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DEMISESQUICENTENNIAL

Studying the Exclusionary Rule: An Empirical Classic

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INTRODUCTION

Then-Justice William Rehnquist declared, “The most comprehensive study on the exclusionary rule is probably that done by Dallin Oaks . . . in 1970.”¹ Rehnquist was referring to *Studying the Exclusionary Rule in Search and Seizure*,² and his praise was too guarded. Nothing else came close to Oaks’s study at the time Rehnquist wrote, and very little comes close as we approach the article’s fortieth anniversary.³

Oaks’s article is the second most cited of those published by *The University of Chicago Law Review* in its seventy-five-year history (after Antonin Scalia’s *The Rule of Law as a Law of Rules*⁴).⁵ Fourteen Su-

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¹ *California v. Minjares*, 443 US 916, 926 (1979) (Rehnquist dissenting from denial of a stay).

² Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U Chi L Rev 665 (1970).

³ See *United States v. Janis*, 428 US 433, 450 n 22 (1976) (majority opinion of Blackmun) (“The salient and most comprehensive study is that of Oaks.”); 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, 1394–95 (1983) (“The leading study [on the deterrent effects of the rule] remains the 1970 work of Professor Dallin Oaks.”); Timothy Perrin, et al, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L Rev 669, 696 (1998) (“The Oaks study is plainly the most thorough study of the rule undertaken as of the date of its publication, and few subsequent studies match it in thoroughness or analytical consistency.”).

⁴ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175 (1989).

⁵ See Foreword: Demisesquicentennial, 75 U Chi L Rev 33, 35 n 17 (2008).

preme Court opinions, scores of lower court opinions, and hundreds of scholarly articles have recited its findings.

At the time Oaks prepared his study, The University of Chicago Law School and its next-door neighbor, the American Bar Foundation, were churning caldrons of empirical study of crime and criminal justice. Oaks, a professor at the Law School, was also Executive Director–Designate of the American Bar Foundation. He and Warren Lehman had recently published a detailed, book-length study of the Cook County criminal justice system, *A Criminal Justice System and the Indigent*.⁶ A few years earlier, Harry Kalven, Jr. and Hans Zeisel had published *The American Jury*,⁷ and Norval Morris had founded The University of Chicago Center for Studies in Criminal Justice with a grant from the Ford Foundation.⁸ As Oaks examined the exclusionary rule, Franklin Zimring and Gordon Hawkins studied deterrence;⁹ Norval Morris and Gordon Hawkins wrote *The Honest Politician's Guide to Crime Control*;¹⁰ Jerome Skolnick probed policing;¹¹ Hans Mattick wrote about prisons and jails;¹² Mark Haller examined the history of organized crime in Chicago;¹³ Kenneth Culp Davis explored police and prosecutorial discretion;¹⁴ Johannes Andenaes considered the moral-educative effect of the criminal law;¹⁵ and I asked lawyers to tell me about plea bargaining.¹⁶

Studying the Exclusionary Rule in Search and Seizure was Oaks's last article as a member of The University of Chicago Law School faculty. In 1970, the Church of Jesus Christ of Latter Day Saints ("LDS Church") asked him to become President of Brigham Young University, and after eleven years in that position, he became a justice of the

⁶ Dallin H. Oaks and Warren Lehman, *A Criminal Justice System and the Indigent* (Chicago 1968).

⁷ Harry Kalven, Jr. and Hans Zeisel, *The American Jury* (Chicago 1966).

⁸ Albert W. Alschuler, *In Memoriam: Norval Morris*, 72 U Chi L Rev 455, 463 (2005).

⁹ See generally Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control* (Chicago 1973); Frank Zimring and Gordon Hawkins, *Deterrence and Marginal Groups*, 5 J Rsrch in Crime & Delinquency 100 (1968).

¹⁰ Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago 1970).

¹¹ See generally Jerome H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society* (Center for the Study of Law and Society 2d ed 1975).

¹² See generally, for example, Hans W. Mattick and Alexander B. Aikman, *The Cloacal Region of American Corrections*, 381 Annals Am Acad Polit & Soc Sci 109 (1969); Hans W. Mattick, *The Prosaic Sources of Prison Violence*, (The University of Chicago Law School Occasional Paper No 3, Mar 1972).

¹³ See generally, for example, Mark H. Haller, *Urban Crime and Criminal Justice: The Chicago Case*, 57 J Am Hist 619 (1970).

¹⁴ See generally Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State 1969).

¹⁵ See generally Johannes Andenaes, *Punishment and Deterrence* (Michigan 1974).

¹⁶ See generally, for example, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U Chi L Rev 50 (1968).

Utah Supreme Court. In 1984, he left the court to become a member of the Quorum of Twelve Apostles of the LDS Church. At that time, he was the youngest of the apostles by many years. Oaks is now seventy-five, but a biography on his high school website declares that with “the LDS Church being organized the way it is,” his “time of greatest prominence” may lie ahead.¹⁷

Oaks’s article provided a comprehensive review of the debate about the exclusionary rule and what was known about its operation. The article examined court records in several jurisdictions to determine how the rule was being implemented and whether it had changed things. It reported Oaks’s interviews with police officials. It examined both the asserted benefits of the rule and its asserted costs, and it considered alternatives to the rule.

I. THE EXCLUSIONARY RULE AND DETERRENCE

Critics of the exclusionary rule often have cited Oaks for the proposition that, as Chief Justice Warren Burger put it, “there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials”¹⁸—or, that as then-Justice Rehnquist more gently put it, “it is an open question whether the exclusionary rule deters the police from violating Fourth Amendment protections of individuals.”¹⁹

Defenders of the rule have quoted this passage:

If constitutional rights are to be anything more than pious pronouncements, then some measurable consequence must be attached to their violation. It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequence. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial

¹⁷ See Brigham Young University High School, *Dallin H. Oaks*, online at http://www.byhigh.org/Alumni_K_to_O/Oaks-DallinH/DallinHOaks.html (visited Aug 29, 2008). See also Martin B. Hickman, *Succession in the Presidency*, in Daniel H. Ludlow, ed, 1 *Encyclopedia of Mormonism* 1420, 1420 (Macmillan 1992) (“Upon the death of the President of The Church of Jesus Christ of Latter-day Saints, the senior apostle in the Church’s governing quorums . . . becomes presiding officer of the Church.”).

