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A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence

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ABSTRACT

This Article considers several different theoretical bases for exclusionary rules within domestic criminal justice systems, and many associated countervailing considerations against exclusion, in order to identify a principled basis upon which a model exclusionary rule could be built. The Article then describes various application doctrines that form part of different existing exclusionary rules, and assesses how effectively each of these doctrines can be justified in terms of one or more of the accepted bases for exclusion. Finally, building on the theoretical and comparative study within the first two portions of this Article, it concludes by proposing a principle-based model exclusionary test that could be adopted in almost any domestic jurisdiction, and explains how each of the previously discussed exclusionary doctrines either would or would not integrate into this proposed model exclusionary rule.

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INTRODUCTION

The laws of evidence and criminal procedure in many countries include exclusionary rules for dealing with tainted evidence[1]—that is to say, rules allowing courts to exclude evidence that has been obtained in breach of an individual's statutory or constitutional human rights. These exclusionary rules are often complex,[2] and are—perhaps justifiably—often criticized in both

1. *See, e.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 24(2) (U.K.) [hereinafter Canadian Charter] (for a Canadian example of a constitutional exclusionary rule).

2. The three part, multi-factorial analysis that applies to Canadian exclusionary decisions under § 24(2) of the Canadian Charter was recently created by the Supreme Court of Canada in R. v. Grant, [2009] 2 S.C.R. 353 (Can.). However, applying the analytical framework is not a simple matter: one study found that courts spend an average of sixteen paragraphs within their reasons

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academic[3] and popular[4] discourses. The purpose of this Article is therefore to propose a simple, principle-based exclusionary rule that is flexible enough that it could be adopted by any court that is faced with the task of interpreting or applying a domestic[5] exclusionary rule. By embracing simplicity, and by building upon a foundation of well-articulated principles, the model exclusionary rule proposed within this Article is intended to respond to current and past criticisms of exclusionary rules.

Through previous study[6] of the Canadian exclusionary rule,[7] it has become apparent that the Canadian rule is not solidly grounded in either the text of the Charter of Rights and Freedoms (*Canadian Charter* or *Charter*),[8] or in easily defensible principles. Further study of foreign exclusionary rules reveals that inconsistencies often exist between the purported rationale for, and the actual application of, a given exclusionary rule.[9] Certainly, much has been written about the strengths and flaws of various exclusionary rules that are used throughout the world. A typical Canadian law review article on the subject of section 24(2) of the *Charter*, for instance, will often include a series of footnotes that make reference to some of the approximately ten-to-twenty leading articles by criminal law scholars who have framed the debate about how Canada's

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explaining how they have applied the Grant framework. *See* Mike Madden, *Empirical Data on Section 24(2) Under R. v. Grant*, SOC. SCI. RES. NETWORK, 6 tbl.6 (Jan. 23, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1745243. [hereinafter Madden, *Empirical Data*].

3. *See, e.g.*, Akash Toprani, Note, *A Tale of Two Section Twenty-Fours: Towards a Comprehensive Approach to Charter Remedies*, 70 U. TORONTO FAC. L. REV. 141 (2012).

4. *See, e.g.*, Richard Humphreys, *Miscarriage of Justice as Guilty Get Off on a Technicality*, INDEPENDENT (July 28, 2013), http://www.independent.ie/opinion/analysis/richard-humphreys-miscarriage-of-justice-as-guilty-get-off-on-technicality-29453976.htmls.

5. Throughout this Article, references to exclusionary rules should be understood to mean only those exclusionary rules that operate within domestic—as opposed to international—criminal justice systems. It is acknowledged that separate considerations relating to different (and much more ambitious) purposes and functions of international criminal proceedings would likely justify the application of a different kind of exclusionary rule at any international criminal court or tribunal. For a much more detailed discussion about how international trials demand a unique exclusionary rule, see Mike Madden, The Exclusion of Improperly Obtained Evidence at the International Criminal Court: A Principled Approach to Interpreting Article 69(7) of the *Rome Statute* 104–18 (April 2014) (unpublished LL.M. Thesis, Dalhousie University's Schulich School of Law), *available at* http://dalspace.library.dal.ca/bitstream/handle/10222/50199/Madden-Michael-LLM-Law-April-2014.pdf.

6. Madden, *Empirical Data*, *supra* note 2; Mike Madden, Marshalling the Data: An Empirical Analysis of Section 24(2) Case Law in the Wake of R. v. Grant, 15 Canadian Crim. L. Rev. 229 (2011). [hereinafter Madden, Marshalling the Data].

7. Canadian Charter, *supra* note 1; R. v. Grant, [2009] 2 S.C.R. 353 (Can.).

8. Canadian Charter, *supra* note 1.

9. *See infra* Part II for extensive discussion of different foreign exclusionary rules and the theoretical problems associated with many aspects of these rules.

exclusionary rule can and should operate.[10] A typical article might also refer to the current status of exclusionary rules in any number of different countries, including England, New Zealand, the United States, South Africa, and Israel, to name but a few of the most frequently compared jurisdictions.[11] One can safely say that Canadian scholars are carefully considering certain aspects of their exclusionary rule, and they are diligently looking beyond their borders in their efforts to suggest how exclusionary jurisprudence could be improved. This situation in the Canadian academic legal environment is reflective of the way that exclusionary rules are thought of and written about elsewhere in the English-speaking world[12]—and there is no shortage of doctrinal commentary on any domestic exclusionary rule.

However, the overwhelming majority of current legal scholarship dealing with exclusionary rules either fails altogether to consider why exclusionary rules exist in the first place, or accepts without question the proffered rationale for a given exclusionary rule that has been supplied by a high court in a particular jurisdiction.[13] In other words, scholars tend to uncritically accept the status quo when it comes to asking what an exclusionary rule should do, and then proceed to comment upon how a given rule is or is not efficient in achieving the purpose that they have unquestioningly accepted. This type of micro-criticism tends to miss potentially more important issues: what if the rationale that underlies the rule is not sound to begin with, or what if a high court has supplied an incomplete or incorrect answer when it has pronounced upon the rationale for a jurisdiction's rule? As these questions suggest, it is time to critically think about why and how exclusionary rules should operate, in order to derive a more principle-based model exclusionary rule.

This Article will begin in Part I with an attempt to establish a principled basis for exclusionary rules in general. Part II will then comprehensively evaluate different aspects of exclusionary rules that are actually in use throughout the world by assessing how effectively the components of these rules can be justified on the basis of the principles developed in Part I. Finally, Part III

10. *See, e.g.*, Steven Penney, Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter, 49 McGill L.J. 105, 107–08 nn.7–8 (2003) (citing ten previous works on § 24(2) of the Canadian Charter in the span of two footnotes).

11. *See, e.g.*, Michael Davies, Alternative Approaches to the Exclusion of Evidence Under s. 24(2) of the Charter, 46 Crim. L.Q. 21 (2002) (Can.) (referring to exclusionary doctrines that apply in New Zealand and the United States as a basis for comparison with the Canadian rule).

12. *See, e.g.*, Binyamin Blum, Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation, 60 Stan. L. Rev. 2131 (2008) (describing developments to the Israeli exclusionary rule in the context of similar changes to the law in the United States, Canada, South Africa, and the United Kingdom).

13. *See supra* notes 10–11.

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will draw from the preceding parts in order to develop and justify a model exclusionary test that could be used within almost any domestic criminal justice system.

Instead of a complicated exclusionary rule framework that develops on a case-by-case basis in ways that are often internally incoherent, this Article ultimately proposes a relatively simple exclusionary rule that could be much more easily justified on the basis of objective principles. Although academic writing cannot realistically propose how courts should decide exclusionary matters in particular cases, this Article should nonetheless provide a paradigm for thinking about the doctrine of exclusion that would guide courts in determining whether tainted evidence should be admitted or excluded in each case.

I.
THE THEORY OF EXCLUSIONARY RULES

> The term "exclusionary rule" is a bit like the lunchmeat spam—virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions.[14]

Meaningful discourse about exclusionary rules might begin with an explanation of how we conceive of the function that exclusionary rules should perform within our legal systems. After all, how can one determine whether there should be an exception to an exclusionary rule in cases where police have acted in clear good faith when they inadvertently breached an individual's rights (i.e., the specific content of an exclusionary rule), if one has not first determined that an exclusionary rule should serve a deterrent function (i.e., the more general principle that underpins exclusionary rules)?[15] Therefore, the goal of Part I will be to look beneath the surface at exclusionary rules, in order to ascertain what these rules can and should reasonably be expected to accomplish. Ultimately, a

14. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 MIL. L. REV. 211, 214 (2012) [hereinafter Milhizer, *Great Myths*].

15. For a similar assertion that the rationale of an exclusionary rule tends to determine the content of the rule, *see* Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-Patriot Act America*, 70 MO. L. REV. 519, 521 (2005) ("[T]he decision to pursue deterrence goals rather than provide a remedy for the deprivation of constitutional rights had a profound effect on the subsequent development of the exclusionary rule."). *See also* Kelly Perigoe, Comment, *Exclusion of Evidence for Failure to Advise Suspects of the Right to Counsel and to Silence Before Custodial Police Interrogation: Comparing the United States and Canadian Doctrines and the Reasons for Their Difference in Scope*, 14 UCLA J. INT'L L. & FOREIGN AFF. 503, 528 (2009) ("Whether a court bases its exclusionary doctrine on a rationale of maintaining trial fairness or on rationales of deterrence and trustworthiness often dictates whether the evidence will ultimately be admitted.").

principled basis for the development of a model exclusionary rule will emerge from the analysis contained within this Part.

A. Understanding Forward-Looking Rationales for Exclusion

For the purposes of this Article, different bases for the exclusion of tainted evidence will be considered as either forward-looking or backward-looking rationales for exclusion. Forward-looking rationales are not concerned with redressing past wrongs, such as rights breaches that led to the collection of impugned evidence, but instead focus on the impact that exclusion is likely to have on a go-forward basis. Some variants of forward-looking theories suggest that they seek to avoid additional harm to the accused that would result from admitting tainted evidence: "when the government tries to convict a person on the basis of an earlier violation of his [constitutional] rights, does it not seek to inflict a *second and distinct* injury?"[16] There are arguably two main forward-looking rationales: the deterrence rationale and the dissociation rationale.

1. The Deterrence Rationale

According to the deterrence rationale, evidence obtained in breach of an individual's fundamental rights must be excluded from criminal trials in order to deter state officials from similarly breaching the rights of others in the future. Backward-looking justifications for the rule are typically rejected by those who espouse a deterrence-based rule in recognition of the fact that courts cannot unring the bell after someone's rights have been breached: "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim,"[17] because the "ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."[18] Instead, "[t]he 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."[19] The deterrent rationale for exclusion is thus violator-centric, in that it is concerned with the effect of exclusion on those who have violated, or who might in the future violate, rights of citizens and suspects in criminal investigations.

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16. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an Empirical Proposition?*, 16 CREIGHTON L. REV. 565, 594 (1983).

17. United States v. Calandra, 414 U.S. 338, 347 (1974).

18. Linkletter v. Walker, 381 U.S. 618, 637 (1965), *abrogated by* Griffith v. Kentucky, 479 U.S. 314 (1987), *and* Teague v. Lane, 489 U.S. 288 (1989).

