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THE EXCLUSIONARY RULE AS PUNISHMENT

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I. INTRODUCTION

"*To trigger the exclusionary rule, 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*."[1]

With these words in *Herring v. United States*,[2] the U.S. Supreme Court may have re-written the exclusionary rule — the rule that evidence obtained in violation of a defendant's constitutional rights is inadmissible at trial.[3] Exceptions to the exclusionary rule are nothing new,[4] but these limitations for the most part have remained exceptions to a general rule of exclusion.[5] *Herring* may have reversed this equation, requiring "case-by-case, multifactored inquiry into the degree of police culpability."[6] *Herring* thus sparked immediate scholarly inquiry into whether the Court has presaged the end of the exclusionary rule.[7] Lower courts also began to weigh how to apply *Herring*.[8]

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1 Herring v. United States, 129 S. Ct. 695, 702 (2009).

2 *Id.*

3 *See generally* Mapp v. Ohio, 367 U.S. 643, 646-59 (1961) (explaining exclusionary rule and applying to states); Weeks v. United States, 232 U.S. 383, 398 (1914) (identifying exclusionary rule).

4 *See* Guzman v. City of Chicago, 565 F.3d 393, 398 n. 1 (7th Cir. 2009) (noting "the myriad of doctrines employed to avoid the suppression of evidence"); Craig M. Bradley, *Red Herring or the Death of the Exclusionary Rule?*, 45 TRIAL 52 (Apr. 2009) ("For the last 37 years … the Court has been chipping away at [the] mandatory exclusionary rule, gradually expanding the number and kinds of cases in which evidence will not be excluded, despite the constitutional violation").

5 *Cf. Mapp*, 367 U.S. at 655-56 (holding that "all evidence obtained by searches and seizures in violation of the Constitution is … inadmissible in state court"); Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568-69 (1971).

6 *Herring*, 129 S. Ct. at 711 (Breyer, J., dissenting).

7 *See e.g.*, Susan A. Bandes, *The Roberts Court and the Future of the Exclusionary Rule*, AMERICAN CONSTITUTION SOCIETY PAPER, at 1-2 (2009) (arguing that the Supreme Court is "busily laying the groundwork for abandoning the exclusionary rule"); Bradley, *supra* note 4, at *54 ("*Herring* makes clear that if Roberts, Scalia, Alito, and Thomas get their way, the major pillar upholding Fourth- and Fifth-Amendment rights will soon collapse"); *see also* Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009);

This essay considers a related emerging question: whether a majority of the Supreme Court believes the exclusionary rule constitutes punishment that must satisfy the justifications for state-imposed punishment.[9] To explore this question, this essay will examine the Supreme Court's theoretical justifications for the exclusionary rule leading to its recent decisions in *Herring* and *Hudson v. Michigan*,[10] and highlight the language in these recent decisions that resonates of classic punishment theorists such as Jeremy Bentham and Henry M. Hart. This essay concludes by briefly mapping what a punishment-driven theory of the exclusionary rule may mean for the future.

II. THE EXCLUSIONARY RULE: AN UNCERTAIN THEORETICAL BASIS?

The exclusionary rule is not mandated by the U.S. Constitution,[11] as the Supreme Court long ago abandoned an individual rights theory for the rule.[12] Nor does the rule "repair" or "redress the injury" from the constitutional violation.[13] Tort law provides that remedy.[14] Rather, "the rule is a judicially created remedy designed to safeguard [constitutional] rights generally."[15] And, the rule safeguards constitutional rights through deterrence: "By refusing to admit evidence gained as a result of [unconstitutional] conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused."[16]

One unanswered question nevertheless has endured: whether the exclusionary rule *punishes* the constitutional violation.[17] The exclusionary rule does deprive the State of something valuable to

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Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 30, 2009; *but cf.* Michael J.Z. Mannheimer, *More on the Herring Case*, CRIMPROF BLOG, Jan. 14, 2009, http://lawprofessors.typepad.com/crimprof_blog/2009/01/more-on-the-her.html ("the Court hedges, both at the beginning and end of its opinion, potentially narrowing the scope of the ruling"); Laurie L. Levenson, *The Fading Exclusionary Rule*, NAT'L L.J., June 8, 2009, at 17 (discussing possible narrow interpretation of *Herring*).