¹⁸ *Bivens v Six Unknown Named Agents*, 403 US 388, 416 (1971) (Burger dissenting).

¹⁹ *California v Minjares*, 443 US 916, 926 (1979) (Rehnquist dissenting from the denial of a stay). See also *United States v Calandra*, 414 US 338, 348 n 5 (1974) (majority opinion of Powell) (noting “disagreement as to the practical efficacy of the exclusionary rule” and citing Oaks for the proposition that “relevant ‘empirical studies are not available’”).

review, and it gives credibility to the constitutional guarantees. By demonstrating that society will attach serious consequences to the violation of constitutional rights, the exclusionary rule invokes and magnifies the moral and educative force of the law. Over the long term this may integrate some fourth amendment ideals into the value system or norms of behavior of law enforcement agencies.²⁰

The propositions attributed to Oaks by advocates on both sides of the exclusionary rule divide are consistent and correct.

Oaks distinguished between the “direct” deterrent effect of the exclusionary rule and the rule’s long-term behavioral effects. He wrote:

As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution.²¹

Quantifying the behavioral effects of the exclusionary rule is, as Oaks reported, impossible. One cannot compare the frequency of Fourth Amendment violations before and after *Mapp v Ohio*,²² for no one can determine the incidence of unlawful searches and seizures in non-exclusionary rule states before *Mapp*. In these states, the legality or illegality of police searches almost never came before the courts. As Oaks concluded, “[I]t is possible [only] to nibble around the edges of the problem by small inquiries.”²³

Oaks concentrated on laws prohibiting gambling and the sale and possession of weapons and narcotics. As he demonstrated, the enforcement of these laws is highly dependent on police searches and seizures.²⁴ He hypothesized that if unlawful searches were occurring in non-exclusionary rule jurisdictions prior to *Mapp* and that if *Mapp* had reduced their incidence, the total number of arrests and convictions for weapons, narcotics, and gambling offenses should have declined. He collected the relevant figures for Cincinnati, Ohio and reported:

²⁰ Oaks, 37 U Chi L Rev at 756 (cited in note 2), quoted in *Calandra*, 414 US at 366 (Brennan dissenting) (quoting this passage in full); *United States v Caceres*, 440 US 741, 770 n 14 (1979) (Marshall dissenting) (quoting this passage in part).

²¹ Oaks, 37 U Chi L Rev at 755 (cited in note 2).

²² 367 US 643 (1961). *Mapp* held that the Due Process Clause of the Fourteenth Amendment incorporates the Fourth Amendment’s prohibition of unreasonable searches and seizures and requires state courts to exclude unlawfully seized evidence. See *id* at 657.

²³ Oaks, 37 U Chi L Rev at 716 (cited in note 2).

²⁴ See *id* at 682 table 3.

So far as concerns narcotics and weapons offenses in Cincinnati, the *Mapp* decision does not seem to have had any effect whatever on the number of arrests or upon the number or percent of convictions. . . . But [there was] a consistent annual reduction in the number of “raids” that resulted in gambling arrests. Thus, there was an average of 242 raids per year in the five years before *Mapp*, and only 73 in the six years after. That difference might itself indicate an important conformity induced by the *Mapp* decision, but . . . the decreasing number of raids began in 1959, two years before the *Mapp* decision, and decreased consistently from year to year through 1962.²⁵

Oaks’s figures strongly suggested that, although the criminal prosecution of gamblers was falling out of favor in Cincinnati, *Mapp* had not had any noticeable effect. Three years after Oaks’s study, however, Bradley Canon examined the arrest rates for narcotics, gambling, weapons, and stolen property offenses in fourteen cities before and after *Mapp*.²⁶ In a few of these cities, the Supreme Court’s ruling appeared to have had a substantial impact. Canon wrote of Baltimore, “[T]he decreases in arrests [except in gambling cases] following *Mapp* were both dramatically sudden and truly spectacular; one would be hard pressed to attribute them in large measure to anything but the imposition of the exclusionary rule.”²⁷ In other cities, however, the apparent effect was slight or nonexistent.²⁸ Canon concluded, “[O]ur argument is negative, not positive; . . . the evidence from the fourteen cities certainly does not support a conclusion that the exclusionary rule had no impact upon arrests in search and seizure type crimes in the years following its imposition.”²⁹ As Oaks discovered, practices and patterns differ greatly from one jurisdiction to the next, and they may leave researchers scratching their heads.³⁰ Both before and after Oaks’s study, the Supreme Court has shrugged when addressing whether the exclusionary rule can reduce the number of unlawful searches: “[I]t is hardly likely that conclusive factual data could ever be assembled.”³¹

²⁵ Id at 690–91.

²⁶ See generally Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea against a Precipitous Conclusion*, 62 Ky L J 681 (1973).

²⁷ Id at 704.

²⁸ Id at 706.

²⁹ Id at 707. See also Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 Am Polit Q 57, 73 table 3 (1977) (concluding—strangely—that *Mapp* had a greater effect in states that excluded unlawfully obtained evidence before that decision than in states that did not).

³⁰ See Oaks, 37 U Chi L Rev at 687 (cited in note 2) (noting, for example, that “[t]he figures on motions to suppress in Chicago and the District of Columbia are in sharp contrast at every level”).

³¹ *Elkins v United States*, 364 US 206, 218 (1960), quoted in *Harrison v United States*, 392 US 219, 224 (1968); *United States v Janis*, 428 US 333, 453 (1976). See also *Janis*, 428 US at 450 n 22

The exclusionary rule is unlikely to have what Oaks called a “direct” deterrent effect. In ordinary usage, the word “deterrence” refers to discouraging behavior through fear of punishment. It does not encompass all means of influencing behavior. And a rule that simply restores the status quo ante does not punish. In many situations, the exclusionary rule appears to leave an officer with nothing to lose by violating the Fourth Amendment.