19. Elkins v. United States, 364 U.S. 206, 217 (1960).

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This deterrence theory appears to be premised on three underlying assumptions: first, that police officers and other state agents involved in evidence collection are somewhat informed about the exclusionary rule;[20] second, that these individuals care enough about the outcome of exclusionary decisions so as to shape their behavior in ways that respect the rights of those who are ultimately accused of crimes;[21] and, third, that respect for the rights of *all persons* can be encouraged by a rule that only excludes evidence collected *against those who are accused of crimes and who proceed to a contested criminal trial*.[22] The validity of these assumptions has been, at least in the United States, subject to much debate and empirical study.[23] The United States Supreme Court seems now to have accepted that it will be difficult, if not impossible, to conclusively ascertain the validity of deterrent assumptions that underlie the exclusionary rule.[24]

Even if one cannot empirically verify the efficiency of an exclusionary rule in terms of its deterrent effect, a deterrent-based rule can nonetheless be criticized from a variety of other theoretical perspectives. Numerous scholars have postulated that an exclusionary rule might actually lead to more, or worse, police misconduct than it strives to deter, and have argued that the rule leads to police perjury,[25] when officers deliberately misrepresent facts surrounding searches and arrests in order to "construct the appearance of compliance" with constitutional and human rights law, and to avoid exclusionary rulings from trial

20. *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 600 (2013) ("The exclusionary rule can only be effective as a deterrent to police if the jurisprudence surrounding the rule is sufficiently clear that it can be understood and followed by those officers.").

21. *See id.* at 602–04.

22. *See id.* at 604 (criticizing this implied assumption of the deterrence rationale for exclusion: "The exclusionary rule attempts to address whether a conviction is likely to flow from a search, but in fact it does little to address the many police activities that never fall under judicial scrutiny.").

23. *See, e.g.*, 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. B. FOUND. RES. J. 611 (1983).

24. *See* United States v. Janis, 428 U.S. 433, 450 n.22 (1976), *superseded by statute*, Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001(a), 112 Stat. 685, 726–27, *as recognized in* Thompson v. United States, 523 F. Supp. 2d 1291, 1294–95 (N.D. Ala. 2007) ("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 even in the situations in which it is now applied.").

25. On the problem of police perjury (or the phenomenon of "testilying") generally, *see* David M. Tanovich, *Judicial and Prosecutorial Control of Lying by the Police*, 100 CRIM. REP. (6TH SER.) 322 (2013); *see also* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

judges.[26] Others suggest that the exclusionary rule leads police to abandon the prospect of securing convictions against criminals, while driving them to aggressively police communities in ways that would not withstand constitutional scrutiny at criminal trials: "the exclusionary rule may actively encourage such illegal police activity [leading] to an increase in the use of 'preventative patrols'—police searches aimed not at arrest and prosecution, but at confiscation of weapons and drugs."[27] Still others suggest that reliance on a deterrence-based exclusionary rule inhibits the development of more effective means of controlling police misconduct.[28]

Deterrence theory essentially predicts that a simple and desirable goal can be achieved by excluding improperly obtained evidence: police and other state actors involved in the criminal process will respect the constitutional rights of the populace because the operation of the exclusionary rule and its undesirable effects on crime control has deterred them from collecting evidence in breach of such rights. However, as even a cursory review of the literature surrounding deterrence theory reveals, the simple premise of the theory is vulnerable to persuasive criticisms.

Notwithstanding the criticisms of deterrence theory, few would argue that an exclusionary rule will have *no* deterrent effect on law enforcement officers, or that it is incapable of deterring rights violations at least some of the time. Thus, while empirical studies and theoretical analysis might indicate that an exclusionary rule is an inefficient, imperfect, or incomplete tool for deterring rights breaches, it does not follow that the rule cannot deter egregious police misconduct. In other words, there is probably some useful role for deterrence theory to play in any discussion about the function and content of principled exclusionary rules.

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26. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 192 (Quid Pro Books 4th ed. 2011) (1966).

27. Jacobi, *supra* note 20, at 610; *see also* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 126 (2003) ("[L]arge portions of police activity relating to the seizing of criminal property do not produce (and may not even have been designed to produce) incriminating evidence, and thus do not result in criminal prosecutions.").

28. *See* Milhizer, *Great Myths*, *supra* note 14, at 237 (suggesting that the exclusionary rule holds "out the false promise of deterrence while masking the need [to] engage in reform that effectively addresses police misconduct"); *see also* Stone v. Powell, 428 U.S. 465, 500 (1976) (Burger, J., concurring) ("[I]t now appears that the continued existence of the rule . . . inhibits the development of rational alternatives. The reason is quite simple: Incentives for developing new procedures or remedies will remain minimal or nonexistent so long as the exclusionary rule is retained in its present form.").

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2. The Condonation/Dissociation Rationale

The condonation rationale for exclusion is predicated on the notion that courts will be seen to condone improper police or investigative behavior if they admit improperly obtained evidence into a criminal proceeding. Eugene Milhizer suggests:

> The [theory is] premised on the following syllogism: (1) permitting the reception of evidence at trial indicates not only that the evidence is reliable, probative and relevant, but also it signals that courts encourage or condone the methods used to obtain the evidence; (2) courts should not encourage or condone illegal police conduct; and, therefore, (3) the reception of illegally obtained evidence signals that courts encourage or condone police misconduct.[29]

Similarly, the dissociation rationale for exclusion articulates a need for courts to distance, or to dissociate, themselves from other state actors who have breached an accused's rights—by excluding tainted evidence from a trial.[30] Both concepts embrace the same key ideas, and simply express these ideas in different (positive/negative) terms: on the one hand, judicial condonation of police misconduct is undesirable, so evidence obtained in breach of a defendant's[31] rights must be excluded in order to avoid the appearance of such judicial condonation. On the other hand, courts must strive to dissociate themselves from unlawful actions by state officials within other branches of government, and excluding improperly obtained evidence is one effective means of achieving dissociation. While the deterrent rationale for exclusion is violator-centric, the condonation and dissociation rationales for exclusion are court-centric: these latter bases for exclusion focus on the impact that exclusion will or could have upon the integrity of the courts.

Condonation theory provides the dominant rationale for the Canadian exclusionary rule. In *R v. Collins*, a majority of the Supreme Court of Canada (SCC) opined that the purpose of the rule is to:

> prevent having the administration of justice brought into <u>further disrepute</u> by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies.[32]

The majority further noted, "the administration of justice would be brought into greater disrepute . . . if this Court did not exclude the evidence and

29. Milhizer, *Great Myths*, *supra* note 14, at 239.

30. R. v. Collins, [1987] 1 S.C.R. 265, ¶ 45 (Can.).

31. The terms "accused," "accused person" and "defendant" will be used interchangeably throughout this Article, although it is acknowledged that most jurisdictions will only use one of these terms in order to refer to individuals who are charged with crimes.

32. [1987] 1 S.C.R. 265, ¶ 31 (Can.).

dissociate itself from the conduct of the police in this case."[33] The *Collins* decision illustrates the close connection between concepts of dissociation and condonation, and, through its use of the future tense, highlights the forward-looking basis for the Canadian exclusionary rule. The rationale for exclusion that was advanced in *Collins* has been reaffirmed in more recent cases such as *R v. Grant*,[34] where a majority of the SCC explicitly noted that the exclusionary analysis is "forward-looking,"[35] and explained that exclusion is often necessary because "admission may send the message the justice system condones serious state misconduct."[36]

American exclusionary law, while now grounded narrowly and exclusively in deterrence theory, was also initially somewhat concerned with dissociating the judiciary from other state actors who participated in rights breaches. For instance, in *Weeks v. United States*,[37] the first United States Supreme Court decision to unanimously recognize a constitutional exclusionary rule, Justice Day explained that "unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction* in the judgments of the courts which are charged at all times with the support of the Constitution."[38] Justice Brandeis, writing in dissent in *Olmstead v. United States*,[39] subsequently explained why exclusion should have been mandated in that case, using the language of condonation and dissociation:

> The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. . . . And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. . . . [A]id is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order is to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.[40]

Although Justice Brandeis's reasoning as to why the exclusionary rule should operate has not subsequently been adopted by any majority of the United States

33. *Id.* ¶ 45.

34. [2009] 2 S.C.R. 353 (Can.).

35. *Id.* ¶ 71.

36. *Id.*

37. Weeks v. United States, 232 U.S. 383 (1914), *overruled by* Elkins v. United States, 364 U.S. 206, 212–13 (1960).

38. *Id.* at 392 (emphasis added).

39. Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

40. *Id.* at 483–84.

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Supreme Court,[41] it nonetheless provides some clear insight into the judicial thought that underpins dissociation and condonation theories of exclusion.

Dissociation and condonation rationales are not predicated on empirical propositions about the effectiveness of the exclusionary rule to the same extent as deterrent rationales, since the benefit of the rule—under dissociation theory—is largely unquantifiable.[42] Although some studies have been suggested[43] and undertaken[44] in efforts to measure the "repute" of the justice system, and how this reputation is affected by exclusionary decisions, the results of these studies should admittedly be viewed with caution,[45] and the SCC has expressed reluctance to place any emphasis on empirical data in support of the dissociation rationale.[46] Instead, the benefits of exclusionary rules that serve dissociative purposes must be explained in more abstract and philosophical terms, but this reality does not necessarily weaken the validity of the condonation/dissociation rationale as a basis for any exclusionary rule.

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41. Notwithstanding the majority opinions of the United States Supreme Court on exclusionary rulings over the years that have emphasized the deterrent rationale of the American rule, numerous dissents have attempted to re-inject a measure of dissociation into the rule. See, for instance, the dissenting opinion of Justice Ginsburg (writing for herself and three other judges in a 5-4 decision) in Herring v. United States, 555 U.S. 135, 148–57 (2009), for the most recent example of this phenomenon. Justice Ginsburg acknowledges that a "main objective" of the rule is deterrence, *Id.* at 152, but she sees "a more majestic" role for the rule, *Id.* at 151, and suggests that it enables the judiciary to avoid being tainted by partnership in unlawful action, and allows judges to withhold judicial imprimatur or endorsement of tainted evidence. *Id.* at 148–57. There is a strong current of dissociation theory running through Justice Ginsburg's dissent.

42. *See* Milhizer, *Great Myths*, *supra* note 14, at 247 ("[I]f the basic and straightforward deterrence claims in support of the exclusionary rule are unverified and unverifiable, as has been established, then Brandeis's more abstract and expansive claims suffer the same infirmity but to a far greater degree.").

43. Dale Gibson, *Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms*, 61 CANADIAN B. REV. 377 (1983).

44. Alan W. Bryant et al., *Public Attitudes Toward the Exclusion of Evidence: Section 24(2) of the Canadian Charter of Rights and Freedoms*, 69 CANADIAN B. REV. 1 (1990).

45. *Id.* at 41 ("[T]he results of this study should raise serious questions about the forensic use of most survey evidence on the admissibility of evidence in courts.").

46. *See, e.g.*, R. v. Collins, [1987] 1 S.C.R. 265, ¶ 32 (Can.).

> The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable, and may consider public opinion polls[.] It would be unwise, in my respectful view, to adopt a similar attitude with respect to the *Charter*. Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. . . . The *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority.) (citations omitted).

B. Understanding Backward-Looking Rationales

Rather than concentrating primarily on the effect that rights breaches (and exclusion) will have, prospectively, on the justice system, backward-looking rationales for exclusion attempt to correct for harm that has already been done to individuals as a result of state misconduct. There are two main backward-looking rationales for exclusion: the compensation rationale and the vindication rationale.

1. The Compensation Rationale

Compensation theory acknowledges that any remedy must have value commensurate with the value of the right that has been breached in the first place. The compensation rationale uses exclusion in order to recognize "that rights have value and that if the right is destroyed the wrongdoer should provide alternative value to the rights holder lest the right be valueless."[47] As David Paciocco explains:

> the only way to set the clock back is to treat the parties as though the constitutional violation never occurred. Exclusion arguably achieves this by depriving the state of its wrongful gain and leaving the accused to face the case he would have faced had the right not been violated.[48]

The compensation rationale for exclusion is clearly accused-centric, as it is focused on the beneficial impact that exclusion should have on an individual whose rights have been breached.