[8] In the short time since *Herring* was decided, "some courts have been reluctant to read Herring too broadly." *Id.* But not all courts. *See* People v. Stokley, 2009 WL 2208388, at *4 (N.Y. Sup. Ct. 2009) (concluding under *Herring* that even if identification procedure resulted from an unlawful arrest, "the defendant would not be entitled to the exclusion of otherwise reliable identification evidence"); *cf.* United States v. Monghur, 576 F.3d 1008, 1014 (9th Cir. 2009) (finding home search unlawful but remanding for District Court "to consider whether suppression is the appropriate remedy in light of *Herring*").

[9] *See generally* Kent Greenwalt, *Punishment*, 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1282, 1282-83 (Joshua Dressler ed., 2d ed. 2002) ("Since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification").

[10] Hudson v. Michigan, 547 U.S. 586 (2006).

[11] *See* Brock v. United States, 573 F.3d 497, 499 (7th Cir. 2009) ("The exclusionary rule is not required by the Constitution"); *cf.* Stone v. Powell, 428 U.S. 465, 482 (1976).

[12] *See Herring*, 129 S. Ct. at 700 (confirming that "the exclusionary rule is not an individual right"); *see also Stone*, 428 U.S. at 486; United States v. Calandra, 414 U.S. 338, 348 (1974).

[13] *Stone*, 428 U.S. at 484, 486; *see also* Elkins v. United States, 364 U.S. 206, 217 (1960).

[14] *See* United States v. Sims, 553 F.3d 580, 584-85 (7th Cir. 2009) ("A person whose rights have been violated by a search can be remitted to suit against the police for committing a constitutional tort").

[15] *Calandra*, 414 U.S. at 348; *see also* United States v. Leon, 468 U.S. 897, 906 (1984).

[16] *Leon*, 468 U.S. at 919; *see* United States v. Janis, 428 U.S. 433, 446 (1976) *rev'd on other grounds* ("the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct'"); *Calandra*, 414 U.S. at 347; *Stone*, 428 U.S. at 486. *See* State v. Bolt, 689 P.2d 519, 524-28 (Az. 1984) (illustrating the rule's origins and development); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365 (1983).

[17] *See generally* Sharon L. Davies, *The Exclusionary Rule — A Price or Sanction?*, 73 S. CAL. L. REV. 1275 (2000) (exploring whether the exclusionary rule punishes those who violate the constitutional protection).

it,[18] and deterrence models have a strong conceptual relationship to punishment.[19] Deterrence, however, also informs regulatory models of legal sanction,[20] such as tort law.[21] Indeed, "the punitive/regulatory distinction" can apply to almost any sanction,[22] and punishment thus must involve more than simply State imposition of an unpleasant condition.[23]

In this light, the exclusionary rule could be understood as falling more on the regulatory rather than punitive side of this conceptual divide. In deciding whether to exclude evidence, the Supreme Court traditionally has focused on law enforcement's amenability to future deterrence more than the severity or wrongfulness of constitutional violations,[24] and the Court has "priced" deterrence by weighing the utility of exclusion against its costs.[25] To the extent the exclusionary rule has necessitated individualized proof of wrongful conduct, that proof generally is satisfied by officer negligence.[26] As a result, the exclusionary rule largely has responded to constitutional violations in a one-size-fits-all pursuit of deterrence, treating intentional and recurring violations the same as isolated negligent violations, so long as deterrence will work appreciably.[27]

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[18] *Cf.* Greenwalt, *supra* note 9, at 1282-83 ("punishment involves pain or deprivation").

[19] *See generally* WAYNE R. LAFAVE, CRIMINAL LAW 26-34 (4th ed. 2003).

[20] *See* Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 540 (2005) (explaining that "regulatory policy is designed to produce optimal levels of risk [and] … is concerned above all with producing the right deterrent signal"); *cf.* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 279 (1998) (noting view that "deterrence is a broader concept than mere punishment").

[21] *Cf.* Posner & Sunstein, *supra* note 20, at 553-54 ("The tort system is conventionally said to have two purposes: compensation and deterrence").