It seems useful, however, to draw a distinction between the Constitution’s rules about when a search may occur and its rules about how a search must be conducted. When the police lack probable cause for a search, the Fourth Amendment generally requires them to stay out. When they have probable cause, the Fourth Amendment generally tells them to obtain a warrant, knock and announce their presence, seize only items named in the warrant, use only reasonable force, and so on. The exclusionary rule is more likely to induce compliance with rules about how a search must be conducted than to induce compliance with rules about when a search may occur.

When the police lack probable cause for a search and cannot easily establish it, they may nevertheless search and recover incriminating evidence. The evidence they seize may be suppressed, and a criminal may escape punishment. If the police had not conducted their illegal search, however, the criminal would have escaped punishment. James Madison and the Fourth Amendment, not the exclusionary rule, would have set him free.

In cases in which the issue is simply whether to search or not, the police ordinarily have nothing to lose by searching in violation of the Fourth Amendment. Moreover, they often have something to gain. Their search may allow them to recover contraband, harass the suspect, improve their arrest records, press the suspect to become an informant, gain intelligence, or even seize evidence that later can be used against someone who lacks standing³² to challenge the search or against anyone in the various legal proceedings in which the Supreme Court has held the exclusionary rule inapplicable.³³

(“The final conclusion is clear. No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect.”).

³² The Supreme Court has sought to ban the useful word “standing” from the Fourth Amendment discourse. See, for example, *Minnesota v. Carter*, 525 US 83, 87 (1998); *Rakas v. Illinois*, 439 US 128, 139 (1978). But I refuse to yield to the Court’s linguistic tyranny.

³³ See, for example, *Pennsylvania Board of Probation and Parole v. Scott*, 524 US 357, 365 (1998) (holding that the exclusionary rule does not apply in parole revocation proceedings); *Immigration and Naturalization Services v. Lopez-Mendoza*, 468 US 1032, 1050 (1984) (holding that the exclusionary rule does not apply in civil deportation hearings); *Janis*, 428 US at 460 (holding that the exclusionary rule does not apply in federal civil tax proceedings in which the challenged evidence has been seized by state law enforcement officers).

When the question is whether to obtain a warrant or knock, however, the police do have something to lose.³⁴ In this situation, the suspected criminal will not go free either way. He will avoid punishment only if the police break the rules. A nearly costless step is likely to make all the difference. Studies by Canon and others have revealed a substantial increase in the use of search warrants following *Mapp v Ohio*.³⁵

Of course the rules about when the police may search are the Fourth Amendment's primary safeguards of property and privacy. People care more about whether the police will come in than about whether they will come in with a piece of paper or without one. The exclusionary rule seems better able to enforce the rules that make less difference in people's lives.

At least when the issue is whether to comply with a rule about how a search must be conducted, the exclusionary rule may influence police conduct, not by punishing or deterring, but by removing one incentive to violate the Fourth Amendment.³⁶ In addition, the exclusionary rule may influence police conduct in the positive way that Oaks emphasized. Under the regime of *Wolf v Colorado*,³⁷ in which state courts were free to admit unconstitutionally obtained evidence and half of the states did,³⁸ judges in half of the states had almost no occasion to give legal guidance to the police. The legality of searches and seizures was irrelevant to any issue that was likely to come before them. Oaks wrote:

The salient defect in the rule of *Wolf v. Colorado* was the difficulty of persuading anyone that the guarantees of the fourth amend-

³⁴ More precisely, the police are likely not to gain a conviction they otherwise could easily have obtained.

³⁵ See Canon, 62 Ky L J 681 at 714 (cited in note 26); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U Colo L Rev 75, 124 (1992) (finding that judges, prosecutors, and public defenders in Chicago reported increased use of search warrants); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U Chi L Rev 1016, 1017 (1987) (finding that police officers in Chicago reported increased use of search warrants); Neil A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 L & Contemp Probs 467, 475 (1971) ("Prior to the 1961 *Mapp* decision search warrants in New York City were hardly ever issued, but in 1963 over 5000 search warrants were issued."); Perrin, et al, 83 Iowa L Rev at 700 (cited in note 3) ("[F]ew would dispute . . . that there has been a large increase in the use of search warrants since *Mapp*."). Oaks sought information on the frequency of arrest warrants before and after *Mapp* without success. See Oaks, 37 U Chi L Rev at 714 (cited in note 2).

³⁶ The Supreme Court confounded these two concepts in a frequently quoted statement in *Elkins*: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." 364 US at 217.

³⁷ 338 US 25 (1949) (holding that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure"), overruled by *Mapp*, 367 US at 654.

³⁸ See *Elkins*, 364 US at 225 (reviewing the law in each state).

ment were seriously intended and important when there was no sanction whatever for their violation. As a visible expression of social disapproval for the violation of these guarantees, the exclusionary rule makes the guarantees of the fourth amendment credible. Its example teaches the importance of observing them.³⁹

There is good reason to believe that the repeated articulation of Fourth Amendment norms—not only in Supreme Court decisions but also in everyday interaction between the courts and local police departments—can influence police conduct. When exclusion achieves its goals primarily through long-term guidance and habit formation rather than push-pull deterrence, however, a time-series study of police behavior in the years just before and just after *Mapp* is unlikely to capture the effect. Social change commonly takes place over a longer period than social scientists can measure.

Although no hard data prove the exclusionary rule's success, evidence of its success is not difficult to find. As Yogi Berra explained, "You can observe a lot by just watching."⁴⁰ Wayne LaFave notes that the rule's influence is apparent "in the use of search warrants where virtually none had been used before, stepped-up efforts to educate the police on the law of search and seizure where such training had been virtually nonexistent, and the creation and development of working relationships between police and prosecutors."⁴¹

William Mertens and Silas Wasserstrom describe the response of the Metropolitan Police Department of the District of Columbia to a Supreme Court decision forbidding random automobile stops to check drivers' licenses.⁴² Although the Department previously had permitted these stops in reliance on local judicial decisions, the chief of police issued a telex within hours of the Supreme Court's ruling forbidding the practice. According to Mertens and Wasserstrom, the response of the Delaware State Police was similar.⁴³ These police responses not only illustrate the receptiveness of police agencies to legal rulings, but they also show the importance of the exclusionary rule in generating these rulings. Without the rule, there would have *been* no Supreme Court decision on the legality of automobile stops to check licenses. Random ve-

³⁹ Oaks, 37 U Chi L Rev at 711 (cited in note 2) (citations omitted).