The compensation rationale, while attractive at first glance, suffers from several weaknesses. First, as a matter of logic, excluding improperly obtained evidence does nothing to "compensate" an accused; rather, exclusion merely avoids penalizing an accused through the admission of evidence that would lead to conviction. It would perhaps be more coherent to explain exclusion not as a form of compensation to the accused, but as a form of deprivation to the state, and to recognize that this deprivation is not necessarily the same as compensation to the accused. Second, as with the deterrent rationale, the compensation rationale for exclusion arguably inhibits more robust and effective remedies from developing to compensate for rights breaches by the state. For instance, if exclusion is thought to sufficiently compensate an individual whose rights have been breached, then there is likely no reason for a State to create any kind of additional public damages remedy for rights breaches as a means of compensating the individual for harm suffered. Furthermore, exclusion is an

47. David M. Paciocco, *Section 24(2): Lottery or Law—The Appreciable Limits of Purposive Reasoning*, 58 CRIM. L.Q. 15, 21 (2012).

48. *Id.* at 22.

utterly ineffective form of compensation for persons who suffer constitutional violations but who are not prosecuted because the remedy of exclusion is only available to criminal defendants. Anyone whose rights were breached but who does not end up facing a criminal trial cannot (and would have no need to) access the remedy of exclusion. Nonetheless, assuming that some would see the "windfall"[49] from which an accused benefits when exclusion takes place as being a valid form of compensation (one that could operate to mitigate the harm occasioned by the government after a rights breach), then compensation theory can probably provide a valid basis for an exclusionary rule.

2. The Vindication Rationale

Vindication theory is closely linked to both compensation and dissociation theory. As Paciocco suggests, "'[v]indication' refers to 'affirming constitutional values' by granting meaningful remedies,"[50] which is superficially similar to compensation theory's underlying premise. However, vindication can be distinguished from compensation in that vindication does not necessarily demand a correspondence between the harm suffered as a result of a rights breach and the remedy for the breach, since a meaningful remedy can be a symbolic one that offers no compensation to the accused. Paciocco's description of vindication theory also resembles dissociation theory, in that he suggests a focus on collective (rather than individual) constitutional values and "not on the victim's loss."[51] However, Paciocco correctly notes that condonation/dissociation theory is primarily about courts protecting their own integrity, and he implicitly recognizes the retrospective and individualized aspects of vindication theory when he says, "the vindication rationale is also about promoting the relevant right,"[52] both for the benefit of the accused whose right was violated, and for the larger public who has an interest in protecting the right more generally. Some aspects of Paciocco's vindication theory (namely the backward-looking and individualized aspects of it) are more persuasive than others. For instance, one might disagree with him that vindication does not focus on the victim's loss, since a right cannot, realistically, be vindicated without recognition of the individual harm that was done to the victim, and the victim's

49. Exclusion is frequently described as a form of windfall to the accused. *See, e.g.*, Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1134 (1996) ("The guiltier you are, the more evidence the police find, the bigger the exclusionary rule windfall; but if the police know you are innocent, and just want to hassle you . . . the exclusionary rule offers exactly zero compensation or deterrence.").

50. Paciocco, *supra* note 47, at 23.

51. *Id.*

52. *Id.* at 24.

sense that the breach must be avenged in order for her to be satisfied. In this sense, the vindication rationale for exclusion is better conceptualized as one with a dual focus: it is both accused-centric, and more broadly, rights holder-centric. Vindication theory suggests that exclusion is warranted in part to give meaning to a particular right of a particular accused that was violated in a particular case, but it is also warranted in order to give expressive meaning to that right in a larger, more collective sense.

The divisions among various rationales for exclusion are not watertight, and this reality is most apparent in considering the vindication rationale. Depending on how one characterizes the vindication rationale, it may be more forward- or backward-looking in nature, and it may be more individual- or group-centric in nature. Ultimately, however, the rationale is capable of offering somewhat of a valid, if a little abstract, basis for exclusion that is unique from the other bases discussed above.

C. Countervailing Considerations Against Exclusion

While all of the above theories are capable of justifying the existence of an exclusionary rule, any discussion about such rules should also include consideration of any relevant factors militating against exclusion. For the purposes of this Article, these factors could be grouped into the following general categories: public safety, proportionality, efficiency, and epistemology.

1. Public Safety Considerations

The basic premise of a public safety argument against exclusionary rules, or in favor of significant restrictions on exclusionary rules, is that exclusion allows dangerous criminals to go free, which is detrimental to the public's safety. This argument is currently very strong in both American judicial[53] and academic[54] rhetoric, and can probably help to explain the substantial narrowing of the American exclusionary rule over the last fifty years.

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53. *See, e.g.*, the typically expressive dicta of Justice Scalia in Hudson v. Michigan, 547 U.S. 586, 595 (2006) ("The cost of entering this [exclusionary rule] lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card."). This language was echoed by Chief Justice Roberts in Herring v. United States, 555 U.S. 135, 141 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system.'").

54. *See, e.g.*, Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 766 (2008) ("The end of reducing police misconduct is unquestionably beneficial. But the means of achieving it—deliberately allowing dangerous criminals to go free and crimes to go unpunished—is unquestionably problematic.").

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2. Proportionality Considerations

The basic premise of the proportionality argument against exclusion is that exclusion is a disproportionate remedy. A minor or technical breach of one's rights, or a breach made by a police officer acting in good faith, for instance, will be rectified with the "massive"[55] remedy of exclusion. This result, critics argue, does not accord with our fundamental "notion that judicial sanctions should fit the harm."[56] Thus, proportionality militates against the existence of, or at least against the broad application of, exclusionary rules.

3. Efficiency Considerations

Countervailing considerations based on efficiency suggest that exclusion should be avoided because it is an inefficient remedy: either it does not have its purported effect, or it generates only a marginal amount of the desired effect at great cost.[57] This line of reasoning is similar to the proportionality considerations discussed above, except that efficiency compares the costs and benefits of the rule across the full spectrum of cases in order to determine its institutional efficiency. Proportionality, in contrast, compares the effect of the rule in a particular case with the harm to an accused's rights in that case, in order to ensure a correspondence between the two individualized circumstances.

4. Epistemic Considerations

Apart from any consequentialist criticisms of exclusionary rules—such as the public safety ones mentioned above—a non-consequentialist argument can be made that exclusionary rules impair the truth-seeking function of criminal trials by hiding relevant and reliable evidence from fact-finders.[58] Thus, while the result of an exclusionary rule is that guilty people will often be acquitted (consequentialist reasoning), an exclusionary rule is also harmful in a more

55. Justice Scalia described the remedy of exclusion as "massive" three times in the course of his roughly fourteen-page opinion in Hudson v. Michigan, 547 U.S. 586, 586-600 (2006).

56. Paciocco, *supra* note 47, at 27.

57. See Jacobi, *supra* note 20, for an example of commentary that relies heavily on inefficiency criticisms of the American exclusionary rule.

58. *See, e.g.*, Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998):

> Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions. Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule. (citations omitted).

abstract (non-consequentialist) way because it creates dissonance within the accepted theory of criminal trials. Trials are first and foremost about establishing the truth in relation to charges against an accused, so a rule that impairs courts in their abilities to establish the truth undermines the legitimacy and coherence of the entire criminal trial process.[59] According to this reasoning, exclusionary rules should be eliminated or constrained to minimize the dissonance they create within criminal trial theory.

Although some might suggest that the above countervailing considerations support a total elimination of exclusionary remedies,[60] a more modest view that encompasses consideration of both the laudable objectives of exclusion and the countervailing factors militating against exclusion would recognize that, in particular cases or classes of cases, any one of the above countervailing considerations could be so overwhelmingly strong as to require the admission of tainted evidence in spite of a rights breach that occurred during the collection of the evidence.[61] In other words, the choice between exclusion or admission of tainted evidence as a rule of law is not a binary one: the salutary aspects of an exclusionary remedy can be acknowledged as a general matter, without losing sight of the fact that exclusion often causes harm to the integrity of the justice system. Thus, while an exclusionary rule should, in principle, be justifiable on the basis of one of the accepted rationales for exclusion, exceptions to an exclusionary rule should be equally justifiable in terms of one or more of the countervailing factors discussed above.

D. Selecting a Principled Basis for Exclusionary Rules

With the preceding discussion in mind, it is now possible to select a principled and defensible basis for an exclusionary rule by answering the following questions: (1) which of the rationales for exclusion are laudable?; (2) are any of the rationales wholly unachievable through exclusion?; and, (3) are any of the rationales incompatible with one another? The answers to these questions should reveal the rationale(s) upon which exclusionary rules can and should be developed.

The first question involves a value judgement, but it is likely uncontroversial to suggest that all of deterrence, dissociation, compensation, and

59. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1029 (1974).

60. Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 380 (2010).

61. *See, e.g.*, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1118 (2011) (suggesting that the American exclusionary rule should—and does—"pay its own way" by ensuring that exclusion only results when the deterrent value of the rule "outweighs the costs of potential lost evidence").

vindication are laudable objectives because they would tend to benefit society as a whole. The second question has not yet been conclusively answered through empirical study, and it is perhaps incapable of ever being answered in a falsifiable way. Nonetheless, exclusion seems capable of achieving some degree of deterrence, dissociation, compensation, and vindication at least some of the time.

The third question is perhaps the most difficult one to answer. At first glance, there does not appear to be any categorical conflict between the different rationales for exclusion, in that, for instance, reliance on a deterrent rationale does not generally preclude one from also relying on a dissociation, compensation, or vindication rationale. That being said, when it comes to the specific content of a given exclusionary rule, it would certainly be possible for a part of the rule to be justifiable on the basis of one rationale, but not another. For instance, consider an exception to the exclusionary rule for good faith mistakes by police: this exception could be justified under a deterrent rationale (since good faith mistakes are essentially "accidents" that cannot be deterred), but the exception would be inconsistent or incompatible with a compensation rationale (since the victim would be denied compensation in the form of exclusion even though her rights were breached). It is important to recall, however, that the central goal of this Article is to craft an exclusionary rule from first principles, rather than to simply determine which principles best describe existing exclusionary rules. Thus, the question is not, "which principles can coexist simultaneously as foundations of an extant exclusionary rule?" but, rather, "which principles can coexist simultaneously in the abstract, and how would these principles then influence the content of a subsequently-created model exclusionary rule?"

When the focus is on principles in the abstract, it becomes apparent that all of the four dominant rationales for exclusion can and should operate together to determine the content of an exclusionary rule. However, in certain cases, notwithstanding the benefits that would flow from exclusion in terms of deterrence, dissociation, compensation or vindication, the costs of exclusion in terms of public safety, efficiency, proportionality, and epistemic coherence of the criminal trial process might nonetheless be so great as to demand the admission of tainted evidence as an exception to a general exclusionary rule.

This conclusion that deterrence, dissociation, compensation, and vindication should *all* help to ground an exclusionary rule, and that certain countervailing considerations could similarly help to ground any individual exception or class of exceptions to an exclusionary rule, is important because it provides one with a theory for developing more principled exclusionary alternatives to those offered within domestic jurisdictions throughout the world.

II.
ASSESSING COMMON ELEMENTS OF EXCLUSIONARY RULES

Having established this principled basis for exclusionary rules, this Article can now productively begin a comparative study of existing domestic exclusionary rules. In this Part, therefore, some of the most common doctrines that form part of national exclusionary rules will be examined in an attempt to determine how well these doctrines can integrate into a model exclusionary rule that is based on the principles identified in Part I of this Article. Specifically, the ensuing comparative study will consider standing and identity requirements of various exclusionary rules, evidence-related factors that commonly influence the application of given exclusionary rules, and factors other than evidence-related ones that tend to have an impact on exclusionary decisions.

