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A SPECTACULAR NON SEQUITUR: THE SUPREME COURT'S CONTEMPORARY FOURTH AMENDMENT EXCLUSIONARY RULE JURISPRUDENCE

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ABSTRACT

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence is constructed upon an analytic mistake that H. L. A. Hart described in another context as a "spectacular non sequitur." The Court's non sequitur is a consequence of its recent insistence that the sole justification for excluding evidence seized in violation of the Fourth Amendment is the prospect of deterring law enforcement officers. This exclusively consequentialist approach ignores or rejects the principled foundations of the rule. It also creates conceptual and practical problems for the Court's larger exclusionary rule doctrine, including the good faith exception, the cause requirement, and the requirement to show standing. Faced with these results, the Court has two options. First, it can abandon almost a century of doctrine in favor of a dramatically expanded exclusionary rule cut loose from general rules and exceptions; or, second, the Court can preserve the bulk of its Fourth Amendment exclusionary rule jurisprudence by adopting a hybrid theory of the exclusionary rule that embraces retributive principles. This Article argues for the latter course and explores the consequences. Principal among them is that the Court must accept the exclusionary rule as the natural and necessary sanction for Fourth Amendment violations rather than a contingently justified judicial doctrine. Although some Justices and their academic supporters may think this a steep price to pay, this Article argues that the costs are more than justified by the rewards of doctrinal coherence, added clarity, and predictability.

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INTRODUCTION

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence is constructed upon an analytic mistake that H.L.A. Hart described in another context as a "spectacular *non sequitur*."[1] That path to irrelevance is paved by the Court's insistence that the sole justification for excluding evidence seized in violation of the Fourth Amendment is the prospect of deterring law enforcement officers from committing future violations.[2] This deterrence-only approach ignores or rejects more principled justifications that inspired the rule at its genesis and have sustained it through the majority of its history and development.[3] More worrisome, however, is that deterrence considerations are conceptually insufficient by themselves to justify core components of the Court's Fourth Amendment exclusionary rule doctrine, including the good faith exception and the cause and standing requirements.[4] Faced with this conclu-

1. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 19 (1968).

2. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

3. *See generally* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 536 (1975); Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47 (2010).

4. The deterrence-only approach is also insufficient to justify the wide-ranging collateral use exception, which allows the government to rely on unlawfully seized evidence in non-criminal proceedings such as parole hearings and deportation procedures. The range of issues implicated by the collateral use exception is quite broad. Discussion of this exception is therefore reserved for separate treatment. *See* David Gray, Meagan Cooper & David McAloon, *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7 (2012).

sion the Court has two options: It can abandon almost a century of doctrine in favor of a dramatically expanded exclusionary rule cut loose from general rules and exceptions, or it can preserve and clarify the bulk of its Fourth Amendment exclusionary rule jurisprudence by adopting a hybrid theory that embraces retributive principles derived from the constitutional imperatives historically dominant in the Court's exclusionary rule cases.[5] This Article contends that the Court should take the latter road. There are tolls to be paid, of course, but they are modest and few. Principal among them is that the Court must again endorse the exclusionary rule as a "necessary consequence of a Fourth Amendment violation"[6] rather than as a mere judicial construction contingently supported by speculative deterrence calculations. This Article therefore stands in opposition not only to the contemporary Court, but also to proposals by Guido Calabresi,[7] Christopher Slobogin,[8] Akhil Amar,[9] Randy Barnett,[10] Richard Posner,[11] and others that would jettison the exclusionary rule in favor of alternatives such as sentencing reduction and civil enforcement.[12]

The charge of spectacular non sequitur requires explanation and elaboration. Part I makes the initial case. Part II traces the doctrinal history in order to highlight the central role of constitutional principle in the Court's construction and elaboration of the Fourth Amendment exclusionary rule and its more recent decision to justify the rule as a form of punishment designed to deter officers from violating the Fourth Amendment.[13] Although subject to criticism on and off the Court, this "punitive turn"[14] raises the question of what theory of punishment should guide courts when applying the exclusionary rule.