[22] United States v. Salerno, 481 U.S. 739, 746-47 (1987) (holding that even extended physical detention may be regulatory rather than punitive in nature); *cf.* Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 202-210 (1996) (reviewing civil-criminal distinction); Kenneth Mann, *Punitive Civil Sanction: The Middle Ground between Criminal and Civil Law*, 101 YALE L.J. 1795, 1803-1814 (1992) (discussing paradigms of criminal and civil law).

[23] Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

[24] *See Calandra*, 414 U.S. at 348 (rule applies "where its remedial objectives are thought most efficaciously served").

[25] *See* Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 363 (1998) (holding the rule applies "where its deterrence benefits outweigh its 'substantial social costs'"); *cf.* Davies, *supra* note 17, at 1277 (observing that "some penalties 'price' behavior, while other penalties 'sanction' it"); *cf.* Posner & Sunstein, supra note 20, at 540, 559-61 (emphasizing cost-benefit calculus of regulatory policy); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 194 (1991) ("tort law prices, while criminal law prohibits").

[26] *See Leon*, 468 U.S. at 919, *quoting* United States v. Peltier, 422 U.S. 531, 539 (1975) ("'the deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right'"). Some have argued that this "negligence" often has resembled strict liability, where officers have acted diligently but nevertheless contravened a constitutional rule. *See* Harold Rothwax, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 41-48 (Warner ed. 1996) (arguing that 90 percent of exclusionary rule cases address non-culpable violations).

[27] *See* George C. Thomas, III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 21-23 (1993) (observing that the Supreme Court has divided the exclusionary rule between "good faith" violations and "all other violations"); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 2-11 (1987) ("the exclusionary rule applies (or until recently, used to apply) without regard to whether police error is inadvertent or deliberate, minor or gross" [internal footnote omitted]); *cf.* Bivens v. Six Unknown Fed. Narcotics Officers, 403 U.S. 388, 418 (1972) (Burger, C.J., dissenting) (complaining that "the exclusionary rule has increasingly been characterized by a single, monolithic, and drastic judicial response to all official violations of legal norms. Inadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work. These honest mistakes have been treated the same way as deliberate and flagrant … violations").

The Supreme Court thus commonly has characterized the exclusionary rule as "remedial,"[28] a characterization in line with the Court's prevailing cost-benefit calculus. Justice William Brennan has written even more specifically:

> [T]he exclusionary rule does not depend in its deterrence rationale on the punishment of individual law enforcement officers. Indeed, one general fallacy in the reasoning of critics of the exclusionary rule is the belief that the rule is meant to deter official wrongdoers by punishment or threat of punishment … The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large.[29]

This regulatory view of the rule has been expressed by other Justices and scholars.[30]

And yet, the Supreme Court by no means has wed itself to a regulatory model of the exclusionary rule. For example, the Supreme Court has characterized the exclusionary rule, at least obliquely, as a type of punishment.[31] The Supreme Court also often has referred to the exclusionary rule as a deterrent "sanction,"[32] and a "penalty,"[33] and has excluded some "good faith" constitutional violations from the exclusionary rule.[34] The Court further has indicated that the exclusionary rule should conform to "the idea of proportionality,"[35] a concept closely associated with — although not necessarily dependent on — punishment theory.[36] Most pointedly, Chief Justice Warren Burger once characterized the exclusionary rule as "capital punishment."[37]

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[28] *See e.g.*, Arizona v. Evans, 514 U.S. 1, 11 (1995) (characterizing exclusionary rule as a "remedial device"); Brewer v. Williams, 430 U.S. 387, 421 (1977) ("judicially conceived remedial device"); Illinois v. Krull, 480 U.S. 340, 347 (1987) (same); *Calandra*, 414 U.S. at 348 (referring to the exclusionary rule's "remedial objectives"); *cf.* Thomas & Pollack, *supra* note 27, at 27 (observing that "[o]ne could view the exclusionary rule as a remedial, rather than punitive, device").

[29] *Peltier*, 422 U.S. at 556-57 (Brennan, J., dissenting) (internal footnote omitted); *see also Leon*, 468 U.S. at 953 (Brennan, J., dissenting) (same).

[30] *See* Stewart, *supra* note 16, at 1400 (emphasizing that the exclusionary rule furthers "systematic deterrence," and "is not designed to punish the particular police officer for violating a person's … rights"); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709-10 (1970) (observing that the rule regulates wider behavior of all law enforcement and the public at large, and "does not impose any direct punishment on a law enforcement official who has broken the rule").