A. Identity and Standing Questions

In looking at standing and identity aspects of national exclusionary rules, there are essentially two related questions to be addressed. First, how do exclusionary rules treat evidence that is collected by private individuals in a manner inconsistent with human rights standards, as opposed to by state actors? And, second, how do exclusionary rules apply in cases where evidence is collected in breach of the human rights of someone other than the accused person? The first question will be referred to as the "identity" question, since it is really concerned with the identity—as either a State or private actor—of an individual who collects tainted evidence, while the second question will be referred to as the "standing" question, since it essentially asks whether an accused person has standing to challenge a human rights violation against a third party.

1. The Identity Question

In Canada, the identity question is perhaps an easy one to answer as a matter of constitutional law: the exclusionary rule is created by section 24 of the *Charter*, and section 32 of the *Charter* stipulates that the instrument only applies to the federal and provincial governments and legislative bodies.[62] In other words, since the constitutional exclusionary rule is derived from the *Canadian Charter*, and since the *Charter* "is essentially an instrument for checking the

62. *See* McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229 (Can.) (regarding the application of the Canadian Charter generally); *see also* R. v. Buhay, [2003] 1 S.C.R. 631 (Can.) (regarding the application of the section 24(2) exclusionary rule in particular, to only state actors).

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powers of government over the individual,"[63] it follows that the exclusionary rule cannot apply to actions by non-governmental actors. The same approach is taken to exclusion in the United States: "[t]he Fourth Amendment gives protection against unlawful searches and seizures . . . [but] its protection applies to governmental action."[64] Thus, in the United States, evidence that was unlawfully taken from a defendant's office by a private person can be admitted into evidence, even though it would be subject to the exclusionary rule if a public official had collected such evidence.[65] However, in jurisdictions where exclusionary rules are applicable to more than just breaches of constitutional rights (for instance, where an exclusionary rule could also apply to breaches of statutory criminal procedure laws)[66] or where constitutional rights apply erga omnes (rather than just between the State and an individual),[67] then the identity question can become more complex.

By way of example, Belgium has an exclusionary rule that applies in cases where evidence is gathered illegally, such as in breach of the formal requirements of the *Code of Criminal Procedure*,[68] but also in cases where the method of collection has undermined the reliability of the evidence, or when use of certain evidence would render a trial unfair.[69] It should also be noted that Belgian penal law permits a "civil party" to participate in trials where the party's interests are at stake, and where the party may be entitled to an award of damages as a result of the alleged crime.[70] Perhaps because of these two factors,[71] Belgian case law between 1923 and 1990 affirmed that the

63. McKinney v. Univ. of Guelph, [1990] 3 S.C.R. 229, 261 (Can.).

64. Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

65. *See generally* Burdeau v. McDowell, 256 U.S. 465 (1921); *see also* Steven Euller, *Private Security and the Exclusionary Rule*, 15 HARV. C.R.-C.L. L. REV. 649, 649–50 (1980) (describing how a private citizen can acquire evidence through theft, burglary, and by drilling into a defendant's personal safe, all without triggering the American exclusionary rule).

66. As is the case in Belgium, *see infra* note 70 and accompanying text.

67. As is the case in Greece: *see infra* note 75 and accompanying text.

68. CODE D'INSTRUCTION CRIMINELLE [C.I.CR.] (Belg.).

69. *See* Cour de Cassation [Cass.] [Court of Cassation], Oct. 14, 2003, PAS. 2003, No. 499 (Belg.) (generally called the *Antigone case*, after the name of the police operation that led to the illegally collected evidence in that case; describing the three circumstances that can lead to application of the exclusionary rule), *available at*
http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20031014-18.

70. *See* CODE D'INSTRUCTION CRIMINELLE [C.I.CR.] arts. 63, 66, 67 (Belg.). One might conceptualize this type of trial as both a criminal and civil trial implicating the State, the accused, and the victim(s), all rolled into a single process.

71. Civil law systems generally include the "civil party" or victim who seeks damages as a participant in criminal trials. This "civil party" often has rights to tender or call evidence. Perhaps because of this "civil party" who brings his own evidence to the trial, collected outside of the ambit

exclusionary rule applied equally to government and private actors[72] such that evidence collected by a private actor who did not comply with statutory search and seizure requirements would be inadmissible against an accused person.

Similarly, in Greece, the Supreme Court has held that the statutory exclusionary rule found at section 177(2) of the *Code of Penal Procedure*[73] prohibits the admission of a recorded conversation even where the conversation was recorded by a private individual, since it is an offense to make such recordings.[74] With respect to searches that violate the Greek constitutional right to privacy, the constitutional exclusionary rule also applies to both private and state actors, "since constitutional rights in Greece apply erga omnes"—regulating even conduct between private individuals—by virtue of Article 25 of the Greek Constitution.[75] Furthermore, in both Italy[76] and Spain,[77] some evidence collection methods can trigger the application of exclusionary rules even if the evidence is collected by private persons.

The different ways in which the identity question is addressed in domestic legal systems merits consideration. For instance, an exclusionary rule that applies to private actors might not be defensible under the deterrence theory of exclusion since private individuals who illegally collect evidence do not necessarily do so with a view to securing successful prosecutions, so exclusion in one case will likely not deter private individuals from illegally collecting evidence in other cases. However, an exclusionary rule that applies to private actors could easily be justified in terms of compensation and vindication

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of state authority, exclusionary rules in civil law jurisdictions tend to apply to private actors as well as to state actors.

72. *See* Marie-Aude Beernaert & Philip Traest, *Belgium: From Categorical Nullities to a Judicially Created Balancing Test*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 161, 162–66 (Stephen C. Thaman ed., 2013) (describing the evolution of Belgian exclusionary case law from 1923 to the present).

73. POINIKOS KODIKAS [P.K.] [Criminal Code] 5:177(2) (Greece), *translated in* Dimitrios Giannoulopoulos, *The Exclusion of Improperly Obtained Evidence in Greece: Putting Constitutional Rights First*, 11 INT'L J. EVIDENCE & PROOF 181, 191 (2007).

74. *See* Georgios Triantafyllou, *Greece: From Statutory Nullities to a Categorical Statutory Exclusionary Rule*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 261, 276 (Stephen C. Thaman ed., 2013) (describing the Greek Supreme Court decision 1568/2004 on this point).

75. Giannoulopoulos, *supra* note 73, at 196.

76. Wiretaps executed by private persons in Italy are not authorized by law, and would therefore be excluded. *See* Giulio Illuminati, *Italy: Statutory Nullities and Non-Usability*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 235, 255 (Stephen C. Thaman ed., 2013).

77. *See* Lorena Bachmaier Winter, *Spain: The Constitutional Court's Move from Categorical Exclusion to Limited Balancing*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 209, 219 (Stephen C. Thaman ed., 2013) (noting that in Spain, the constitutional right to privacy—which can be enforced through exclusion—grants a person a "space of liberty and privacy against interference from third persons, be it from public authorities, other citizens or private entities").

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theories, and could possibly also be justified in terms of dissociation. In jurisdictions where rights apply erga omnes, for instance, exclusion could potentially provide the same level of compensation to an accused person regardless of whether misconduct against the accused flowed from the actions of State or private actors. Likewise, in these jurisdictions, a right could be vindicated through exclusion even in cases where the right was trammeled by the conduct of a private individual rather than a police officer, since the expressive aspect of an exclusionary remedy that gives real meaning to a right remains extant even in these cases. Stated simply, if a "right" is capable (by definition) of being breached by a private actor in a particular jurisdiction, then there is no principled reason under either compensation or vindication theory why an exclusionary rule should not be applicable in cases of rights breaches by private actors in these jurisdictions.

Such an application of an exclusionary rule to private actors is perhaps more difficult to justify on the basis of dissociation theory, even in jurisdictions where rights apply erga omnes, since dissociation theory is largely premised on the notion that courts must dissociate themselves from improprieties committed by individuals within other branches of government, but not necessarily by private citizens. One must not forget, however, that dissociation theory is essentially the same as condonation theory, and both theories seek to avoid the perception that courts condone rights breaches. When dissociation and condonation theories are understood in this way, it becomes apparent that any exclusionary rule that is applicable to improper actions of both private and state actors can be justified under dissociation and condonation theories, since courts should no more condone misconduct by individual citizens than by state officials if the courts are to maintain their integrity as guardians of the law.

There may be many good reasons why an exclusionary rule that applies in respect of tainted evidence collected by private individuals would be desirable and justifiable on at least some of the recognized bases for an exclusionary rule, including compensation, vindication, and dissociation bases for exclusion. However, in jurisdictions such as Canada, where, by definition, rights do not apply erga omnes, any attempt to justify the application of an exclusionary rule to misconduct by private individuals would be less persuasive, since these non-state actors technically cannot breach rights that are extended by the State to individuals in the first place.

2. The Standing Question

In Canada, the standing question has a relatively straightforward answer. As a matter of constitutional law, exclusionary remedies are only available

under section 24(1)-(2) of the *Charter* to "[a]nyone whose rights or freedoms . . . have been infringed or denied."[78] Thus, in *R v. Edwards*,[79] the accused was unsuccessful in seeking exclusion of a cache of drugs that was found by police when they conducted an unreasonable search of his girlfriend's residence, since it was not the accused's own—but, rather, his girlfriend's—*Canadian Charter* right to be free from unreasonable search and seizure that was infringed in that case.[80]

The Canadian position on standing to invoke an exclusionary remedy is mirrored in many other jurisdictions. In Germany, for instance, "a person may only challenge the admissibility of illegally obtained evidence, if the violated rule on evidence gathering protects his or her acknowledged interests and thus forms part of his or her legally protected rights."[81] In the United States, "a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights,"[82] even in an egregious case when state agents deliberately exploited the standing requirement by conducting an unlawful search of an innocent third party's effects in order to collect incriminating evidence against the defendant.[83]

However, the standing question is not answered in the same way in every jurisdiction. In South Africa, for instance, section 35(5) of its Constitution[84] has been interpreted by the Supreme Court of Appeal (but not yet by the South African Constitutional Court) as requiring "the exclusion of evidence improperly obtained from any person, not only from an accused,"[85] in a case where the evidence of a witness who had previously been subjected to police torture as part of the investigation was excluded. Similarly, the California Supreme Court held in 1955 that evidence obtained in violation of the state constitution could not be used in a criminal prosecution even where the defendant was not the victim of the unlawful search or seizure.[86] This rule remained in place until a constitutional amendment in 1985 brought the State's

78. Canadian Charter, *supra* note 1, § 24(1).

79. *See* R. v. Edwards, [1996] 1 S.C.R. 128 (Can.).

80. *Id*. ¶¶ 50–57 (Can.); *see also* R. v. Belnavis, [1997] 3 S.C.R. 341 (Can.) (reaching a similar result).

81. Sabine Gless, *Germany: Balancing Truth Against Protected Constitutional Interests*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 113, 122 (Stephen C. Thaman ed., 2013).

82. United States v. Payner, 447 U.S. 727, 731 (1980).

83. *See id.* at 731–32.

84. S. AFR. CONST., 1996.

85. *Mthembu v. The State* 2008 (2) SA 407 (A) ¶ 27 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZASCA/2008/51.html.

86. *See* People v. Martin, 45 Cal. 2d 755, 857–58 (Cal. 1955), *superseded by constitutional amendment*, CAL. CONST. art. I, § 28(d).

exclusionary rule into line with the federal rule that imposed a standing requirement upon defendants.[87]

One South African scholar has suggested that "the rationale of the exclusionary rule should determine the nature of the standing threshold requirement."[88] This is a sound proposition. If a given exclusionary rule is to serve a deterrent function, then surely the rule would be more efficient without a strict standing requirement that could shield many (perhaps most) instances of police misconduct from judicial review. Similarly, if an exclusionary rule is based on condonation or dissociation theory, then the rule should be applicable in cases where a third party's rights have been breached, since courts risk condoning police misconduct when they admit evidence obtained through the breach of a third party's rights just as much as when they admit evidence obtained through the breach of an accused person's rights (just as courts benefit from the act of dissociating themselves from this misconduct as much when they exclude evidence obtained through third-party rights breaches as through breaches of an accused's rights).