Part II draws connections between the Court's historical concerns with constitu-

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5. *Cf.* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 565 n.1 (1983) (noting the exclusionary rule "did originally and for much of its life" rest on principle rather than utility) (emphasis omitted) (citing Allen, *supra* note 3, at 537).

6. Herring v. United States, 555 U.S. 135, 141 (2009).

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

8. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999).

9. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 791–92 (1994). For an incisive critique of Amar's views on the Fourth Amendment and exclusionary rule, see Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

10. Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983).

11. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1981).

12. For a trenchant argument against civil enforcement, see Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

13. Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1294, 1310–15 (2000).

14. After taking its punitive turn, the Court has borrowed heavily from its own constitutional tort doctrine. *See* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011). Laurin suggests this borrowing has brought considerable confusion to the Court's exclusionary rule jurisprudence. *Id.* at 743. The remedy promoted in this Article might be of considerable use in meeting those concerns. *See infra* Part III.

tional principle and retributivist theories of punishment to propose a hybrid theory committed to retributivist principles and to utilitarian concerns. This proposal is offered not as an ideal defense of the exclusionary rule but as a conceptually coherent account of the Court's exclusionary rule jurisprudence after taking the punitive turn as a given. Others may prefer to turn back the clock, but that is not the agenda here.[15]

Part III discusses major components of the Court's exclusionary rule jurisprudence including the good faith exception, the cause requirement, and the standing requirement, and offers three principal reasons why this hybrid approach is novel and more powerful than prior attempts to theorize the Fourth Amendment exclusionary rule. First, as Christopher Slobogin has pointed out, all the non-utilitarian defenses of the exclusionary rule that have been offered so far turn on the claim that suppression is an individual right of the defendant.[16] The hybrid approach proposed here does not; rather, it frames exclusion as a retributively justified public response to illegal searches. Second, as Akhil Amar has argued, all of the Court's attempts to justify the exclusionary rule and its doctrinal components after the punitive turn are "wholly inadequate to the task at hand" and "cannot explain where [the exclusionary rule] comes from . . . why it applies only in criminal and not civil cases . . . [or the] Fourth Amendment standing doctrine."[17] The hybrid approach is up to this task. Third, in answer to frequent complaints about the Court's contemporary deterrence-only approach, renewed again recently in *Messerschmidt v. Millender*,[18] the hybrid approach promises welcome predictability by providing lower courts with clear guidance based on familiar common law rules governing criminal responsibility. Part IV concludes.

I. THE SPECTACULAR NON SEQUITUR

Jeremy Bentham famously attempted to rationalize familiar culpability excuses such as infancy and insanity based solely on utilitarian considerations,[19] and without relying on the retributivist principles traditionally deployed to defend common law conditions of criminal responsibility.[20] H.L.A. Hart later argued that

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15. *See, e.g.*, Robert M. Bloom & Erin Dewey, *When Rights Become Empty Promises: Promoting an Exclusionary Rule that Vindicates Personal Rights*, 46 IRISH JURIST 38, 41–42 (2011) (arguing the exclusionary rule is a less effective remedy when justified by deterrence theory).

16. Slobogin, *supra* note 8, at 365.

17. Amar, *supra* note 9, at 791–92.

18. Petition for Writ of Certiorari, Messerschmidt v. Millender, No. 10-704 (Nov. 22, 2010), *cert. granted*, 131 S. Ct. 3057 (2011) (presenting the question whether "the Malley/Leon standards [should] be reconsidered or clarified in light of lower courts' inability to apply them in accordance with their purpose of deterring police misconduct . . . "). The Court ultimately decided to stand pat. *See* Messerschmidt v. Millender, 132 S. Ct. 1235 (2012).

19. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, at ch. 13, § 3 (1789).

20. *See, e.g.*, 5 WILLIAM BLACKSTONE, COMMENTARIES *20–33.

Bentham's efforts amount to a "spectacular *non sequitur*."[21] This Part contends that the charge Hart levels against Bentham applies with equal force to the Supreme Court's efforts to justify the Fourth Amendment exclusionary rule based solely on deterrence considerations. It begins by elaborating Hart's critique of Bentham.

