a crime while only 15% were either acquitted or had their cases dismissed. See id.

79. In United States v. Leon, 468 U.S. 897, 907 (1984), the Court found that one of the objectionable collateral consequences of the exclusionary rule "is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." Id. It is somewhat puzzling that the Court finds the possibility of a "favorable plea bargain" to be such an objectionable collateral consequence of the exclusionary rule. An objection to the guilty being set free is one thing, but it is difficult to see how a plea bargain impacts the criminal justice system's supposed truth-finding function.

80. This sentiment is perhaps best expressed by the unofficial first rule of law enforcement: "make sure that when your shift is over you go home alive." THE UNTOUCHABLES (Paramount Pictures 1987).
Furthermore, the focus upon convicting and incarcerating a defendant as the objective of law enforcement ignores the separate objective of seizing contraband. Both law enforcement and society in general have a vested interest in the seizure of dangerous and illegal items, such as firearms and narcotics. Because the confiscation of contraband is in itself a societal "good," even if the evidence were to be subsequently suppressed, there would be minimal "costs" on society imposed by the exclusionary rule. While the objective of convicting the defendant who possessed the contraband might not be achieved, the removal of the contraband from society is another law enforcement objective that has been achieved despite the exclusionary rule. It is worth noting that, unlike in Weeks, where the defendant was petitioning to have the evidence at issue returned to him, Bonnie Dean Herring was not going to be handed back a handgun and methamphetamine if the Court had applied the exclusionary rule in his case. Furthermore, confidence in our judicial system is not eroded by such an application. Unlike the situation where someone goes unpunished for a violent crime perpetrated upon another citizen, when someone is charged with merely possessing a prohibited item, the exclusion of evidence obtained by the police when there has been a violation of a defendant's Fourth Amendment rights serves to reinforce the public's confidence in the rule of law.

In fact, one can imagine a scenario where law enforcement intentionally disregarded the prohibitions against unreasonable searches and seizures in order to effectuate the seizure of contraband with full knowledge that

81. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) ("Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: It undeniably detracts from the truth-finding process and allows many who would otherwise be incarcerated to escape the consequences of their actions.").


83. See Stone v. Powell, 428 U.S. 465, 490–91 (1976) ("Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.").
whatever evidence they might recover would be deemed inadmissible. Consider a neighborhood where the proliferation of gun violence had reached epidemic proportions. The police might adopt a tactic of aggressively searching anyone they stop for a traffic infraction with the objective of getting as many guns off the street as possible. The fact that the weapons they recover might be suppressed and convictions rendered unattainable by the exclusionary rule becomes irrelevant. The confiscation of the illegal weapon, the arrest and possible pre-trial detention of the defendant and the possibility of a conviction for some offense as part of a plea bargain all further the objectives of law enforcement.  

**CONCLUSION**

In *United States v. Leon*, the Court announced that the "substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern." But the Court fails to analyze those "substantial" costs, other than to reference the impediment to the "truth-finding" functions of the judge and jury which the Court had previously identified in *United States v. Payner*. The fear the Justices articulate is that "some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." They also are concerned with the "magnitude of the benefit conferred on such guilty defendants" and believe that this is offensive to the "basic concepts of the criminal justice system." The overarching fear seems to be that the application of the rule will generate disrespect for the law and the administration of justice. That

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84. *In United States v. Calandra*, 414 U.S. 338, 351 (1974), in deciding it was unnecessary to extend the exclusionary rule to grand jury proceedings, the Court suggested that "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained." I find this reasoning to be highly suspect when we consider the coercive effects of pre-trial detention coupled with our current criminal justice system's reliance on plea bargaining. It would seem entirely logical for a prosecutor to obtain an indictment against a defendant and then offer a favorable plea bargain which the defendant may very well accept in order to avoid the risk of incarceration.


88. *Id.* at 908.
fear, coupled with the belief that the rule entails "substantial" social costs, continues to inform the Court's reasoning when it comes to the application of the exclusionary rule, as evidenced by the Court's two recent opinions in *Hudson v. Michigan* and *Herring v. United States*.

However, as I have argued, these fears are overblown and fail to take into account some of the basic tenants of our criminal justice system. The idea that most, if not all of the defendants charged with a crime are dangerous is simply an exaggeration. Moreover, the suggestion that a criminal trial is a search for the truth is a mischaracterization of basic criminal procedure. The statement that the focus of a criminal trial is, and should always remain, on the guilt or innocence of a defendant is simply untrue. The conclusion that imposing the rule will somehow frustrate law enforcement fails to recognize the proliferation of plea bargaining and the practical objectives of police officers.

Fundamentally, the Court has changed how it views the exclusionary rule. Originally, the exclusionary rule was a way of protecting the people from their own government. Now, the Supreme Court characterizes the rule as not only an obstacle to effective law enforcement but also as a threat to the safety of the citizenry. The Court now focuses its attention on the fact that the guilty may be set free by the application of the exclusionary rule and tend to ignore the fact that an officer of the law has broken it. While the dissenting Justices in *Herring* may disagree with the majority regarding the effectiveness of the exclusionary rule as a deterrent, they fail to challenge the assumption that the rule imposes unacceptably high social costs. If the Court were to attempt to articulate "a more majestic conception" of the Fourth Amendment and the exclusionary rule, it might first do well to confront the exaggerated claims of the rule's cost to our society. Ultimately, the Court needs to remember that

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91. "Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." *McNabb v. United States*, 318 U.S. 332, 343 (1943).
93. *Id.* at 707 (citing *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).
the rule is designed to protect the people from their government, which has the potential to become the most dangerous of criminals.