Vindication theory offers a more tenuous justification for an exclusionary rule's application to third-party rights breaches, since the remedy of exclusion is arguably not well suited for vindicating rights of those who are not the subjects of criminal prosecutions. However, if one accepts that vindication only requires a meaningful and expressive remedy, but not a remedy that is particularly beneficial to a given rights holder, then exclusion could be justifiable on vindication grounds, at least to some extent, in the case of third-party rights breaches, since the remedy meaningfully deprives the State of otherwise admissible evidence. In contrast, if an exclusionary rule is primarily grounded in compensation theory, then a strict standing requirement would be entirely consistent with the rule's rationale, since the accused has suffered no compensable loss when a third party's rights—as opposed to the accused's own rights—have been breached.

Recalling from Part I that deterrent, dissociation, compensation and vindication theories are all capable of offering a justifiable basis for an exclusionary rule, and that several or all of these rationales for exclusion could concurrently form the basis of a single exclusionary rule, there is no principled reason why an exclusionary rule cannot and should not be invoked even in cases

87. *See* Mark E. Cammack, *The United States: The Rise and Fall of the Constitutional Exclusionary Rule*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 3, 15 (Stephen C. Thaman ed., 2013) (discussing the history of California's exclusionary rule).

88. Dave Ally, Constitutional Exclusion Under Section 35(5) of the Constitution of the Republic of South Africa, 1996, 193 (June 15, 2009) (unpublished LL.D. thesis, University of Pretoria), *available at* http://repository.up.ac.za/handle/2263/25645.

where the rights of someone other than the accused are breached. Eliminating a strict standing requirement would assist any exclusionary rule in achieving at least two, and possibly three, of the recognized objectives of exclusionary rules: vindication, deterrence, and dissociation.

The above discussion, while suggesting that several accepted bases for exclusion justify applying exclusionary rules both when a non-state actor is involved in a rights breach (the identity question), and when a third party's rights are breached (the standing question), does not necessarily imply that exclusion should always be the result in such cases. Regardless of what one concludes about the standing and identity questions, all of the countervailing considerations that militate against the operation of exclusionary rules (as discussed above in Part I) continue to exist. Thus, while the discussion in this section strives to demonstrate that exclusionary rules would be more capable of achieving their various objectives of deterrence, dissociation, compensation, and vindication (and would therefore be more defensible on a principled basis) if they could be applied to exclude evidence even in cases where traditional standing and identity requirements have not been met, the existence of countervailing factors suggests that exclusionary rules should only lead to actual exclusion in certain classes of cases—but probably not all cases—involving rights breaches. In other words, acknowledging that an exclusionary remedy should more frequently be available as a matter of principle in many jurisdictions does not necessarily mean that exclusion should result more frequently, since countervailing considerations of efficiency, proportionality, public safety and epistemic concerns must still be weighed to determine whether exclusion is desirable in a particular case or in particular classes of cases. Nonetheless, the absolute unavailability of exclusion as a remedy in many jurisdictions when standing and identity requirements have not been met will tend to weaken the logical coherence that should exist between a given exclusionary rule and the purported rationale for the rule, as the above discussion has attempted to show.

B. Evidence-Related Factors Influencing Exclusion

This section will describe and analyze various evidence-related factors that often influence exclusionary decisions. These factors can broadly be understood as relating to one of the following three questions. First, how central is the evidence to the prosecution's case? Second, was the tainted evidence obtained directly or indirectly as result of a rights breach? And, third, could the State have obtained the evidence without having resorted to a rights breach? For the sake of simplicity, these questions will be referred to as the importance of the evidence question, the derivative evidence question, and the hypothetical clean path question, respectively. Each question will be considered in turn.

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1. The Importance of the Evidence Question

Should evidence be excluded less often when it is of central importance to the prosecution's case? This, essentially, is the question that the "importance of the evidence" doctrine seeks to answer.

In Canada, the SCC has set down an exclusionary framework that involves consideration of three factors: seriousness of the rights breach, significance of the impact that the breach has on the accused, and, consideration of the public interest in seeing the case adjudicated on its merits.[89] However, with respect to the third factor, the SCC further observed, "[t]he importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry,"[90] since:

> [t]he admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.[91]

In practice, lower courts have mainly read this passage to mean that the third *Grant* factor will be difficult to prove (and exclusion will therefore less likely follow) in cases where the tainted evidence is central to the prosecution's case.[92]

Australian common law also considered the importance of the evidence in its exclusionary framework. In the leading case on exclusion, *Bunning v. Cross*,[93] a majority of the SCC first suggested that some flexibility to admit tainted evidence would be accorded to police in cases where the evidence "is both vital to conviction and is of a perishable or evanescent nature"[94]—perhaps to account for exigent circumstances where there is a danger that an accused will destroy the evidence. However, in the same *Bunning* decision, the majority clarified that they were really most concerned with the centrality of the evidence to the case, rather than the possibility of destruction of the evidence: "[i]f other equally cogent evidence, untainted by any illegality, is available to the

89. R. v. Grant, [2009] 2 S.C.R. 353, ¶ 85 (Can.).

90. *Id.* ¶ 83.

91. *Id.*

92. *See, e.g.*, R. v. Bacon, 2010 B.C.P.C. 1, ¶¶ 82–86 (Can.) (noting in the decision not to exclude that "the exclusion of the handguns would result in the dismissal of all charges related to the possession of the handguns and prohibited device" and would "gut the prosecution"). For an appellate court's perspective, *see* R. v. Martin, 2010 NBCA 41, ¶¶ 94, 100–01 (Can.) (noting in overturning the trial judge's exclusionary ruling that the impugned wiretap evidence was important to the prosecution's case: "[w]ithout it, the prosecution's case collapsed and society's interest in adjudication on the merits was compromised").

93. (1978) 141 CLR 54 (Austl.).

94. *Id.* ¶ 38.

prosecution at the trial the case for the admission of evidence illegally obtained will be the weaker."[95] In other words, exclusion will be palatable under Australian common law only in those cases where it has no impact on the outcome of a case. This common law exclusionary rule continues to apply in several Australian jurisdictions (South Australia, Queensland, Western Australia, and the Northern Territory),[96] but has now been further codified in section 138 of the *Uniform Evidence Legislation*[97] applicable throughout New South Wales, Victoria, Norfolk Island, the Australian Capital Territory, and Tasmania.[98]

The importance of the evidence doctrine has less, or even no, role in other jurisdictions. In Israel, for instance, the Supreme Court postponed any move to set down a clear framework for application of the doctrine:

> The question of the degree to which the courts in Israel should take into account the importance of the evidence and the seriousness of the offence attributed to the accused within the framework of exercising their discretion under the case law doctrine of inadmissibility does not require a decision in the appellant's case and we can leave this too to be decided in the future.[99]

In Greece, Article 19(3) of the Constitution provides for an absolute exclusionary rule in cases where an individual's right to privacy has been breached.[100] What is remarkable about this rule is that it will automatically exclude the kinds of reliable, physical evidence that is generated by searches and seizures in violation of rights to privacy, when this evidence will often be the most central to the prosecution's case. Thus, in Greece, it seems that the importance of the evidence doctrine has been rejected altogether.

Notwithstanding the various jurisdictions that have found a place for the importance of the evidence doctrine in their legal systems, there remain two theoretical problems with the doctrine that must be identified before moving on. First, the doctrine may create a perverse incentive for police to cease collecting additional evidence once they have breached a suspect's rights, on the presumption that the tainted evidence is more likely to be excluded if it is accompanied by other incriminating evidence (i.e., where the tainted evidence is less central to the prosecution's case). Second, it is probably unwise to assess

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95. *Id.* ¶ 39.

96. Kenneth J. Arenson, *Rejection of the Fruit of the Poisonous Tree Doctrine in Australia: A Retreat from Progressivism*, 13 U. NOTRE DAME AUSTL. L. REV. 17, 20 (2011).

97. The term "Uniform Evidence Legislation" actually refers to a series of identical *Evidence Acts* that are in force in each of a number of Australian jurisdictions. *See*, *e.g.*, *Evidence Act 2008* (Vic) s 138 (Austl.), *available at* http://www.austlii.edu.au/au/legis/vic/consol_act/ea200880/.

98. Arenson, *supra* note 96, at 20.

99. CrimA 5121/98 Issacharov v. Chief Military Prosecutor 61(1) PD 461, ¶ 73 (2006) (Isr.).

100. 2001 SYNTAGMA [SYN.] [CONSTITUTION] 19 (Greece).

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the importance of a piece of evidence to the prosecution's case as a preliminary matter, arguably before the full significance of any single piece of evidence can be appreciated (i.e., on a voir dire in a common law trial, or by an examining magistrate in a civil law jurisdiction). As Justice Scalia of the United States Supreme Court observed in relation to these kinds of evidentiary decisions in another context, "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty."[101] In some ways, the importance of the evidence doctrine follows the same flawed reasoning: admitting tainted evidence because it is central to the prosecution's case could essentially amount to admitting evidence when the defendant is obviously guilty.[102]

From a deterrence perspective, the fact that a particular piece of tainted evidence is important or central to the prosecution's case should weigh in favor of *exclusion* rather than *admission* of the evidence, since the deterrent rationale for exclusion assumes that police care about exclusionary outcomes, and since a failed prosecution is more likely in cases where central evidence is excluded. In other words, the deterrent effect of an exclusionary rule will be greater if the rule tends to exclude central or important evidence with more frequency rather than less.

As a matter of principle, the importance of the evidence doctrine should not necessarily have any influence on an exclusionary rule based on vindication, compensation, or dissociation theories. From a court-centric perspective, the degree to which evidence is important to the prosecution's case will neither increase nor decrease the level of judicial condonation of a particular rights breach if the evidence is admitted, since admitting tainted evidence arguably always condones a breach, and excluding it arguably always allows judges to dissociate themselves from a breach, irrespective of the class of evidence that is in issue.

Similarly, from an accused person's objective perspective, or from the public's perspective, the degree of compensation or vindication that an exclusionary decision yields will not depend on the centrality of the evidence that is excluded: exclusion either is, or is not, necessary as a consequence of a rights breach to achieve compensation and vindication goals—but in neither case will the centrality of the evidence have an impact in this calculation. If

101. Crawford v. Washington, 541 U.S. 36, 62 (2004).

102. For a similar expression of the same thought, see D. Ally, *Determining the Effect (the Social Costs) of Exclusion Under the South African Exclusionary Rule: Should Factual Guilt Tilt the Scales in Favour of the Admission of Unconstitutionally Obtained Evidence?*, 15 POTCHEFSTROOM ELECTRONIC L.J. 477, 498 (2012) ("Such an approach implies that unconstitutionally obtained evidence should be readily admitted in the event that the accused is adjudged to be factually guilty.").

compensation is (at least theoretically) generated through exclusion by restoring the accused to the position he would have been in but for the rights breach, then exclusion achieves this measure of compensation when important, unimportant, and every middling degree of somewhat important evidence is excluded. In terms of vindication theory, the remedy of exclusion is expressive, rather than objectively quantifiable, so vindication is equally achieved through exclusion regardless of the importance of the evidence—one cannot hope for *more* vindication from the exclusion of some evidence than from other evidence.