⁴⁰ Carl C. Gaither and Alma E. Cavazos-Gaither, eds, *Statistically Speaking: A Dictionary of Quotations* 143 (CRC Press 1996).

⁴¹ Wayne R. LaFave, 1 *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2(b) at 33 (West 4th ed 2004).

⁴² See William Mertens and Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo L J 365, 399–401 (1981) (describing the effect of *Delaware v Prouse*, 440 US 648 (1979)).

⁴³ *Id.* at 400.

hicle stops might have continued in the District of Columbia and throughout America to this day. When one stops thinking about gangbuster police officers determined to get away with as much as they can and starts thinking about how the exclusionary rule enables the courts to develop and reinforce legal norms, the effect of the rule is difficult to miss.

Researchers not only can watch, but they also can talk to participants in the criminal justice system. Many researchers have, and their findings are in accord. Judges, prosecutors, defense attorneys, and police officers agree that the exclusionary rule has influenced police conduct for the better.

Oaks described the earliest of these studies.⁴⁴ In 1963, Stuart Nagel surveyed police chiefs, prosecutors, judges, defense attorneys, and ACLU officers in forty-seven states.⁴⁵ The overwhelming majority agreed that the exclusion of unlawfully obtained evidence reduced illegal searches.⁴⁶ *Mapp* had been decided in 1961, and Nagel asked whether police compliance with the Fourth Amendment had increased or decreased between 1960 and 1963. Seventy-five percent of the respondents in states without an exclusionary rule prior to *Mapp* said that compliance had increased, but only 57 percent of the respondents in the states that had an exclusionary rule prior to *Mapp* said so.⁴⁷ Similarly, Michael Katz reported that 64 percent of the prosecutors, 62 percent of the defense attorneys, and 78 percent of the judges surveyed in North Carolina agreed that the “[e]xclusion of evidence is an effective way of reducing the number of illegal searches.”⁴⁸

Following Oaks’s study, Myron Orfield interviewed twenty-six narcotics officers in Chicago. None of them favored abolition of the exclusionary rule, although they all favored modification of the rule to admit evidence seized in good faith.⁴⁹ The officers believed that the rule had affected police conduct for the better and considered the rule superior to tort remedies for unlawful searches.⁵⁰ A later study by Orfield reported the perceptions of Chicago prosecutors, public defenders, and judges. Again, all of the respondents agreed that the exclusionary rule had reduced police misconduct. They described not only how the rule had affected individual officers, but also how it had produced institutional reform in the Chicago Police Department and generated

⁴⁴ See Oaks, 37 U Chi L Rev at 679–81 (cited in note 2).

⁴⁵ See Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 Wis L Rev 283, 283–84.

⁴⁶ Id at 298.

⁴⁷ Id at 287.

⁴⁸ Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 NC L Rev 119, 134 (1966).

⁴⁹ Orfield, Comment, 54 U Chi L Rev at 1018 (cited in note 35).

⁵⁰ Id.

a closer working relationship between police officers and prosecutors.⁵¹ A survey of law enforcement officers in Ventura County, California reported that 60 percent regarded the threat of suppression as an “important consideration in conducting searches and seizures.”⁵² Fifty-seven percent agreed that “[t]he interests of the criminal justice system are well served by excluding unlawfully seized evidence.”⁵³

The exclusionary rule does not operate primarily by altering a short-term pleasure-pain calculus or by frustrating a police officer’s distinctive blood lust. It works over the long term by allowing judges to give guidance to police officers who ultimately prove willing to receive it.⁵⁴

II. THE COSTS OF THE EXCLUSIONARY RULE

When the Supreme Court describes the costs of exclusionary rule, it places at the top of its list “the grave adverse consequence . . . of releasing dangerous criminals into society.”⁵⁵ When Oaks turned to the negative effects of the rule, however, he mentioned freedom for the guilty only as part of a troubling comparison: “In terms of direct corrective effect, the exclusionary rule only benefits a person incriminated by illegally obtained evidence. It does nothing to recompense the injury suffered by the victim of an illegal search that turns up nothing incriminating.”⁵⁶

Oaks in fact denied that “handcuffing the police” was a cost of the rule:

The whole argument about the exclusionary rule “handcuffing” the police should be abandoned. If this is a negative effect, then it is an effect of the constitutional rules, not an effect of the exclusionary rule as the means chosen for their enforcement. Police of-

⁵¹ Orfield, 63 U Colo L Rev at 80 (cited in note 35).

⁵² Perrin, et al, 83 Iowa L Rev at 720 (cited in note 3).

⁵³ Id at 732. The researchers who conducted the survey were exclusionary rule critics.

⁵⁴ I have noted:

Critics of the exclusionary rule may have followed too closely Justice Holmes’s advice to view the law from the perspective of a “bad man” who wishes only to evade it. From a “bad cop” perspective, it is easy to ridicule the exclusionary rule’s supposed deterrent effect. . . . [A]lthough the “bad cop” deserves attention, the “good cop” merits notice as well.

Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in Eugene W. Hickok, Jr., ed, *The Bill of Rights: Original Meaning and Current Understanding* 197, 203–04 (Virginia 1991).

⁵⁵ *Hudson v Michigan*, 547 US 586, 595 (2006). See also *Illinois v Gates*, 462 US 213, 257 (1983) (“We will never know how many guilty defendants go free as a result of the rule’s operation.”); *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388, 416 (1971) (Burger dissenting) (“Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals.”).