A. Bentham's Spectacular Non Sequitur

The common law has long excused those who act from infancy, insanity, or honest mistake of fact. Retributivists endorse these excuses in light of their principled commitment to punish only those who are culpable for their conduct.[22] Bentham rejected retributivism but was nevertheless interested in preserving these common law excuses. He therefore attempted to reconstruct them based solely on utilitarian considerations.[23] Bentham's efforts turn on his claim that it would be "inefficacious" to punish inculpable offenders because the threat of penal sanction did not and could not reach them, and therefore did not and could not have played a role in their decisions to act.[24] From a utilitarian point of view, Bentham reasons, punishing the inculpable simply serves no crime-control purpose because they could not have been deterred. Bentham therefore concludes that the insane, the infantile, and those who act from mistake should qualify for a general excuse from criminal responsibility because punishing them would cause pain without generating compensatory reductions in future disutility as a product of deterrence.[25]

The substance buttressing Hart's charge of "spectacular non sequitur" is that Bentham's attempted reconstruction of common law excuses falls well short of justifying a *general* prohibition against, for example, punishing the insane. Rather, "all that [Bentham] proves," Hart writes, "is the quite different proposition that the *threat* of punishment will be ineffective so far as the class of persons who suffer from these conditions is concerned."[26] Hart continues:

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21. HART, *supra* note 1, at 19.

22. For a brief sketch of these retributivist commitments, see David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1617, 1656–72 (2010). As I acknowledge there, and here, "retributivism" is a fairly big tent that includes a variety of theories. *See infra* notes 161–79 and accompanying text. For present purposes, I use "retributivism" to refer to theories that are committed to the proposition that punishment can only be justified because it is deserved. By contrast, utilitarian theories hold that punishment can only be justified because it produces more good than ill, usually by preventing future crime.

23. BENTHAM, *supra* note 19, at ch. 13, § 3.

24. *Id*.

25. For a contemporary overview of punishment theory's concerns with utilitarian justifications, see John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009); Gray, *supra* note 22; Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 212–13 (2009); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010); Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605 (2011).

26. HART, *supra* note 1, at 19 (emphases omitted).

> Plainly it is possible that though (as Bentham says) the *threat* of punishment could not have operated on them, the actual *infliction* of punishment on those persons, may secure a higher measure of conformity to law on the part of normal persons than is secured by the admission of excusing conditions.[27]

It is a straightforward but powerful point with echoes in the distinction between specific deterrence and general deterrence. Punishing an insane offender may not serve to deter that offender or others who are insane. However, punishing all offenders, including the insane, may well aid in deterring other potential offenders who would be inclined to violate the law were it not for the clear and consistent threat of punishment backed by general enforcement of the law. Hart's point also has a temporal dimension. After all, although it is certainly true that punishing an insane offender—or any offender—now will not have deterred him in the past, it does not follow that doing so will not deter him in the future if his condition abates or if punishing in the present provides more traction for later threats of future punishment. The point is particularly persuasive in the case of mistakes of fact. That is, in part, why criminal codes and punishment theories grounded in utilitarian considerations are willing to recognize strict liability crimes and to punish offenders who make negligent mistakes of fact.[28]

We can also see Hart's point by subjecting Bentham's defense of excuses to an argument ad absurdum. Let us start with the fundamental deterrence premise:[29]

> Punishment is justified if and only if it will reduce future crime by deterring potential offenders.

Now consider in syllogistic form Bentham's reconstruction of culpability excuses:

> 1. An offender should be punished if and only if his punishment will deter him or similarly situated offenders from committing future crimes.
> 2. Punishing an insane offender will not deter him or similarly situated insane offenders.
> 3. Therefore, by *modus tollens*, insane offenders should not be punished.

For purposes of the argument, let us assume premises 1 and 2. Now, every criminal offender was not, by definition, deterred by previous punishments inflicted against him and other similarly situated offenders. Furthermore, every future offender will, by definition, not have been deterred by the threat of punishment posed by prior punishments of him or other similarly situated

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27. *Id.*

28. *See, e.g.*, MODEL PENAL CODE § 2.02 (Official Draft 1962).