It is possible that the importance of the evidence doctrine has become part of some exclusionary rules predominantly because certain countervailing factors weighing against exclusion tend to be higher in cases where evidence is central to the prosecution's case. Although some public safety arguments might be made against exclusion when the evidence at issue is important to the prosecution's case, public safety concerns will tend to be driven more by the nature of the offense with which an accused is charged rather than by the quality of the evidence that is subject to exclusion after a rights breach. For example, excluding central evidence in a shoplifting case is unlikely to persuade people that public safety will be compromised whereas excluding evidence in a murder trial might seriously threaten public safety, so public safety arguments against the exclusion of central evidence are perhaps misplaced.

However, epistemic arguments against the exclusion of central evidence could have much more purchase: the truth-seeking function of a criminal trial is compromised very severely when the most truth-assisting, central evidence in a trial is excluded. From a proportionality perspective, one could argue that the remedy of exclusion disproportionately penalizes the State and rewards the accused when central evidence is excluded such that exclusion "effectively guts the prosecution."[103] This argument is not entirely convincing, as it suggests that a remedy should only flow to the accused in cases where the State can still convict the accused without the benefit of the excluded evidence (which could deprive the remedy of any ability to effectively compensate the accused and would substantially weaken the remedy's ability to vindicate rights breaches). This kind of results-driven reasoning, while perhaps capable of persuading the populace that exclusion should be avoided, is difficult to support in principle.

As the above discussion suggests, there is scope for debate about what role the importance of the evidence doctrine should play in exclusionary decisions. On the one hand, from a principled perspective, an exclusionary rule based on a deterrent rationale should favor the exclusion of important evidence that is obtained through rights breaches, while exclusionary rules based on other

103. R. v. Grant, [2009] 2 S.C.R. 353, ¶ 83 (Can.).

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rationales probably do not need to consider the importance of the evidence doctrine. On the other hand, regardless of the rationale(s) that underpin a particular exclusionary rule, countervailing considerations involving epistemic concerns about exclusion are most powerful in cases involving especially important evidence. Conclusions are not easily drawn about how this doctrine should integrate, if at all, into a principled exclusionary rule.

2. The Derivative Evidence Question

The concepts of "derivate evidence"[104] and "fruit of the poisonous tree"[105] are often discussed in the same context.[106] However, for the sake of clarity, this Article will avoid use of the unhelpful metaphor "fruit of the poisonous tree" and will refer only to derivative evidence—evidence that is collected indirectly as a consequence of a rights breach.[107] In any situation where a rights breach takes place, one of three evidentiary possibilities logically exists: first, the breach may not yield any evidence (in which case, the breach could not be remedied through application of an exclusionary rule). Second, the breach could directly yield evidence: cases of unlawful searches wherein evidence is found and immediately seized by police, or wherein police physically assault a suspect until she confesses, come to mind as examples of this second possibility. And third, the breach could lead to either direct evidence or information (as distinct from evidence) that, in turn, causes police to collect incriminating evidence at some other time, or in some other place. The term derivative evidence in this Article means indirect evidence that is collected by way of this third possibility, rather than evidence that is collected directly as a result of a rights breach.[108]

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104. *See* R. v. Stillman, [1997] 1 S.C.R. 607, ¶¶ 99–101 (Can.) (explaining of the concept of derivative evidence).

105. *See* Nix v. Williams, 467 U.S. 431, 441 (1984) (referring to the "fruit of the poisonous tree").

106. *See* KERRI MELLIFONT, FRUIT OF THE POISONOUS TREE: EVIDENCE DERIVED FROM ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE (2010) (linking fruit of the poisonous tree and derivative evidence).

107. *See, e.g.*, Mark D. Wiseman, *The Derivative Imperative: An Analysis of Derivative Evidence in Canada*, 39 CRIM. L.Q. 435, 436 (1997) ("While there is no standard definition of the term in the jurisprudence *per se*, courts in Canada frequently use the term to refer to secondary evidence which is obtained from or traced to a primary evidentiary source.").

108. The term is also used this way in Kerri Anne Mellifont, The Derivative Imperative: How Should Australian Criminal Trial Courts Treat Evidence Deriving from Illegally or Improperly Obtained Evidence?, 2 (2007) (unpublished J.S.D. dissertation, Queensland University of Technology School of Law) [hereinafter JSD Thesis], *available* at http://eprints.qut.edu.au/16388/1/Kerri_Mellifont_Thesis.pdf. There, the author offers the following example of derivative evidence: "[A] murder weapon located during an illegal search is primary evidence; whereas if it was found as a result of an improperly obtained confession, it is derivative

Some jurisdictions explicitly treat derivative evidence in the same way as primary evidence for exclusionary purposes. In Serbia's new *Code of Criminal Procedure*,[109] for instance, tainted evidence that is obtained either directly or indirectly must be excluded.[110] This legislative wording appears to represent a deliberate choice on the part of the legislators that will resolve a previously existing controversy among academics and courts in that country about whether derivative evidence ought to be excluded.[111] A similar rule exists in Slovenia, where courts cannot base findings on directly tainted evidence, nor on evidence that was acquired indirectly through the use of tainted evidence.[112] Likewise, in Columbia, evidence that owes its existence to excluded evidence must also be excluded.[113]

In other jurisdictions, exclusionary rules categorically do not apply to derivative evidence. In the Netherlands, for instance, the exclusionary rule that is created by section 359(a) of the *Code of Criminal Procedure* authorizes a court to rule that "the results of the investigation obtained through the breach may not contribute to the evidence of the offence charged."[114] As Matthias

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evidence. A confession obtained as a result of an earlier improperly obtained confession is also derivative evidence." *Id.* at 2.

109. SERB. CODE CRIM. P., (2011), *translated by Criminal Codes*, LEGISLATIONLINE, http://www.legislationline.org/documents/id/8918 (last visited March 14, 2015). Although the Code was adopted in 2011, it did not enter into force until January 15, 2013. *See id.* art. 608 (Entry into Force and Beginning of Implementation of the Code).

110. *Id.* art. 16 ("Court decisions may not be based on evidence which is, directly or indirectly, in itself or by the manner in which it was obtained, in contravention of the Constitution, this Code, other statute or universally accepted rules of international law and ratified international treaties.").

111. *See generally* Snežana Brkić, *Serbia: Courts Struggle with a New Categorical Statutory Exclusionary Rule*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 309, 314–15 (Stephen C. Thaman ed., 2013).

112. Criminal Procedure Act, art. 18(2) (2006), *translated by Criminal Codes*, LEGISLATIONLINE, *available at* http://www.legislationline.org/documents/id16906 (last visited March 15, 2015):

> The court may not base its decision on evidence obtained in violation of human rights and basic freedoms provided by the Constitution, nor on evidence which was obtained in violation of the provisions of criminal procedure and which under this Act may not serve as the basis for a court decision, or which were obtained on the basis of such inadmissible evidence.

113. CÓDIGO DE PROCEDIMIENTO PENAL (Criminal Procedure Code) art. 23 (Colum.),, *translated in* Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L LAW 333, 344 (2010) ("All evidence obtained in violation of fundamental guarantees is null within the full meaning of the law and should thus be excluded from the procedure. Evidence that is the consequence of the excluded evidence, or can only be explained by reason of its existence, receive the same treatment.").

114. Wetboek van Strafvordering (Code of Criminal Procedure) (Neth.), *translated in* Matthias J. Borgers & Lonneke Stevens, *The Netherlands: Statutory Balancing and a Choice of Remedies*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 183, 185 (Stephen C. Thaman ed., 2013).

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Borgers and Lonneke Stevens note, this statutory wording and the manner in which it has been judicially interpreted have barred any application of the exclusionary rule to derivative evidence, since "[t]here must be a *direct connection* each time between the breach of procedural rules . . . on the one hand and, on the other, the obtaining of evidence or the harm actually suffered by the accused."[115] The exclusionary rule in Germany also does not extend to derivative evidence,[116] nor does it in England, at least with respect to evidence derived from tainted confessions.[117]

Finally, in many jurisdictions, exclusionary rules apply to derivative evidence, but in more complicated or nuanced ways than to direct evidence. For instance, in the United States, derivative evidence is presumptively inadmissible, but this exclusionary rule is subject to at least three broad exceptions: inevitable discovery, good faith, and attenuation of the breach (i.e., a weakened causative connection between the breach and the derivative evidence).[118]

Ultimately, there is a large variance in how derivative evidence is treated in domestic laws, partly because there are corresponding differences in the underlying rationales for domestic exclusionary rules. If a rule is based on deterrence, then exclusion of derivative evidence is probably justifiable; without exclusion, police might be inclined to routinely breach suspects' rights by, for instance, beating confessions from suspects. This is because even if the confession is inadmissible, at least the leads that a confession generates might be sufficient to both solve a case and collect enough incriminating derivative evidence to yield a conviction.[119] Stephen Thaman makes this point effectively with the following observation:

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115. Borgers & Stevens, *supra* note 114, at 190.

116. Gless, *supra* note 81, at 128 ("The doctrine of 'fruits of the poisonous tree' is recognized neither in the case law, nor by a majority of scholars."). Gless explains the rejection of this doctrine in Germany "by the fact that in Germany evidence is not excluded in order to deter police misconduct, but basically on the 'clean hands' rationale." *Id.* at 129).

117. *See* Police and Criminal Evidence Act, 1984, c. 60, § 76(4) (Eng.) (stating that the fact that a confession is inadmissible does not "affect the admissibility in evidence . . . of any facts discovered as a result of the confession").

118. *See* Stephen C. Thaman, *Constitutional Rights in the Balance: Modern Exclusionary Rules and the Toleration of Police Lawlessness in the Search for Truth*, 61 U. TORONTO L.J. 691, 695–96 (2011) [hereinafter Thaman, *Police Lawlessness*].

119. This concern was acknowledged by the Supreme Court of Canada when the Court recently reformulated its application framework for the Canadian exclusionary rule in R. v. Grant, [2009] 2 S.C.R. 353, ¶ 128 (Can.) ("The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible."). However, one might criticize the Court for continuing to reason along such deterrent-based lines, while nonetheless professing that "the concern of this inquiry is not to punish the police or to deter *Charter* breaches." *Id.* ¶ 73.).

> Clearly if the "fruits" of unlawful wiretaps or bugs may be used to convict a person, then there would be no incentive for law enforcement officials to refrain from secretly wiretapping or bugging private places without probable cause or judicial authorization due to the derivative usefulness of this investigative tool.[120]

Deterrence theory requires exclusionary rules that help to shape police conduct toward more lawful, constitutional standards. Such rules will be more effective if all tainted evidence (both direct and derivative) is excluded after a rights breach.

In contrast, if an exclusionary rule is based on a dissociation rationale, then courts might be more willing to admit *derivative* evidence, since they could point to the exclusion of tainted *primary* evidence as their means of distancing themselves from a rights breach (at least in cases where a given rights breach generates both primary and derivative evidence). The same could be said in respect of exclusionary rules that are predicated on compensation and vindication rationales: as long as some evidence that was obtained directly as a result of a rights breach is excluded, then the accused will have been partially compensated, and the relevant right will have been partially vindicated, regardless of the fact that other derivative evidence that flows from the rights breach is admitted against the accused. However, compensation, vindication, and dissociation rationales would all favor the exclusion of tainted derivative evidence more strongly in cases where rights breaches do not immediately generate any primary evidence (only information or leads), but the breaches eventually generate derivative evidence. This would be so because such cases would leave courts in situations where the only ways to vindicate rights, compensate accused persons, and avoid condoning breaches would be through exclusion of the relevant derivative evidence.

None of the recognized countervailing factors discussed above in Part I would have a particularly strong influence on the derivative evidence question. Public safety, efficiency, proportionality, and epistemic problems with exclusion do not change depending on the direct or indirect nature of the evidence in issue.