⁵⁶ Oaks, 37 U Chi L Rev at 736 (cited in note 2).

officials and prosecutors should stop claiming that the exclusionary rule prevents effective law enforcement. In doing so they attribute far greater effect to the exclusionary rule than the evidence warrants, and they also are in the untenable position of urging that the sanctions be abolished so that they can continue to violate the rules with impunity.⁵⁷

In the years after Oaks's study appeared, researchers calculated what proportion of criminal defendants had escaped conviction by virtue of the exclusionary rule, and they reported that the number was small. Federal courts excluded unlawfully seized evidence in only 1.3 percent of all criminal cases filed by federal prosecutors,⁵⁸ and search and seizure motions were successful in only 0.7 percent of all criminal cases in a large, nine-county, state court sample.⁵⁹ Moreover, federal prosecutors refused to prosecute only 0.2 percent of the cases in which felony arrests had been made on the ground that they feared the exclusion of seized evidence,⁶⁰ and in California, only 0.8 percent of all arrests were rejected for prosecution because prosecutors anticipated the suppression of evidence.⁶¹

One cannot know whether the researchers' numbers say something good or something bad about the rule. Were few cases "lost" to the rule because police officers feared exclusion and rarely violated the Fourth Amendment? Or because judges and prosecutors winked at Fourth Amendment violations, police perjury provided an easy way around the rule, or defense attorneys interested in a fast buck or in quickly moving cases persuaded their clients to plead guilty rather than litigate motions to suppress?

When Justice William Brennan, dissenting in *United States v Leon*,⁶² cited the researchers' findings as proof of the low social cost of the exclusionary rule,⁶³ Justice Byron White responded for the majority that "the small percentages . . . mask a large absolute number of felons who are released."⁶⁴ Yet one may wonder how much numbers of either type aid the debate. When opponents of the exclusionary rule declare it

⁵⁷ Id at 754.

⁵⁸ See Comptroller General of the United States, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 9–11 (GAO 1979); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) about the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 8 Am Bar Found Rsrch J 611, 660 (1983).

⁵⁹ See Peter Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 8 Am Bar Found Rsrch J 585, 596 (1983).

⁶⁰ Davies, 8 Am Bar Found Rsrch J at 635 (cited in note 58).

⁶¹ Id at 619.

⁶² 468 US 897 (1984).

⁶³ Id at 950–51 (Brennan dissenting).

⁶⁴ Id at 908 n 6 (majority opinion of White).

inappropriate (indeed insane) to release a Ted Bundy, Jeffrey Dahmer, or Gary Leon Ridgway because the police unlawfully searched his automobile, it is not much of an answer to say, "Yes, but it doesn't happen often."

Oaks considered several other possible negative effects of the exclusionary rule, including court delay, the diversion of resources from trials to satellite hearings, the weakening of substantive Fourth Amendment guarantees by judges reluctant to exclude evidence, the encouragement of plea bargaining, the empowerment of corrupt police officers to immunize criminals by botching searches, and the imposition of extrajudicial punishment by officers who find themselves unable to secure convictions lawfully.⁶⁵ He focused particularly on the rule's fostering of false testimony by the police. After *Mapp*, some officers not only conducted illegal searches, but they also lied about them. The exclusionary rule might have increased rather than reduced police lawlessness.

Oaks reported high-ranking police officers' admissions that officers "twist" the facts to prevent suppression.⁶⁶ He noted Jerome Skolnick's description of how the police "fabricate" probable cause after the fact.⁶⁷ And he described the research of a group of Columbia Law School students who examined police offense reports in narcotics cases in the six months before and after *Mapp*. These students discovered that the proportion of cases in which narcotics officers claimed that drugs were dropped to the ground or otherwise in plain view more than doubled after *Mapp*.⁶⁸ It seemed less likely that drug users had changed their patterns of behavior than that the officers were devising stories that would make the drugs they seized admissible.⁶⁹

Studies after Oaks's have reached similar conclusions. Ten of twenty-one Chicago narcotics officers told Orfield that judges were "frequently" correct to disbelieve police testimony. Sixteen of the twenty-one agreed that the police "shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact."⁷⁰ A New York City commission on police corruption reported in 1994, "Several officers . . . told us that the practice of police falsification

⁶⁵ See Oaks, 37 U Chi L Rev at 739-54 (cited in note 2).

⁶⁶ See id at 739.

⁶⁷ See id at 740, citing Skolnick, *Justice without Trial* at 215 (cited in note 11).

⁶⁸ See Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 Colum J L & Soc Probs 87, 94 table II (1968).

⁶⁹ Oaks dutifully noted another possible explanation that New York police officers and prosecutors had suggested to him. After *Mapp*, narcotics officers might have conducted fewer unlawful searches of narcotics suspects. Instead, they might have "rushed" these suspects, "hoping to produce a panic in which the person would visibly discard the narcotics." Oaks, 37 U Chi L Rev at 699 n 90 (cited in note 2).

⁷⁰ Orfield, Comment, 54 U Chi L Rev at 1050 (cited in note 35).

in connection with . . . arrests is so common in certain precincts that it has spawned its own word: ‘testilying.’”⁷¹ Officers told the commission of “a litany of manufactured tales” concerning bulges in pockets, suspicious items in plain view, traffic violations, money changing hands, and reliable informants.⁷²

Police officers determined to perjure themselves and able to get away with it can effectively overrule *Mapp v Ohio*. The frequency with which suppression motions are granted, however, suggests that things are not that bad.⁷³

III. ALTERNATIVES TO THE EXCLUSIONARY RULE

In 2006, in *Hudson v Michigan*,⁷⁴ the Supreme Court held the exclusionary rule inapplicable to cases in which police officers violate the Fourth Amendment by failing to knock and announce their presence before breaking in.⁷⁵ It wrote,

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.⁷⁶

The Court noted four developments that it said had made civil remedies more effective than they were when the Supreme Court decided *Mapp*. First, during the same term that it decided *Mapp*, the Court held that a federal civil rights statute⁷⁷ authorized civil actions

⁷¹ Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, *Commission Report 36* (City of New York 1994) (“Mollen Report”).