29. A more complete consequentialist justification of punishment would entail a more holistic accounting of the costs and benefits associated with punishment. *See, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (using an "'economic' approach" to analyze the "optimal amount" of criminal enforcement). Although more complicated, that complete picture does not bar analysis of the components because a totality is the sum of its parts, even if there is a premium added to the whole.

offenders. Therefore, if the measure of criminal responsibility is whether an offender and those similarly situated would be deterred if he is punished, then it seems to follow that nobody who violates the law should be punished, because neither he nor anybody who is similarly situated—law-breakers—was or will be deterred by the spectacle. By contrast, the innocent have and do demonstrate their susceptibility to the threat of punishment. Therefore, if Bentham's argument is taken to its natural conclusion, then it seems only the innocent should be punished because it is only the innocent who have demonstrated that they and those similarly situated have been deterred or will be deterred.[30]

Unfortunately, a practice of punishing the innocent and excusing the guilty leaves no motive to obey the law. Worse, it actually provides an incentive for citizens to break the law in order to demonstrate they are undeterred or undeterrable.[31] Abiding this result would obviously compromise the core goal of utilitarianism. To avoid this absurd result Bentham appears to have two choices. First, he can abandon punishment as a practice. This move gets him nowhere, however, because it removes major disincentives against committing crimes. Alternatively, he can abandon his second premise and license punishing the guilty regardless of whether they or those like them will be deterred, as long as doing so will enhance general deterrence. Hart argues that Bentham is committed to this latter course.[32]

None of this means the balance of costs and benefits might not be in favor of excusing any individual offender who is inculpable. Rather, the point is that deterrence considerations alone cannot justify a *general* excuse for all offenders who are inculpable.[33] For example, one might argue that excusing the insane as a class would not diminish general deterrence because there are relatively few such offenders. However, if we can excuse, say, twenty percent of offenders without compromising general deterrence, then it is not clear why culpability rather than the nature of the offense, risk and nature of future offenses, sensitivity of the

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30. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 9 (1971).

31. Although this may seem far-fetched, Part III explains how the Court's contemporary deterrence-only approach creates strong incentives for officers to violate the Fourth Amendment. *See also*, Gray, Cooper & McAloon, *supra* note 4 (detailing the effects of the contemporary "silver platter doctrine" on law enforcement's respect for Fourth Amendment rights).

32. HART, *supra* note 1, at 19. Bentham does not appeal to other utilitarian justifications of criminal punishment such as incapacitation or rehabilitation, and for good reason. *See supra* text accompanying notes 23–25. Incapacitation and rehabilitation both turn on individualized assessments of future dangerousness, which spin free from general considerations of culpability. Take crimes of passion. Some crimes of passion are committed by otherwise good citizens faced with one-off circumstances. The classic example is the cuckold. Others are committed by hotheads prone to losing their tempers. Although the effects of passion on their culpability may be the same, the cuckold is much less likely to reoffend than the hothead and, therefore, there is little reason to incapacitate or attempt to rehabilitate the cuckold but there is strong reason to make those attempts with the hothead.

33. Becker, *supra* note 29, at 170; *see also* discussion of specific and general deterrence *supra* text accompanying note 28.

offender,[34] or any number of other case-dependent considerations would not matter more if the overall project is to minimize pain and maximize pleasure.[35]

There are also considerable crime-control advantages to be gained by punishing more generally without taking into account excusing conditions.[36] Doing so likely would encourage greater attention and care, thereby reducing negligence and accompanying harm.[37] As Hart points out, punishing the inculpable would also avoid sticky credibility concerns and eliminate the motive for defendants to malinger in order to avoid liability.[38] Punishing the inculpable might also convey a more consistent, clear, and coherent message to the public regarding the normative commitments of the criminal law, thereby enhancing what Paul Robinson and John Darley have referred to as "The Utility of Desert."[39]

This last point suggests another potential Benthamite response to Hart's charge. One might argue that those who can be deterred would understand the morality of excusing the inculpable and that providing culpability excuses would therefore not diminish general deterrence. This point might be taken further to suggest that punishing the inculpable risks reducing the moral status of the criminal law in the eyes of its general audience by inflicting punishment on those who are not culpable.[40] Diminishing the moral status of the law by punishing the inculpable, the argument might go, would actually reduce deterrence as compared to a morally constrained program of punishment that attends to issues of culpability.[41]