[31] *See Janis*, 428 U.S. at 448 (rejecting exclusionary rule in tax proceeding, because "the local law enforcement official is already 'punished' by the exclusion of the evidence in the state criminal trial").

[32] *Cf. Janis*, 428 U.S. at 448 (addressing the exclusionary rule as a "deterrent sanction"); *Leon*, 468 U.S. at 906 (referring to "exclusionary sanction"); McGautha v. California, 402 U.S. 183, 211 (1971) (referring to "the exclusionary rule as a sanction for unlawful police conduct").

[33] *See* Withrow v. Williams, 507 U.S. 680, 701 (1993) (referring to "penalty of exclusion"); United States v. Payner, 444 U.S. 727, 733 n. 5 (1980) (noting that "suppression of highly probative evidence in a trial against a third party would penalize society unnecessarily"); *cf. also Stone*, 428 U.S. at 498 (Burger, C.J., concurring) (discussing rule in context of "penalties").

[34] *See generally Leon*, 468 U.S. 897; *see also Evans*, 514 U.S. 1; *Krull*, 480 U.S. 340; Massachusetts v. Sheppard, 468 U.S. 981 (1984).

[35] *Stone*, 428 U.S. at 490.

[36] *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271-91 (2005) (reviewing the relationship between proportionality and punishment theory).

[37] *See Bivens*, 403 U.S. at 419 (Burger, C.J., dissenting) (arguing that "society has as much right to expect rationally graded responses form judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition").

Against this opaque theoretical treatment of the exclusionary rule, lower courts not surprisingly have articulated inconsistent views on the nature of the exclusionary rule. Some lower courts have described the exclusionary rule in punishment terms that appear to reject a regulatory understanding of the rule.[38] Other lower courts instead have referred to the rule more generally as a deterrent "sanction,"[39] without pegging this sanction as punitive or regulatory in character.[40] And still other lower courts, in turn, expressly have rejected that the exclusionary rule punishes the constitutional violation.[41]

Therefore, if intent does matter in understanding punishment,[42] exclusionary rule jurisprudence has offered a muddy picture of whether the Supreme Court intends for the rule to punish or to regulate.[43] In *Hudson* and *Herring*, however, the Supreme Court may have confirmed that punishment supplies the rule's theoretical justification.

III. HERRING & HUDSON: FROM REGULATORY MODEL TO PUNISHMENT?

Herring itself involved a relatively simple Fourth Amendment error. The police stopped Herring on an arrest warrant, but police records had not been updated to reflect that the warrant no longer was valid.[44] The arresting officers learned of the mistake in short order, but not before they discovered methamphetamine and a pistol on Herring.[45] The Government did not dispute that

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[38] *See e.g.*, Curry v. State, 780 S.W.2d 825, 827 (Tex. Ct. App. 1990) (referring to "punishment of police by exclusion of improperly obtained evidence"); Robinson v. State, 771 S.W.2d 710, 712 (Tex. Ct. App. 1989) (same); State v. Carter, 370 S.E.2d 553, 564 (N.C. 1988) (referring to rule as punishment connected to culpability). The Seventh Circuit notably has held that "[t]he exclusionary rule is a sanction that is supposed to be proportioned to the wrongdoing that it punishes," United States v. Brown, 328 F.3d 352, 357 (7th Cir. 2003), and "[t]he exclusionary rule is meant to deter illegal police conduct by punishing that conduct." United States v. Markling, 7 F.3d 1309, 1315 (7th Cir. 1993); *see also* United States v. Espinoza, 256 F.3d 718, 724-25 (7th Cir. 2001). These decisions, however, cite only another Seventh Circuit decision as authority for this proposition, *see* United States v. Salgado, 807 F.3d 603, 607 (7th Cir. 1986), and *Salgado* does not cite any authority for defining the exclusionary rule as punishment. *Cf. also* United States v. Crews, 502 F.3d 1130, 1136 n. 4 (9th Cir. 2007) (noting that "[s]earch and seizure laws are designed to punish the police," although citing only to *Calandra* and *Leon* for this principle).

[39] *See e.g.*, United States v. Page, 232 F.3d 536, 540 (6th Cir. 2001); United States v. Luk, 859 F.2d 667, 672 (9th Cir. 1987).