⁷² *Id.* at 38. Christopher Slobogin collects many additional sources. See Christopher Slobogin, *Testilying: Police Perjury and What to Do about It*, 67 U Colo L Rev 1037, 1041–46 (1996).

⁷³ See, for example, Oaks, 37 U Chi L Rev at 684 (cited in note 2) (noting that in 1969, 86 percent of the motions to suppress evidence in Chicago gambling cases were granted); Nardulli, 8 Am Bar Found Rsrch J at 596 (cited in note 59) (reporting that, in a nine-county state court sample, 25 percent of all motions to suppress evidence were granted in drug cases, and 33 percent of all motions to suppress evidence were granted in weapons cases).

⁷⁴ 547 US 586 (2006).

⁷⁵ See *id.* at 595.

⁷⁶ *Id.* at 597. This statement and others prompted academic concern that the Supreme Court might be about to scrap the exclusionary rule. See, for example, David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 Cato S Ct Rev 283, 283; Note, *Fourth Amendment—Exclusionary Rule—“Knock and Announce” Violations*, 120 Harv L Rev 173, 183 (2006). Nevertheless, Justice Anthony Kennedy, who endorsed the majority’s language and who supplied the fifth vote in favor of the *Hudson* ruling, declared in a concurring opinion, “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.” 547 US at 603 (Kennedy concurring).

⁷⁷ 42 USC § 1983 (2000).

against state officers who violate the Constitution.⁷⁸ Second, the Court held a decade later that another statute⁷⁹ authorized similar actions against federal officers.⁸⁰ Third, a 1978 decision “extended [the civil rights remedy] to reach the deep pocket of municipalities.”⁸¹ And fourth, a federal statute allowed civil rights plaintiffs to recover reasonable attorney fees.⁸² The Court concluded, “As far as we know, civil liability is an effective deterrent here.”⁸³

If the measures described by the Court truly had made civil remedies for knock-and-announce violations effective, one would expect the reports to reveal at least a few cases in which plaintiffs had recovered more than nominal damages for knock-and-announce violations. The defendant’s lawyer in *Hudson*, however, could not find any; Michigan’s lawyer could not find any; the dissenting justices could not find any; and the majority could not find any. At the same time, as the dissenting justices noted, the knock-and-announce violations reported in the exclusionary rule cases were “legion.”⁸⁴

The lack of any reported recovery in civil lawsuits for knock-and-announce violations apparently gave the majority no pause. It wrote, “[W]e do not know how many claims have been settled, or indeed how many violations occurred that produced anything more than nominal injury.”⁸⁵ Justices who can assert the effectiveness of an invisible remedy do not lack chutzpah.

Oaks, an exclusionary rule opponent, recognized that existing civil remedies could not do the job. He wrote, “Informed observers other

⁷⁸ See *Monroe v Pape*, 365 US 167, 172 (1961), overruled on other grounds by *Monell v Department of Social Services*, 436 US 658 (1978).

⁷⁹ 28 USC § 1331(a) (2000).

⁸⁰ See *Bivens v Six Unknown Named Agents*, 403 US 388, 396 (1971). The Court’s decisions leave many Fourth Amendment violations without a remedy. The Court has held that unless the police “violate clearly established . . . constitutional rights of which a reasonable person would have known,” they are immune from suit. *Harlow v Fitzgerald*, 457 US 800, 818 (1982). See also *Anderson v Creighton*, 483 US 635, 638 (1987).

⁸¹ *Hudson*, 547 US at 597, citing *Monell*, 436 US 658. *Monell*, however, allowed recovery from municipalities only when an officer’s unlawful actions could “fairly be said to represent official policy.” *Monell*, 436 US at 659. A later ruling held that only violations by officials expressly given final policymaking authority by law could meet this standard. See *City of St. Louis v Praprotnik*, 485 US 112, 123 (1988). Under the Court’s decisions, governmental entities other than municipalities remain immune from suit.

⁸² 42 USC § 1988(b) (2000). Another statute, 42 USC § 1997e(d) (2000), limits attorney fees to 150 percent of the plaintiff’s monetary recovery when the plaintiff is a prison inmate. The Tenth Circuit recently considered a case in which, after an officer unlawfully broke an automobile window, a federal district court awarded nominal damages of \$1. The court held that, because the plaintiff was incarcerated at the time of his lawsuit, the award of attorney fees could not exceed \$1.50. See *Robbins v Chronister*, 435 F3d 1238, 1239 (10th Cir 2006).

⁸³ *Hudson*, 547 US at 598.

⁸⁴ *Id* at 610 (Breyer dissenting).

⁸⁵ *Id* at 598.

than the United States Supreme Court have uniformly agreed that presently available alternatives [to the exclusionary rule] for deterring police misconduct are ineffective.”⁸⁶ The defects in existing tort remedies that he noted, including the limited measure of damages and the danger that jurors may nullify constitutional rights, have not vanished.⁸⁷

Near the end of *Studying the Exclusionary Rule*, Oaks departed from his genuinely dispassionate assessment of the evidence to offer “the author’s own polemic on the rule.”⁸⁸ The bottom line of his not very polemical polemic was that “[t]he exclusionary rule should be abolished, but not quite yet.”⁸⁹ Oaks proposed replacing the rule with “an effective tort remedy against the offending officer or his employer.”⁹⁰

Oaks’s position rested on the commonsense view that sanctions are most effective and most appropriate when applied directly to the individuals responsible for a violation. He quoted Justice Robert Jackson’s statement, “Rejection of the evidence does nothing to punish the wrongdoing official,”⁹¹ and he wrote, “A prime defect of the exclusionary rule is that police who have been guilty of improper behavior are not affected in their person or their pocketbook by the application of the rule.”⁹²

Oaks published his study in the same year that Richard Posner joined the faculty of The University of Chicago Law School and four

⁸⁶ Oaks, 37 U Chi L Rev at 676 (cited in note 2).