Although there is considerable merit to this line of argument, it is hard to see how Bentham or anyone defending his project could pursue it. To do so would simply give away the day by admitting through the back door the moral principles,

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34. *See* Bronsteen, Buccafusco & Masur, *supra* note 25 (arguing that as length of incarceration and monetary penalties are increased the deterrent effect diminishes due to human adaptability). As I have argued elsewhere, the prospect of taking offender sensitivity into account when determining whether to punish counts as good reason not to be a subjectivist utilitarian. *See supra* note 22.

35. The American Law Institute early on endorsed this kind of approach, *see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 150.3 cmt. at 407 (Proposed Official Draft Complete Text and Commentary 1975), as have courts in Canada and New Zealand. *See* Bloom & Dewey, *supra* note 15, at 40–41 (comparing the United States' justification of the exclusionary rule with that of other common law countries).

36. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1170–72 (2009) (analyzing possible justifications of the exclusionary rule as discussed in Ford v. Wainwright, 477 U.S. 399, 407–10, 420–22 (1986)).

37. Herring v. United States, 555 U.S. 135, 153–56 (2009) (Ginsburg, J., dissenting).

38. HART, *supra* note 1, at 19–20.

39. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454–58, 488 (1997) (relating utilitarian theories of criminal law to perceived community standards and normative moral standards); *see also* Markel, Flanders & Gray, *supra* note 25 (defending a theory of criminal punishment based on communication of condemnation); Christopher Slobogin, *Some Hypotheses about Empirical Desert*, 42 ARIZ. ST. L.J. 1189 (2011) (critiquing Robinson & Darley).

40. I am in debt to Deborah Hellman for pressing this argument.

41. Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 292 (1983) (criticizing arguments focused exclusively on the exclusionary rule's effect of "sometimes permit[ing] guilty persons to escape conviction and punishment" while ignoring its purpose of protecting all citizens' rights, both innocent and guilty).

rights, and retributivist justifications of punishment that Bentham barred at the front door. After all, to argue that a morally coherent practice of punishment that hews closely to considerations of principle, rights, and retribution will generate greater overall faith in and obedience to the criminal law is to argue that considerations of principle, rights, and retribution should drive the theory and practice of punishment. The underlying motives for that commitment matter little, if at all. Whether allegiance to retributivist principle is motivated by sincere commitment or cool practicality, the result is the same: a retributivist policy and practice.

These considerations ultimately led Hart to conclude that orthodox utilitarianism is incapable of justifying our common intuitions about culpability and the familiar foundations of moral culpability upon which our practices of criminal blame and punishment are constructed. He therefore favored an approach to the project of justifying punishment that incorporates retributivist principles.[42] He is in good company,[43] counting among his friends the United States Congress,[44] the American Law Institute,[45] and many state legislatures.[46]

There is certainly more that can be said about Hart's debate with Bentham. This short primer is enough for present purposes, however. The next Section makes the preliminary case that the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence suffers from the same conceptual problems Hart exposed in his critique of Bentham. Part III deepens the analysis by discussing individual components of the Court's doctrine.

B. The Supreme Court's Spectacular Non Sequitur

Much of the Supreme Court's contemporary Fourth Amendment exclusionary rule jurisprudence rests on the same "spectacular non sequitur" Hart identifies in his critique of Bentham. The Court is led on this side trip by its relatively recent but consistent assertion that the sole justification for the exclusionary rule is to punish offending officers in order to "deter future Fourth Amendment violations."[47] Just as it did for Bentham, this deterrence-only approach has forced the Court to incoherence and absurdity when trying to identify and justify circumstances in which Fourth Amendment violations should be excused. Take for example Chief Justice Roberts's explanation of the good faith exception in *Herring v. United*

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42. HART, *supra* note 1, at 210.

43. *See, e.g.*, John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129 (2009) (arguing for a theory that "identifies the appropriate roles for retribution and deterrence and uses each to shore up the limitations of the other").

44. *See* 18 U.S.C. § 3553(a)(2) (2006).