[40] *But cf.* United States v. Lyon, 567 F.2d 777, 782 (8th Cir. 1977) (referring to the "fullest deterrent sanctions of the exclusionary rule" in cases where officers are shown to have lied intentionally in applying for a search warrant); United States v. Thomas, 489 F.2d 664, 670 (5th Cir. 1974) (same).

[41] *See* People v. Martin, 290 P.2d 855, 857 (Cal. 1955) ("The United States Supreme Court has clearly recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law"), *quoted by* State v. Narvaez, 722 P.2d 1036, 1038 n.2 (Haw. 1986); People v. DeFelippis, 214 N.E.2d 897, 900 (Ill. 1966); People v. Warburton, 7 Cal.App.3d 815, 824 (Cal. App. 1970); People v. Colonna, 295 P.2d 490, 492 (Cal. App. 1956); People v. Estrada, 253 N.Y.S.2d 876, 886 (N.Y. Sup. Ct. 1964); *cf. also* Lord v. Kelley, 223 F.Supp. 684, (D. Mass. 1963); United States v. Union Asphalt & Roadoils, Inc., 281 F.Supp. 391, 410 (S.D. Iowa 1968).

[42] *Cf.* Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1355-59 (2008) (examining the role of intent in the constitutional law of punishment, and analyzing the "slop" of determinations of intent); *see also Salerno*, 481 U.S. at 747 (holding that "[t]o determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent").

[43] *See* Davies, *supra* note 17, at 1293-1315 (examining several reasons why the exclusionary rule could be viewed as a non-punitive "pricing" sanction, but arguing that "the exclusionary rule is a sanction rather than a price"); Thomas & Pollack, *supra* note 27, at 27 (arguing that the exclusionary rule "penalizes the executive branch of government," but acknowledging that "[o]ne could view the exclusionary rule as a remedial, rather than punitive, device"); *cf.* Norton, *supra* note 20, at 279.

[44] *See Herring*, 129 S. Ct. at 698.

[45] *See id.*

Herring's arrest violated the Fourth Amendment,[46] but argued that the exclusionary rule should not apply to this type of negligent mistake that was attenuated from the actual constitutional violation.

The Supreme Court agreed. In the process, the Court offered several provocative observations about the justified scope of the exclusionary rule. The Court invoked the familiar refrain that "the benefits of deterrence must outweigh the costs,"[47] but added that "[t]he extent to which the exclusionary rule is justified … varies with the culpability of the law enforcement conduct."[48] Thus removing "nonrecurring and attenuated negligence" from the "core concerns" of the exclusionary rule,[49] the Court held that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence."[50] Accordingly, "[t]o trigger the exclusionary rule, 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."[51]

Herring built on the Supreme Court's 2006 decision in *Hudson*.[52] *Hudson* involved a "knock-and-announce" violation that arguably had little to do with the challenged evidence[53] — and a ruling solely on "attenuation" grounds likely would not have rocked the legal landscape. But *Hudson* instead produced its own body of scholarship,[54] because the Court opined well beyond attenuation to characterize the exclusionary rule as a remedy of "last resort."[55] Emphasizing the "grave adverse consequence" of this "massive remedy,"[56] the Court held that exclusion must not only be effective, but "necessary" to deter unlawful police conduct.[57] Otherwise, the exclusionary rule would operate as an "incongruent remedy,"[58] "forcing the public today to pay for the sins and inadequacies" of the past.[59] The Court highlighted available civil remedies and modern police training and discipline as less drastic means of accomplishing the end of constitutional compliance.[60]