⁸⁷ Oaks wrote:

The present tort remedy is ill suited for controlling the police since the measure of damages is not related to the enormity of the wrong committed by the defendant (police officer). Instead, the damages are determined by the injury suffered by the plaintiff, and that injury often cannot be determined in economic terms.

Id at 718. The Supreme Court later held that courts may not invite juries to place a value on the loss of intangible constitutional rights and that “when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.” *Memphis Community School District v Stachura*, 477 US 299, 306 (1986). In appropriate cases, however, juries may award punitive damages. See *Smith v Wade*, 461 US 30, 56 (1983) (holding that a jury may assess punitive damages in a § 1983 action “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”).

The effectiveness of civil remedies also is hampered by the doctrine of qualified immunity, which bars civil recovery for many violations of Fourth Amendment rights. See *Malley v Briggs*, 475 US 335, 341 (1986) (noting that qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law”). In addition, most victims of police abuse are not well advised; they lack easy access to lawyers; they may fear reprisals; and they are likely to seem unattractive to jurors. See Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 Minn L Rev 493, 499–500 (1955).

⁸⁸ Oaks, 37 U Chi L Rev at 755 (cited in note 2).

⁸⁹ Id.

⁹⁰ Id at 756. Oaks considered other alternatives to the rule, including criminal prosecution of the offending officer and internal police discipline, but he judged all existing alternatives ineffective. See id at 673–74.

⁹¹ Id at 725, quoting *Irvine v California*, 347 US 128, 136 (1954).

⁹² Oaks, 37 U Chi L Rev at 725 (cited in note 2).

years before Posner published *Economic Analysis of Law*.⁹³ The past thirty-four years of law and economics scholarship probably would not prompt many revisions of *Studying the Exclusionary Rule*, but they might prompt one. If Oaks now were to revisit his study, he might mention a concept that did not appear in the 1970 article: overdeterrence. When all existing Fourth Amendment remedies seemed ineffective, Oaks was unlikely to worry that the one he proposed might be too effective.

Damage actions of the sort that Oaks envisioned, however, might produce results that the champions of effective law enforcement would not like. Although law enforcement benefits the public, the civil remedies that he favored would inflict the burdens of excess and mistake on individual officers. This mismatch easily could lead officers to play it safer than they should. As long as an action conceivably might be held illegal, an officer faced with the prospect of liability would have little to gain and much to lose by making it.⁹⁴

Orfield's post-Oaks study asked Chicago narcotics officers if they thought a "system in which victims of improper searches could sue police officers directly would be better than the exclusionary rule." All of the officers answered no. Orfield then asked, "What would be the effect of civil suits for damages on police work?" He gave his respondents four choices: "(a) the police would be more careful, (b) the police would be afraid to conduct searches they should make, (c) there would be no effect, and (d) other."⁹⁵ Twenty-one of the twenty-two respondents answered that the police would be afraid to conduct searches they should make.⁹⁶ One high-ranking officer surprised Orfield with his knowledge of Supreme Court decisions. He referred to a proposal for increasing the effectiveness of civil remedies that Chief

⁹³ Richard A. Posner, *Economic Analysis of Law* (Little, Brown 1973).

⁹⁴ See Note, 120 Harv L Rev at 181 (cited in note 76) ("Police officers internalize only a fraction of the social benefits of law enforcement, so making them personally liable for the full costs of their actions would result in overdeterrence."). Governments today commonly indemnify officers for financial liability incurred in the course of their employment; but when an officer's unlawful action could lead to substantial governmental liability, he might fear that this action would lead to discipline, transfer, or other unpleasant personal consequences. Reformers who would substitute civil remedies for the exclusionary rule usually intend this effect, as Oaks did. But see Oaks, 37 U Chi L Rev at 717-18 n 145 (cited in note 2) (reporting unpublished research by William A. Briggs, which noted that although eighteen of thirty-six damage actions filed against Chicago police officers in a federal district court between 1960 and 1967 resulted in indemnification payments by the city, no officer responsible for these payments was disciplined even by reprimand).

⁹⁵ Alschuler, *Fourth Amendment Remedies* at 205 (cited in note 54). See also Orfield, Comment, 54 U Chi L Rev at 1053 (cited in note 35).

⁹⁶ Alschuler, *Fourth Amendment Remedies* at 205 (cited in note 54) (discussing Orfield's work).

Justice Burger had advanced in a dissenting opinion⁹⁷ and said, “If they ever try that one, we’re going to stop doing anything.”⁹⁸

John Dickinson told the Constitutional Convention in 1787:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries and experience has given a sanction to them.⁹⁹

At its inception, the Fourth Amendment exclusionary rule rested primarily on what Yale Kamisar called a “principled basis” rather than “an empirical proposition.”¹⁰⁰ In Oaks’s words, the authors of the rule focused mostly on “the impropriety of the lawgiver’s forbidding conduct on the one hand and at the same time participating in the forbidden conduct by acquiring and using the resulting evidence.”¹⁰¹ The authors of the rule did not see their task as one devising a means of influencing police officers at an optimal level.

Nevertheless, the exclusionary rule may be a more balanced and effective mechanism for influencing police conduct than civil damage actions. Implementing Oaks’s proposal would require lawmakers to answer such questions as: Should the qualified immunity of police officers be abrogated? Should courts hold them (or their employers) liable even when they have acted in good faith reliance on existing law? Would courts prove too reluctant to alter the law when a violation would require police officers or municipalities to pay damages? Would police officers make an economic calculation in deciding whether to obey the Constitution—deciding, for example, that the benefit of catching a suspect by violating his rights outweighed what taxpayers would pay in damages? Should criminals be awarded substantial damages (to spend in the prison commissary or give to their favorite charities) when the police have caught them by violating their rights? How should damages be calculated in the many situations in which the police may violate the Fourth Amendment—for example, when they have probable cause for a search but fail to obtain a warrant and do discover drugs? If damages

⁹⁷ See *Bivens*, 403 US at 421–22 (Burger dissenting) (calling for Congress to develop an “administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated”).

⁹⁸ Alschuler, *Fourth Amendment Remedies* at 205 (cited in note 54).