45. *See* MODEL PENAL CODE § 1.02(2) (Proposed Official Draft 2007).

46. *See, e.g.*, CAL. PENAL CODE § 1170 (2012), *amended by* Act of Sept. 30, 2012, ch. 828, 2012 Cal. Legis. Serv. (West).

47. Davis v. United States, 131 S. Ct. 2419, 2426 (2011). For an insightful critique of *Davis* see David McAloon, Davis v. United States*: Good Faith, Retroactivity, and the Loss of Principle*, 71 MD. L. REV. 1258 (2012).

States.[48]

In *Herring*, investigating Officer Mark Anderson became suspicious when petitioner Bennie Dean Herring gained access to his impounded truck to retrieve "something."[49] Knowing full-well that his gut instincts did not rise to reasonable suspicion, much less probable cause, Anderson refrained from stopping, arresting, or searching Herring as he exited the impound lot.[50] Anderson instead contacted a county clerk to determine whether there were any outstanding warrants against Herring that would justify his arrest.[51] Finding nothing in the records available to her, that clerk consulted her peer in an adjoining county, who reported that her records showed that there was an active bench warrant against Herring for failure to appear.[52] In reliance on this representation, Anderson stopped Herring, arrested him, and, during a search incident to arrest, discovered a small amount of methamphetamine and a gun, both of which were illegal for Herring to possess.[53] The problem was that Anderson was misled. There was no active warrant for Herring's arrest.[54] There once was, but that warrant had been recalled five months earlier.[55] For whatever reason, the police database had not been updated.[56] Word of the mistake reached Anderson fifteen minutes after his initial inquiry, but by then it was too late.[57]

Herring moved at trial to suppress the drugs and gun on grounds they were fruit of an illegal arrest and search incident to arrest.[58] That motion was denied at trial and on direct appeal by the Eleventh Circuit Court of Appeals.[59] Each of these courts assumed without finding that the initial arrest did violate the Fourth Amendment, and instead denied exclusion based on the ground that Anderson had acted in "good faith."[60] Chief Justice Roberts, writing for the Court, affirmed. He

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48. Herring v. United States, 555 U.S. 135, 141–42 (2009) (focusing on the deterrent effect of the exclusionary rule in individual circumstances, rather than as "a necessary consequence of a Fourth Amendment violation"; the good faith exception is justified where the exclusionary rule would have no significant effect in deterring police misconduct).

49. *Id.* at 137. It is clear from the record that Anderson and Herring had a history of mutual antagonism and Anderson's motives may not have been entirely pure. *See* Laurin, *supra* note 14, at 677–78 (describing facts behind *Herring*). As the Court made clear in *Whren v. United States*, 517 U.S. 806, 812–13 (1996), however, Anderson's motives are irrelevant to the question of whether his conduct was objectively reasonable under the Fourth Amendment.

50. *See Herring*, 555 U.S. at 149 (explaining Anderson did not arrest Herring until after he left the impound lot) (Ginsburg, J., dissenting).

51. *Id.* at 137 (majority opinion).

52. *Id.*

53. *Id.*

54. *Id.* at 137–38.

55. *Id.* at 138.

56. *Id.*

57. *Id.*

58. *Id.* at 138.

59. *Id*. at 138–39.

60. *Id*. This procedure is not preferred because it avoids clarifying the constitutional issue. *See* United States v. Dahlman, 13 F.3d 1391, 1397–98 (10th Cir. 1993) (noting that a court, though holding discretion not to, should

began by reciting a now familiar refrain: the exclusionary rule imposes a "costly toll upon truth-seeking" and lets "guilty and possibly dangerous defendants go free."[61] Those costs can only be justified, he wrote, where exclusion "results in appreciable deterrence."[62] Relying on these premises, the *Herring* majority determined that punishing Anderson could not deter future violations.[63] "[C]rucial" to that holding was the lower court's finding that neither Anderson nor the law enforcement employees upon whom he relied were "reckless or deliberate" in their actions.[64] At worst, the Court confirmed, the failure to update the warrant database was "negligent."[65] The Court thought this an important distinction because "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[66] "To trigger the exclusionary rule," the Court held, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[67] Given that law enforcement officers who act in reliance on honest mistakes of fact are not aware they are or very well may be violating the Fourth Amendment, the Court concluded they cannot and will not be deterred by the threat of exclusion and, therefore, the exclusionary rule should not apply in cases where officers like Anderson act in "good faith."[68]