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[46] *See id.* at 705, 706 (Ginsburg, J., dissenting). The majority hinted that this concession may have been precipitous. *See id.* at 699; *cf. 2008-09 Term in Review*, 95 CRIM. L. RPTR. 616 (Aug. 19, 2009).
[47] *Herring*, 129 S. Ct. at 700.
[48] *Id.* at 701.
[49] *Id.* at 702.
[50] *Id.*
[51] *Id.* The Court injected more than a little uncertainty into this statement by adding that "[t]he pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers.'" *Id.* at 703 (quoting Reply Brief for Petitioner 4-5); *see also id.* at 710 n.7 (Ginsburg, J., dissenting).
[52] *Hudson*, 547 U.S. 586.
[53] *See id.* at 590-94.
[54] *See e.g.*, David A. Moran, *Waiting for the Other Shoe to Drop: Hudson and the Precarious State of Mapp*, 93 IOWA L. REV. 1725, 1733 (2008); Sharon A. 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, 1070 (2008); Chris Blair, *Hudson v. Michigan: The Supreme Court Knocks and Announces the Demise of the Exclusionary Rule*, 42 TULSA L. REV. 751, 751 (2007); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005-2006 CATO SUP. CT. REV. 283, 283 (2006).
[55] *See Hudson*, 547 U.S. at 591.
[56] *Id.* at 595.
[57] *Id.* at 596-98 (noting that "deterrence benefits" are "a necessary condition for exclusion," but not a "sufficient condition").
[58] *Id.* at 595.
[59] *Id.* at 597.
[60] *See id.* at 598-99.

Do *Hudson* and *Herring* thus speak in the language of punishment? "Punishment" has supplied an endless stream of schools of thought.[61] But the exclusionary rule, if punishment, has been grounded generally in the utilitarian school of deterrence. For me, therefore, *Herring* and *Hudson* immediately resonated of Jeremy Bentham's utilitarian justification of punishment, *An Introduction to the Principles of Morals and Legislation*.[62] More precisely, these decisions channeled Bentham, refined by Henry M. Hart's classic work, *The Aims of the Criminal Law*.[63]

Bentham argued that all laws should strive "to augment the total happiness of the community," and "therefore, in the first place … to exclude mischief."[64] Bentham, however, opined that "all punishment is mischief; all punishment in itself is evil."[65] Accordingly, "if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."[66] Bentham thus identified four cases "unmeet" for punishment.[67] Bentham's four cases align noticeably with *Hudson* and *Herring*, and may reveal that the Supreme Court understands the exclusionary rule as punishment.

1. *Where it is groundless; where there is no mischief for it to prevent; the act not being mischievous upon the whole*.[68]

This case looks to the act being punished, and excludes from justified punishment acts not themselves mischievous, as well as acts whose benefit outweighs their mischief.[69] The Supreme Court traditionally has evaluated the exclusionary rule by the costs and benefits of that sanction rather than the costs and benefits of the constitutional violation. But, by repeatedly emphasizing that the "massive" and "grave" social costs of exclusion apply even to evidence obtained in violation of the constitution,[70] the Court seemingly has pressed an inverse point: evidence of crime remains beneficial to society, regardless of how it was obtained. One cannot help but read benefit into the Court's view of evidence subject to exclusion when the Court in *Herring* linked the rule to the "flagrancy" of the violation and removed negligent constitutional violations from the rule's "core concerns."[71] The Court thus may have embraced a familiar mantra that, to Bentham, may limit only punishment: some constitutional violations are mere "technicalities," and some technical violations produce valuable evidence against dangerous people.

2. *Where it must be inefficacious; where it cannot act so as to prevent the mischief*.[72]

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[61] *See* Lafave, CRIMINAL LAW, *supra* note 19, at 26 § 1.5(a).
[62] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789), reprinted in THE COLLECTED WORKS OF JEREMY BENTHAM (J.H. Burns, H.L.A. Hart & F. Rosen ed. 1996) [hereinafter PRINCIPLES OF MORALS AND LEGISLATION].
[63] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).
[64] PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 62, at 158.
[65] *Id.*
[66] *Id.*
[67] *See id.* at 159-64.
[68] *Id.* at 159-60.
[69] *See id.* at 159-60.
[70] *See e.g.*, *Hudson*, 547 U.S. at 595; *cf. also Herring*, 129 S. Ct. at 701 ("the principal cost of applying the rule is … letting guilty and possibly dangerous defendants go free").
[71] *Herring*, 129 S. Ct. at 702.
[72] PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 62, at 159, 160-62.

This case focuses on the punishment itself in evaluating its justification, and excludes from justified punishment cases where the punishment will not prevent mischief. Bentham highlighted cases where punishment can "produce no effect,"[73] but also cases of "unintentionality," where "the actor knows not that [the act] is of the number of those to which the penal provision relates,"[74] and "mis-supposal," where the actor has misperceived the attendant circumstances.[75] The Supreme Court in *Hudson* and *Herring* limited the exclusionary rule under similar efficacy considerations.