⁹⁹ Max Farrand, *2 Records of the Federal Convention of 1787* 278 (Yale 1911).

¹⁰⁰ Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition?”*, 16 Creighton L Rev 565, 565 (1983).

¹⁰¹ Oaks, 37 U Chi L Rev at 668 (cited in note 2).

are not to be measured by the harm done to the plaintiff, how are they to be assessed? May jurors put any value they like on intangible rights? The exclusionary rule allows courts to develop the law of the Fourth Amendment in rulings with enough bite to be taken seriously, but it does not, by threatening the pocketbooks of individual officers or their employers, lead the police to resolve all doubts against making any search or seizure that a court or jury might hold unlawful.

CONCLUSION

The empirical scholarship of Dallin Oaks has stood the test of time. Indeed, rereading Oaks prompts an appreciation of some scholarly virtues that may be fading. Oaks's methodology was eclectic and adapted to the issues he confronted. He probed official records and presented numbers when he could, but he also talked to police officers and others who, it turned out, did know something. He did not sneer at anecdotal evidence. He presented his empirical findings in ways that even lawyers could understand.

Much of today's empirical scholarship is different. Researchers run formulaic econometric regressions on large datasets; their computers spew forth conclusions that often look like nonsense; the researchers add some filler about prior studies; and then they publish.

In what appears to be the most recent empirical study of the effect of the exclusionary rule, Raymond Atkins and Paul Rubin bypass the question of whether the rule has affected the conduct of police officers and examine whether it has affected the conduct of criminals.¹⁰² They examine crime rates in 48 states from 1958 through 1967 and in 396 cities from 1948 through 1969 as revealed by the FBI's *Uniform Crime Reports*. They distinguish jurisdictions that excluded unlawfully obtained evidence before *Mapp* from jurisdictions that did not and distinguish years before *Mapp* from years after. They take account of such potentially confounding variables as employment rates, personal incomes, education levels, percentage of the population living in an urban setting, population age, and racial distributions. Their "primary specification for this data set" is a model with state and year fixed effects, taking the form " $\log(\text{Crime})_{it} = a_i + b'x_{it} + g \times \text{Mapp} + \text{state fixed effects} + \text{year fixed effects} + e_{it}$,"¹⁰³

And they find:

Mapp increased crimes of larceny by 3.9 percent, auto theft by 4.4 percent, burglary by 6.3 percent, robbery by 7.7 percent, and

¹⁰² Raymond A. Atkins and Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J L & Econ 157 (2003).

¹⁰³ Id at 165.

assault by 18 percent. Moreover, these results mask larger impacts in suburban cities—where the imposition of the *exclusionary rule* increased violent crimes by 27 percent and property crimes by 20 percent.¹⁰⁴

Crediting these findings would require one to believe that implementing the exclusionary rule substantially increased police compliance with the Fourth Amendment (an effect that all researchers who have looked for it have missed) or at least that criminals believed the rule effective. Moreover, compliance with the Constitution appears to be a very bad thing,¹⁰⁵ for criminals—especially *suburban* criminals—almost instantly responded to apparent police observance of the Fourth Amendment by increasing the rate at which they committed crimes. Oddly, these criminals were especially likely to commit offenses—like assault—whose investigation almost *never* involves searches and seizures.¹⁰⁶ Although lawyers like me are not qualified to offer technical criticism of Atkins and Rubin’s work, we can explain why we find it difficult to follow and difficult to swallow.¹⁰⁷

Oaks’s normative discussion of the exclusionary rule also differs from most normative discussion of the rule today. In the years since his study, a series of Supreme Court decisions have restricted use of the rule, and substantive Fourth Amendment decisions often have bristled with animosity toward the rule. For the most part, legal scholars have protested the Court’s warfare against the rule—helplessly, but without giving quarter. Neither side appears to have great respect for the other.

¹⁰⁴ Id at 174 (emphasis added).

¹⁰⁵ Actually, the authors do not *say* that it is a bad thing. They say only that we need to think about it: “These increases in crime rates are a weighty cost attached to each of the Supreme Court’s decisions to change criminal procedure. Society may decide that our new protections are worth these costs, but an informed debate requires that these costs be known and considered.” Id.

¹⁰⁶ See Oaks, 37 U Chi L Rev at 682 table 3 (cited in note 2). The drug, weapons, and gambling offenses whose investigation most often involves searches and seizures were not among the index crimes included in the *Uniform Crime Reports*, and Atkins and Rubin apparently did not examine them. As this Article has noted, the findings of Oaks and other researchers who have examined post-*Mapp* arrests for these crimes are mixed. See notes 24–30 and accompanying text.

An economist worth his salt might not be troubled by a finding that the exclusionary rule had a dramatic impact in areas of investigation in which searches and seizures rarely occur. Here is what must have happened: when the police responded to *Mapp* by reducing the number of unlawful narcotics searches they had made previously, they were required to devote greater resources to investigating narcotics by other means. They drew these resources from the investigation of crimes like assault. Criminals sensed this shift in resources, and they grew less hesitant about starting bar fights and knifing their domestic partners.

¹⁰⁷ The only scholars to have taken note of Atkins and Rubin’s findings appear to have ingested them whole. See, for example, Alicia M. Hilton, *Alternatives to the Exclusionary Rule after Hudson v. Michigan: Preventing and Remediating Police Misconduct*, 53 Vill L Rev 47, 51 (2008); Keith N. Hylton and Vikramaditya Khanna, *A Public Choice Theory of Criminal Procedure*, 15 S Ct Econ Rev 61, 61–62 (2007).

Studying the Exclusionary Rule reminds us that legal scholars once spoke to courts and not just to each other and that courts sometimes listened. It reminds us that many questions regarding the exclusionary rule are difficult and debatable. And it shows us what scholarly precision and fairness look like. Dallin Oaks was careful never to oversell his findings, and if anything, he was too generous to positions opposed to his own. His scrupulous regard for the facts and for what legitimately could be said on both sides of the issue provides an example of legal scholarship at its best.