As the above discussion demonstrates, the exclusion of tainted derivative evidence can be easily justified according to deterrence theory, but less easily justified under dissociation, vindication and compensation theories. The derivative evidence doctrine will tend not to be affected by general countervailing arguments against exclusion.

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120. Stephen C. Thaman, *"Fruits of the Poisonous Tree" in Comparative Law*, 16 SW. J. INT'L LAW 333, 380 (2010).

3. The Hypothetical Clean Path and Inevitable Discovery Doctrines

The "inevitable discovery" doctrine and the "hypothetical clean path" doctrine are somewhat similar, but the latter doctrine arguably subsumes the former. According to the inevitable discovery doctrine, derivative evidence that is obtained in a manner that breaches a suspect's rights, but that *would* inevitably have been discovered in a lawful manner, is admissible.[121] According to the hypothetical clean path doctrine, "relevant evidence should not be excluded because of a mere 'technical fault', if the evidence *could* otherwise have been discovered by legal means."[122] Thus, the inevitable discovery doctrine essentially requires a positive finding (on a balance of probabilities or preponderance of evidence standard)[123] that the State would have collected the incriminating evidence irrespective of the rights breach, while the hypothetical clean path doctrine merely requires proof that the evidence could have been collected lawfully.

As noted in the previous section, American law recognizes an exception to the exclusionary rule for cases where the incriminating evidence would have been discovered in any event.[124] German law tends to follow the hypothetical clean path doctrine, and, "although the 'hypothetical clean path'-approach has been criticized. . .it is still predominant in case law."[125] Canadian law has recognized that the independent discoverability of tainted evidence has some role to play in exclusionary decisions, but it is not a dispositive factor.[126] In many jurisdictions, such as Greece, any hypothetical scenarios posited by the

121. For the origins of this doctrine in American law, see Nix v. Williams, 467 U.S. 431, 447 (1984) ("[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.").

122. Gless, *supra* note 81, at 123 (emphasis added).

123. Nix, 467 U.S. 444, ("If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received.").

124. Thaman, *Police Lawlessness*, *supra* note 118, at 695–96.

125. Gless, *supra* note 81, at 123 (footnote omitted).

126. R. v. Grant, [2009] 2 S.C.R. 353, ¶ 122 (Can.) Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. . . . The more likely it is that the evidence would have been obtained even without the statement, the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

R. v. Grant, [2009] 2 S.C.R. 353, ¶ 122 (Can.).

State cannot redeem a rights breach that takes place during an unlawful search.[127]

These doctrines dealing with hypothetical clean paths to otherwise-tainted evidence—regardless of the level of speculation that is involved in findings about whether the evidence could or would have been discovered—are conceptually problematic. Consider, for instance, how the doctrine might be justified from a deterrence-based perspective. On the one hand, the fact that police could have obtained a search warrant but chose not to do so could be viewed as a factor that reduces the level of state misconduct in a given case. After all, the State's conduct in such cases would not, in all circumstances, have been impermissible (as contrasted with a case wherein police officers conduct a warrantless search when no ground for a warrant existed in the first place).[128] This line of reasoning appears to be in play in those jurisdictions that recognize a hypothetical clean path doctrine,[129] and it implies that police cannot be deterred by the exclusion of evidence that could have been admitted through some other means. However, on the other hand, many cases wherein police breach a suspect's rights in order to collect evidence that could otherwise lawfully have been obtained will cry out for deterrence.[130] What message is sent to police when courts allow these officials to (at worst) deliberately choose a tainted path over a clean path to evidence, or to (at best) neglect any exploration of other lawful possible sources to the evidence? Many hypothetical clean path decisions to admit evidence will likely provide police with incentives to breach rights rather than serve as deterrents against such breaches.[131]

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127. Article 19(3) of the *Constitution of Greece* provides for an absolute exclusionary rule. *See supra* note 100 and accompanying text.

128. For a discussion along these lines, see R. v. Stillman, [1997] 1 S.C.R. 607, ¶¶. 103–04 (Can.).

129. Such as the United States and Germany. *See supra* notes 124 and 125, respectively.

130. This reality was noted by the Supreme Court of Canada in R. v. Collins, [1987] 1 S.C.R. 265,¶ 38 (Can.):

> [T]he availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the *Charter* tend to render the *Charter* violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the *Charter*, which is a factor supporting the exclusion of the evidence."

131. This is the conclusion that is reached in Jessica Forbes, Note, *The Inevitable Discovery Exception, Primary Evidence, and the Emasculation of the Fourth Amendment*, 55 FORDHAM L. REV. 1221, 1238 (1987) ("The inevitable discovery rule already is overbroad. Applying it to primary evidence completely undermines the deterrent effect of the exclusionary rule.").

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The same flaws with the hypothetical clean path doctrine make it difficult to justify from dissociation, vindication, and compensation perspectives. If a rights breach is no less culpable simply because another line of investigation could have generated the same evidence without a rights breach (setting aside the question of whether such a rights breach is *more* culpable), then courts must still dissociate themselves from these culpable rights breaches by excluding evidence, even where a hypothetical clean path to the evidence existed. Similarly, vindication theory suggests that exclusion is appropriate even in hypothetical clean path cases, since the culpability of the breach and the need to vindicate the affected right remain the same regardless of what other paths police might have chosen to obtain the evidence. Finally, from an accused-centric compensation perspective, it would be difficult to justify the denial of compensation (through exclusion) to an accused person whose rights were breached by state agents who had other investigative options that would not have involved rights breaches, while offering compensation to other accused persons whose rights are violated by police because no other investigative options existed. If a rights breach demands compensation, then extraneous factors such as what other courses of action the police might have pursued should not cause compensation to be withheld from an accused.

Again, as with derivative evidence, recognized countervailing factors against exclusion do not carry more or less weight in the context of the hypothetical clean path doctrine. Public safety concerns remain the same regardless of the path that is chosen to obtain a particular piece of evidence, just as epistemic, proportionality, and efficiency concerns would all remain the same.

On the whole, one is left wondering why the hypothetical clean path doctrine has found its way into so many exclusionary rules.[132] The doctrine cannot easily be explained on the basis of commonly accepted exclusionary principles.

C. Factors (other than Evidence-Related Ones) Influencing Exclusion

In addition to evidence-related factors that often weigh in exclusionary decisions, a number of additional factors that are not so clearly related to the impugned evidence have also become part of many exclusionary rules throughout the world. This section will examine two of these factors: the good faith factor and the seriousness of the offense factor.

132. *See supra* notes 124–126 and accompanying text.

1. The Good Faith Factor

Since at least 1984, American exclusionary case law has consistently held that evidence should not be excluded if it was obtained by police officers who acted in good faith under authority of a search warrant that was subsequently found by a court to be deficient or invalid.[133] This good faith exception to the exclusionary rule is justified within American jurisprudence, as is the exclusionary rule itself, in the language of deterrence: when a police officer acts on the authority of an apparently valid warrant, "there is no police illegality and thus nothing to deter. Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations,"[134] so the exclusionary rule will not apply in such cases.

In New Zealand[135] and Canada,[136] the good faith of a state official who improperly obtains evidence is merely one factor among many that is considered by judges in exclusionary decisions. Similarly, in Israel, a court must "examine whether the law enforcement authorities made use of the improper investigation methods intentionally and deliberately or in good faith,"[137] but, as in Canada and New Zealand,[138] the presence or absence of good faith is not dispositive of matter: "the fact that the authority acted in good faith does not necessarily prevent the evidence being excluded when this is required in order to protect the right of the accused to a fair criminal trial."[139]

In Scotland, case law seems inconsistent in how it treats the good faith doctrine: "acting under an illegal warrant (or without a warrant at all) has been excused in some cases, but exceeding the terms of a warrant has been held—despite the police officers' good faith—to be inexcusable in others."[140] No judicial test in Scotland has established that good faith should be considered in making exclusionary decisions, but a "leading text on the Scots law of

133. *See generally* United States v. Leon, 468 U.S. 897 (1984).

134. *Id.* at 920–21.

135. *See* Evidence Act 2006, § 30(3)(a)-(h) (N.Z.) (stating that where seriousness of the intrusion upon a right and impropriety done in bad faith are two of the listed factors, a court "may, among other matters" consider in deciding whether to exclude evidence).

136. *See* R. v. Grant, [2009] 2 S.C.R. 353, ¶ 75 (Can.) (indicating that good faith reduces the need for judicial dissociation through exclusion of evidence).

137. Issacharov v. Chief Military Prosecutor, Criminal Appeal 5121/98 [2006], ¶ 70 (Isr.).

138. *See supra* notes 135–136 and accompanying text.

139. *Id.*

140. Findlay Stark & Fiona Leverick, *Scotland: A Plea for Consistency*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 69, 77–78 (Stephen C. Thaman ed., 2013).

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evidence"[141] lists "good faith of those who obtained the evidence"[142] as a factor that must be considered by the courts.

In Belgium, the good faith doctrine appears to be more relevant to police disciplinary hearings than to the actual criminal trial of an accused person who was the victim of a rights breach:

> the intentional nature of the illegality committed by the authorities can certainly play an important and even decisive role in any potential disciplinary or criminal proceedings against the officials involved, but it is not clear that this fact should also play a role in the decision of the criminal courts whether or not to accept the evidence in question in the original criminal proceedings.[143]

However, as the above passage demonstrates, Belgian courts may actually be looking at bad faith by the police (intentional illegality) more than good faith, and this is not unique to Belgium. In Taiwan, for instance, section 158-4 of the *Code of Criminal Procedure*[144] -which creates the Taiwanese exclusionary rule[145]-has been interpreted by the Supreme Court as requiring courts to consider "the good or bad faith of the officer when violating the law" as one of eight factors that might influence the exclusionary decision.[146]

The good faith doctrine is complicated in many jurisdictions by somewhat loose and ambiguous language among scholars and judges when referring to the conduct of police, as Steve Coughlan has observed in a Canadian context.[147] What exactly does "good faith" mean? Is it merely the absence of bad faith, or is it behavior that is "so exculpatory of [police] motives as to override any other considerations about seriousness [of the rights breach]"?[148] With respect to Israeli case law, Binyamin Blum has similarly noted that, between the obvious

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141. *Id.* at 72. Stark and Leverick, however, suggest that this authority is somewhat misleading, in that good faith is probably only a factor that *may* be considered by courts, rather than one that *must* be considered.

142. *Id.*

143. Beernaert & Traest, *supra* note 72, at 168.

144. 刑事訴訟法 [The Code of Criminal Procedure] §158-4 (February 6, 2003) (Taiwan), *translated by* LAWBANK, http://db.lawbank.com.tw/Eng/FLAW/FLAWDAT0201.asp (last visited May 20, 2015). ("The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law.").

145. *Id.*

146. Jaw-Perng Wang, *Taiwan: The Codification of a Judicially-Made Discretionary Exclusionary Rule*, *in* EXCLUSIONARY RULES IN COMPARATIVE LAW 355, 356–57 (Stephen C. Thaman ed., 2013).

147. *See generally* Steve Coughlan, *Good Faith, Bad Faith and the Gulf Between: A Proposal for Consistent Terminology*, 15 CANADIAN CRIM. L. REV. 195 (2011).