The Court's logic in *Herring* parallels exactly Bentham's reconstruction of common law culpability excuses and therefore stands as an equally spectacular non sequitur.[69] Chief Justice Roberts is surely right that officers, such as Anderson, who act from honest mistakes of fact, are not readily susceptible to deterrent

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address any Fourth Amendment concerns before addressing the underlying issue). *Cf.* Pearson v. Callahan, 555 U.S. 223, 232–36 (2009) (explaining non-mandatory preference that courts decide constitutional issues before reaching questions of qualified immunity in order to avoid "constitutional stagnation").

61. *Herring*, 555 U.S. at 141 (internal quotation marks and citation omitted); *see also* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J., suggesting the exclusionary rule has the effect of letting criminals "go free because the constable has blundered"); WIGMORE ON EVIDENCE § 2184 (3d ed. 1940) (same). Although beyond the scope of this Article, it is worth pointing out that these costs are actually imposed by the Fourth Amendment itself rather than the exclusionary rule. *See* United States v. Leon, 468 U.S. 897, 946 (1984) (maintaining that the Fourth Amendment, at heart, should be construed to "preserve[] intact the constitutional rights of the accused" while being sufficiently limited to preserve society's "pressing interest in criminal law enforcement") (Brennan, J., dissenting).

62. *Herring*, 555 U.S. at 141 (internal quotation marks, alterations, and citations omitted).

63. *Id.* at 147–48.

64. *Id*. at 140.

65. *Id*.

66. *Id*. at 143.

67. *Id*. at 144.

68. *See id.* at 145 (discussing the good-faith inquiry).

69. *See id.* at 144 (concluding the error in this case does not rise to the level of deliberate, reckless, or grossly negligent conduct and thus that the exclusionary rule should not apply here). Hart's criticism of Bentham argues that Bentham similarly only proves that the threat of punishment does not deter a certain class of people, not that the punishment of these persons would not "secure a higher measure of conformity to law on the part of normal persons . . . ." HART, *supra* note 1, at 19.

threats.[70] To paraphrase Hart, however, the actual *infliction* of punishment on Anderson and his ilk likely would secure a higher measure of conformity with the law on the part of law enforcement officers generally by deterring them either directly or indirectly through what William Mertens and Silas Wasserstrom have called "systemic deterrence."[71] Hart's point, extended here, is there is no reason to think that punishing Anderson would not aid in deterring the members of this rather large audience, which includes the future him.[72] To the contrary, there is good reason to think that they would be deterred less if Anderson was not punished. After all, as Justice Marshall—channeling Hart—points out in *New York v. Harris*, the creation and proliferation of excuses may complicate the deterrent message sent by the exclusionary rule to the point of "barely begin[ning] to eliminate the incentives to violate the Constitution."[73]

There are many responses proponents of the Court's contemporary deterrence-only approach to the exclusionary rule might make here. Part III explores them. For the present, however, it is critical to note that Hart's critique does not mean a full cost-benefit analysis of exclusion in any particular case would not recommend against inflicting exclusion against a Fourth Amendment violator.[74] Rather, the point defended here is that the Court cannot justify *general* exceptions on deterrence grounds without indulging a non sequitur.[75] Given this, it is tempting to

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70. *See* Herring v. United States, 555 U.S. 135, 144 (2009).

71. William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 394–95, 399–401 (1981); *see also* Kamisar, *supra* note 5, at 660–61 (citing the almost immediate effect of Delaware v. Prouse, 440 U.S. 648 (1979), in altering automobile stop policy and practice of the Delaware state police); Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1084–85 (2011) (discussing application of the deterrence inquiry to different institutional actors); Steiker, *supra* note 9, at 852 (stating the exclusionary rule may indirectly change behavior by creating an alternate vision of the "good cop"); Slobogin, *supra* note 8, at 393 (discussing "systemic deterrence"); Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 322–23 (1962) (discussing the immediate effect of the exclusionary rule in California).