In *Hudson*, for example, the Supreme Court openly accepted that some police misconduct is "undeterred."[76] Offering examples of serious police misconduct to prove this point, the Court appeared to reason that exclusion cannot be justified absent proof of real, direct deterrence, no matter how egregious the constitutional violation.[77]

In *Herring*, the Supreme Court linked deterrence theory to Bentham's principles of "unintentionality" and "mis-supposal" by building on the existing "good faith" exception. Noting that negligent conduct, or "innocent mistake," will not be deterred by exclusion more than "marginally," if at all,[78] the Court suggested that exclusion cannot be justified by shaping behavior at the edges, or incrementally through an educative effect.[79] Rather, to be justified, the exclusionary rule must deter "meaningfully."[80] This *required* degree of deterrence efficacy speaks of punishment, not regulation.

3. *Where it is unprofitable, or too expensive; where the mischief it would produce would be greater than what it prevented.*[81]

This case weighs the mischief of the sanction against the mischief to be prevented — a form of proportionality review. The Supreme Court for years has weighed costs of the exclusionary rule against its capacity to deter constitutional violations. But in this case, *Hudson* and *Herring* most strongly may suggest that the Court understands the exclusionary rule as punishment. For the Court did not characterize exclusion simply as a "cost" to be weighed with regulatory dispassion against competing social benefits; the Court addressed the rule as mischief, an adjective-rich evil — a "massive remedy" with "massive" and "grave adverse consequence[s]," a "considerable" social cost, "a get-out-of-jail-free card."[82] Invoking proportionality expressly, the Court in *Hudson* termed exclusion a potentially "incongruent remedy."[83]

To maintain congruence, the Court in *Herring* restricted the exclusionary rule to "deliberate" and "culpable" violations.[84] This language may mean only that exclusion must operate with a high degree of efficacy before it outperforms the mischief of exclusion. But in assessing "worth," the

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[73] *Id.* at 161.
[74] *Id.*
[75] *Id.* at 162.
[76] *Hudson*, 547 U.S. at 596.
[77] *See id.* at 596-97.
[78] *Herring*, 129 S. Ct. at 701-04.
[79] *Cf. id.* at 702 n.4.
[80] *Id.* at 702.
[81] PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 62, at 159, 163-64.
[82] *See Hudson*, 547 U.S. at 595, 599.
[83] *Id.* at 595.
[84] *See Herring*, 129 S. Ct. at 702.

Court separated "deliberate" from "culpable"— "sufficiently deliberate that exclusion meaningfully can deter it, *and* sufficiently culpable that such deterrence is worth the price."[85] Here is where Hart's *Aims of the Criminal Law* appeared for me.

Hart argued that "[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it … is the judgment of community condemnation which accompanies and justifies its imposition."[86] Whatever the nature of the sanction or its objectives, these "consequences take their character as *punishment* from the condemnation which precedes them."[87] Accordingly, punishment "cannot justly be pronounced by the community if the individual's conduct affords no basis for a judgment of moral condemnation."[88] For Hart, *mens rea* provides the "ingredients of moral blameworthiness."[89] For example, purposeful violators, "[i]ndividuals who are able but unwilling to comply … are precisely the ones who ought to be condemned as criminals."[90] Reckless violators too, for "[i]f an individual knowingly takes a risk of the kind which the community condemns as plainly unjustifiable, then he is morally blameworthy and can properly be judged a criminal."[91] But not so with negligent, non-culpable violators:

> [P]unishment of merely negligent behavior is commonly justified not on the ground that violators can be said to be individually blameworthy, but on the ground that the threat of such punishment will help to teach people generally to be more careful. This proposes, as legitimate, an aim [for punishment] which is drastically different from that of inculcating minimum standards of personal responsibility to society.[92]

Hart further asserted that "the indiscriminate use of the device dilutes the force of the threat of community condemnation as a means of influencing conduct in other situations where the basis for moral condemnation is clear."[93]