72. Mertens & Wasserstrom, *supra* note 71, at 401.

73. New York v. Harris, 495 U.S. 14, 23 (1990) (Marshall, J., dissenting); *see also* Davies, *supra* note 13, at 1319 (stating the restrictions on the use of the exclusionary rule threaten to undermine the rule); Kamisar, *supra* note 5, at 662 (same); Mertens & Wasserstrom, *supra* note 71, at 388 (stating the cumulative effect of the exceptions to the exclusionary rule could be great). Without displaying an awareness of the non sequitur, the Court in *Herring* hints at a response to Justice Marshall by quoting at length from Judge Friendly's classic article *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965). *Herring*, 555 U.S. at 143–44. There, Judge Friendly suggests punishing flagrant Fourth Amendment violations may provide sufficient threat to deter officers who can be deterred. I address this point *infra* in Section III.A.

74. *See* HART, *supra* note 1, at 19 (calling Bentham's argument a "*non sequitur*").

75. This objection does not violate the constraints on Supreme Court critiques promoted by Frank Easterbrook in his canonical article *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). There Professor, and now Judge, Easterbrook relies on Kenneth Arrow's Nobel-Prize-Winning Impossibility Theorem to argue the Supreme Court cannot maintain doctrinal consistency over time without sacrificing core procedural commitments. *Id*. at 823–31. Easterbrook's conclusions have since been contested. *See, e.g.*, MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 28, 197–98 (2000). The primary critique advanced here is not that the Court violates the law of transitivity between and among cases but, rather, that within cases the premises applied by the Court do not support its conclusions and, worse, often lead to

conclude that the good faith exception and other culpability-based excuses endorsed in the Court's Fourth Amendment exclusionary rule jurisprudence should be abandoned. This conclusion would be too quick, however. Hart explains why in his critique of Bentham.[76] The sharp end of Hart's argument is not that we should abandon common law excuses.[77] Rather, his point is that we cannot rationalize or justify those excuses solely on deterrence grounds.[78] To preserve these excuses we must instead rely on retributivist justifications of punishment embedded in the common law. Put differently, although deterrence may be a conceptually adequate sword for justifying punishment generally, it is a woeful shield in that it lacks the conceptual capacity necessary to justify general excuses.[79] Raising those shields requires the strong arms of retributivism.

As the rest of this Article will argue, the Court must follow Hart's lead by adopting an approach to the Fourth Amendment exclusionary rule that relies on retributivist principle as well as considerations of utility. This proposal is novel, but it is not radical as a historical matter. Although some justices have managed recently to persuade bare majorities of the Court to endorse the claim that deterrence is the sole justification for the Fourth Amendment exclusionary rule, for most of the rule's history the Court relied upon constitutional principle.[80] The next Part proposes that the Court return partway to those roots by adopting a hybrid approach to the exclusionary rule that incorporates retributivist commitments derived from the constitutional principles that animated the rule at its genesis and through its early development.

II. A BRIEF HISTORY OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

This Part traces briefly the history of the Fourth Amendment exclusionary rule in order to make an uncontroversial point: although the contemporary Court has adopted a deterrence-only approach after the punitive turn, the original foundations of the rule rest on constitutional principle. I then proceed to make a more novel point: that these principled concerns line up with retributivist justifications of punishment, which provide doctrinal foundation for a hybrid approach to the exclusionary rule after the punitive turn. Part III argues that the Court must either embrace this hybrid approach or abandon general limitations on the exclusionary rule, including the good faith exception, the cause requirement, and the standing requirement.

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absurdity. As Easterbrook points out, this brand of critique is still well within bounds. *See* Easterbrook, at 830. I am in debt to Orin Kerr for impressing upon me the need to make this clarification and to Max Stearns for his patient tutelage.

76. HART, *supra* note 1, at 17–24

77. *Id.* at 50–53.

78. *Id.*

79. *See* Posner, *supra* note 11, at 75 (employing a case-by-case approach to Fourth Amendment questions).

80. *See infra* Section II.A.