Hart's premise corresponds remarkably to much of the language in *Hudson* and *Herring*. By defining the "worth" of exclusion by the "culpability" of the police, *Herring* may be demanding that constitutional violations amount to *morally blameworthy* mischief to justify exclusion — and not every constitutional violation, the Court suggested, is so morally blameworthy. Indeed, like Hart, the Court may expect that exclusion will deter, at least in part, through the judgment of condemnation that accompanies the sanction of exclusion. The Court thus similarly may accept that the exclusion of evidence in connection with non-culpable violations may dilute the force of the rule.[94] To outweigh the perceived mischief of exclusion, therefore, the constitutional violation itself must be culpable— an undiluted evil, defined by deliberate or reckless violations of the Constitution. Absent this basis for moral condemnation, *Herring* may announce, the sanction of exclusion fails to outweigh its "massive" costs to society.

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[85] *Id.* (emphasis added).
[86] Hart, *supra* note 23, at 404.
[87] *Id.* at 405 (emphasis added).
[88] *Id.* at 412.
[89] *Id.*
[90] *Id.* at 415.
[91] *Id.* at 416.
[92] *Id.* at 417.
[93] *Id.* at 421.
[94] *Cf. Herring*, 129 S. Ct. at 702 n. 4; *Hudson*, 547 U.S. at 595-97.

4. *Where it is needless; where the mischief may be prevented, or cease of itself, without it; that is, at a cheaper rate*.[95]

This case limits justified punishment to circumstances of necessity, where less drastic alternatives cannot avert the mischief to be prevented.[96] *Hudson's* "last resort" and "necessary deterrence" language invokes this principle, and explains the Supreme Court's emphasis on civil remedies and police training and discipline: these remedies are not simply alternative methods of pursuing deterrence, the Court suggested; they are different in *kind* from the exclusionary rule, and their perceived effectiveness renders exclusion unnecessary. Only punishment should be so cabined within the available arsenal of problem-solving tools available to society.

IV. CONCLUSION

In exploring the language of punishment in *Hudson* and *Herring*, this essay perhaps has taken some academic liberties with language associations. Some of these associations also can be identified in jurisprudential threads that predate *Hudson* and *Herring*. But if *Hudson* and *Herring* confirm these associations, an important jurisprudential marker has been established, and lawyers and judges will need to think very differently about the exclusionary rule to justify it as a form of punishment.[97]

Hudson and *Herring* themselves illustrate that a punishment model greatly may restrict the rule's scope. A punishment model, however, could increase the justification for exclusion in some cases, and perhaps even mandate it. For instance, the Supreme Court has not ruled on whether an equal protection violation in racial profiling cases should result in exclusion.[98] Equal protection violations by definition require intentional misconduct.[99] *Hudson* and *Herring* thus may push in an interesting direction in this type of case. Resolution of these questions may depend on a determination of whom, precisely, the exclusionary rule punishes, a question minimally explored so far.[100] All of these questions, however, will remain difficult to resolve absent clarity in whether the exclusionary rule constitutes punishment or regulation.

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[95] PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 62, at 159, 164.

[96] *See id*. at 164. Necessity appears as a recurring theme for Bentham. *See id*. at 169 ("The punishment ought in no case be more than what is necessary to bring it in conformity with the rules here given"). The Court's approach to exclusion also may reflect Bentham's case-specific necessity. *See Hudson*, 547 U.S. at 596 (noting that "[m]assive deterrence is hardly required").

[97] *Cf. generally Salerno*, 481 U.S. at 746-47.

[98] For courts rejecting an equal protection exclusionary rule, *see* United States v. Nichols, 512 F.3d 789, 794 (6th Cir. 2008); United States v. Foster, 2008 WL 1927392, at *5 (M.D. Ala. 2008); People v. Fredericks, 829 N.Y.S.2d 78, 79 (N.Y. App. 2007). For courts embracing such a rule, *see* Commonwealth v. Lora, 886 N.E.2d 688, 699 (Mass. 2008); United States v. Benitez, 613 F. Supp. 2d 1099, 1101 n.3 (S.D. Iowa 2009); State v. Segars, 799 A.2d 541, 548-49 (N.J. 2002).

[99] *See generally* Washington v. Davis, 426 U.S. 229, 239-242 (1976).

[100] *See* Thomas & Pollack, *supra* note 27, at 27 (even "assuming the essentially punitive nature of the exclusionary rule, one could argue that it punishes society rather than the government").