148. *Id.* at 199.

extremes of "intentionally and knowingly violating the law on the one hand, and doing so in good faith on the other," lie a range of police behaviors that courts are less quick to characterize.[149]

In response to this definitional problem, Coughlan proposes a three-category approach to the good faith doctrine: a label of "bad faith" should be reserved for cases wherein police deliberately or knowingly breach fundamental rights;[150] a label of "good faith" should be reserved for cases wherein police reasonably believe that they are complying with the law (such as when police follow a valid law that is subsequently struck down upon judicial review);[151] and, a neutral assessment that neither good nor bad faith is present should apply to all other cases (such as cases where police act in an environment of legal uncertainty, where they subjectively believe they are complying with the law, but cannot objectively justify their beliefs, or where police are unreasonable or negligent in their efforts to ascertain and comply with the law).[152] Coughlan proposes that true bad faith should always lead to exclusion, true good faith should virtually always rule out exclusion, and, for the vast majority of cases, neutral conduct that cannot clearly be identified as either good or bad faith should have significantly less impact on exclusionary decisions.[153]

Clearly there are many different ways to incorporate the good faith doctrine into an exclusionary rule. An exception that forecloses application of an exclusionary rule whenever the police act in good faith is defensible in terms of deterrence. Since one probably can never deter true accidents,[154] it would be futile to apply an exclusionary remedy as a means of deterring something that cannot be deterred. Similarly, dissociation and condonation theories will seldom demand that exclusion be available as a remedy in cases of good faith rights breaches, since the courts do not necessarily need to dissociate themselves from mere accidental (non-blameworthy) misconduct on the part of other state actors.

The same good faith doctrine, however, would be problematic if elements of vindication or compensation theory also formed part of the underpinning of an exclusionary rule: an accused person whose rights are breached by an officer

149. Binyamin Blum, "*Exclude Evidence, You Exclude Justice"? A Critical Evaluation of Israel's Exclusionary Rule After Issacharov,* 16 SW. J. INT'L LAW 385, 419 (2010).

150. Coughlan, *supra* note 147, at 204–05.

151. *Id.* at 207.

152. *Id.* at 204–05.

153. *Id.* at 199–200.

154. The argument that deterrence of undesirable outcomes that are caused in the absence of moral fault and in the context of non-"useless" activities will be difficult or near impossible to achieve is effectively made in Guido Calabresi, *The Decision for Accidents: An Approach to Non-Fault Allocation of Costs,* 78 HARV. L. REV. 713, 718–20 (1965).

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acting in good faith is arguably no less deserving of compensation than one whose rights are breached by an officer acting in neutral or bad faith, since the accused persons have essentially suffered the same harm in all cases, regardless of the police officers' knowledge or motives in perpetuating rights breaches. Similarly, vindication theory suggests that, if rights are truly to have meaning, then they must be vindicated whenever they are breached (even by officers acting in good faith) rather than just when they are most deliberately or flagrantly breached.[155]

As the above discussion demonstrates, and keeping in mind that vindication and compensation theory could justifiably form part of the basis of any exclusionary rule, there is no principled reason why exclusion should automatically be unavailable to an accused person just because that person's rights have been breached by a state official who acted in good faith. While certain countervailing factors might militate in favor of admission of tainted evidence in cases of good faith rights breaches, a calculation that weighs the benefits of exclusion (in terms of vindication and compensation) against the harms of exclusion (in terms of public safety, efficiency, epistemic, and particularly proportionality concerns) should be undertaken on a case by case basis if an exclusionary rule is to remain defensible as a matter of principle. Blanket exceptions to an exclusionary rule for good faith mistakes by police will tend to undermine the logical coherence of a rule.

2. Seriousness of the Offense as an Exclusionary Factor

The central debate regarding seriousness of the offense as an exclusionary factor is whether exclusionary remedies should be more or less available to those charged with serious offenses, or, expressed in other terms, whether the social costs and benefits of excluding evidence in a serious offense case are appreciably different from those in a less serious offense case.[156]

In some countries, the seriousness of the offense with which an accused is charged is explicitly considered as a factor weighing against application of an exclusionary rule. This is the case in New Zealand, for instance, where section 30(3)(d) of the *Evidence Act, 2006*, lists "the seriousness of the offence with which the defendant is charged" as one factor to be considered among others,[157]

155. *See supra* notes 49–51 and accompanying text.

156. For an introduction to some of the issues and data involved in this debate, *see* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?,* 10 OHIO ST. J. OF CRIM. L. 341, 351–53 (2012).

157. Evidence Act 2006, *supra* note 135, § 30(3)(d).

and where case law has established that this factor militates in favor of admission of improperly obtained evidence.[158]

In other jurisdictions, the applicability of the seriousness of the offense doctrine is less clear. In Canada, for instance, the SCC initially made the following observation in *R. v. Grant*:[159]

> [W]hile the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. [. . .] While the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.[160]

These comments seem to suggest that the seriousness of the offense will be a neutral factor, since it weighs simultaneously in favor of both admission and exclusion. However, in the SCC's subsequent *R. v. Côté* decision wherein the SCC reiterated that seriousness of the offense can "cut both ways,"[161] the Court perhaps hinted at how it actually views this factor by saying that the seriousness of the offense "*will not always* weigh in favour of admission."[162] These words suggest that in proceedings on charges for relatively serious offenses, tainted evidence will tend to, but will not necessarily, be admitted.[163] Ultimately, however, the SCC upheld the trial judge's decision to exclude evidence in spite of the seriousness of the charge in *Côté*, and restored the acquittal that was entered at trial.[164] Thus, the SCC's thinking on seriousness of the offense remains ambiguous.

In Taiwan, similar dissonance between the theory and practice of exclusion is apparent. Section 158-4 of the *Code of Criminal Procedure*[165] has been

158. *See* R v Williams 3 N.Z.L.R. 207 (2007), ¶¶ 245–51 (N.Z.), for an excellent summary by the Court of Appeal on how the legislated exclusionary rule is to be applied in New Zealand. Note that the more recent Supreme Court decision, *Hamed v R* 2 N.Z.L.R. 305 (2012) (N.Z.), may have displaced the earlier Court of Appeal framework for applying the exclusionary rule with a vague, unguided discretionary approach to exclusion. Whether the *Hamed* decision will complement or replace the *Williams* framework in future cases remains to be seen. For an insightful case comment on the *Hamed* decision, *see* Scott Optican, *Hamed, Williams and the Exclusionary Rule: Critiquing the Supreme Court's Approach to S. 30 of the Evidence Act 2006,* 2012 N.Z. L. REV. 605 (2012).

159. R. v. Grant, [2009] 2 S.C.R. 353 (Can.).

160. *Id*. ¶ 84.

161. R. v. Côté, [2011] S.C.J. 46, ¶ 53 (Can.).

162. *Id.*

163. In practice, this hypothesis seems to be borne out by the statistics. *See, e.g.*, Madden, Marshalling the Data, *supra* note 6, at 245 tbl.6 (noting that guns—presumably a form of evidence associated with more serious charges—tend to be admitted much more often than other forms of physical evidence).

164. [2011] S.C.J. No. 46, ¶¶ 89–90 (Can.).

165. Taiwan Code of Criminal Procedure, *supra* note 144.

interpreted by the Taiwanese Supreme Court as requiring courts to consider "the gravity of the charged offence and the harm it caused" as one of eight factors in a balancing calculus.[166] However, one commentator has observed that, "in practice, courts tend not to exclude evidence in cases involving very serious offences, such as murder or rape. Guns are also unlikely to be excluded by many courts."[167] This observation suggests that, while seriousness of the charge is purportedly just one among many co-equal factors, it may actually be the driving factor in Taiwanese exclusionary decisions.

There are persuasive reasons both for and against using a sliding scale of exclusion depending on the seriousness of the offense, perhaps best explained by commentators from Belgium:

> On the one hand, it is understandable that the extreme seriousness of an offence committed by the accused could go against excluding an illegally obtained piece of evidence where the act in question only involved a "minor" illegality. But on the other hand, we could just as easily argue that a guilty verdict involving a particularly serious offence will typically bring with it a very heavy punishment and it is therefore particularly important that the verdict be the result of a procedure conducted in conformity with existing law. There exists a paradox in saying that the rule governing admissibility of evidence in cases involving a serious offence should be more flexible than those which apply in the trial of less serious offences with lesser punishments.[168]

In order to ascertain how this paradox can best be addressed through a principled exclusionary rule, one must consider both the bases for exclusion and the countervailing considerations identified in Part I.

Consideration of the seriousness of an offense is not particularly useful if a given exclusionary rule is grounded in either vindication or compensation theory. Since these rationales for exclusion are mostly accused-centric,[169] the necessity of excluding evidence in the case of a particular rights breach (considered objectively from the accused's perspective) will be the same regardless of the offense with which the accused is charged. Similarly, the need for courts to dissociate themselves from rights breaches by actors within other branches of government will tend to be the same regardless of the offense with which an accused is charged: admitting evidence that was collected through a given rights breach would logically lead to exactly the same degree of judicial condonation in both a prosecution for shoplifting and a prosecution for aggravated sexual assault, because condonation theory is concerned only with

166. Wang, *supra* note 146, at 356–57.

167. *Id.* at 357.

168. Beernaert & Traest, *supra* note 72, at 168.

169. *Supra* notes 47–52 and accompanying text.

the relationship between the courts and the police, rather than with any actions of the accused.[170]

The only rationale for exclusion that might require consideration of the seriousness of the offense doctrine is the deterrence rationale. As discussed in Part I, the deterrence rationale is based in part on the assumption that police and other state agents involved in the criminal process care enough about exclusionary outcomes as to shape their conduct in ways that are less likely to result in rights breaches and the exclusion of tainted evidence.[171] If it is accepted that police dislike outcomes involving exclusion and failed prosecutions, then one could reasonably hypothesize that the level of police concern and interest in exclusionary outcomes is proportional to the seriousness of the offense—that is, police are not very concerned about exclusionary decisions in minor cases, but are quite concerned in major cases. If this hypothesis is correct, then the seriousness of the offense doctrine is highly relevant to a deterrence-based exclusionary rule. Courts will be able to achieve a greater degree of deterrence when they exclude tainted evidence in serious offense cases as compared to minor offense cases, as exclusionary rulings will shape police conduct away from rights breaches both more efficiently and effectively.

As the above discussion demonstrates, the seriousness of the offense doctrine is probably irrelevant to exclusionary rules that are grounded in compensation, vindication, or dissociation theory. However, when the impact of the doctrine on a deterrence-based exclusionary rule is considered, it appears that exclusion should result more frequently in cases involving serious offenses. This conclusion is somewhat surprising, given that several of the exclusionary rules surveyed in this section (including rules from New Zealand,[172] Taiwan,[173] and perhaps Canada[174]) would all favor admission—not exclusion—of tainted evidence in cases where the underlying offense is serious.

The dissonance between theory and reality in the context of the seriousness of the offense doctrine might be due to the fact that countervailing factors militating against exclusion, such as public safety and proportionality concerns, are significantly more powerful in cases involving serious offenses. Public safety is at much greater risk when an individual charged with a serious offense escapes prosecution on a technicality than when a petty criminal is set free. The consequences of exclusion are also tilted disproportionately in favor of an

170. *Supra* notes 28–32 and accompanying text.

171. *Supra* notes 23–27 and accompanying text.

172. *Supra* note 158 and accompanying text.

173. *Supra* notes 165–167 and accompanying text.

174. *Supra* notes 159–164 and accompanying text.

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accused person and against society when the accused who is charged with a very serious offense avoids a trial on the merits after successfully having tainted evidence excluded.

Thus, while seriousness of the offense might be a relevant consideration in many jurisdictions, the way in which the doctrine has been integrated into existing exclusionary rules has either been ill-considered, or ill-explained. When deterrence theory suggests that exclusion is more important in serious offense cases, but domestic legislation and jurisprudence favors admission of tainted evidence in serious offense cases, some explanation as to the cause of the dissonance is arguably required. If courts deem that tainted evidence must be admitted in these cases due to proportionality and public safety considerations, then their decisions, and the overall coherence of their exclusionary rules, would be strengthened by a straightforward explanation of this reality. In the absence of any such explanation, many exclusionary rules continue to exist on bases that are weak and unprincipled.

III.
A DETAILED PROPOSAL FOR A MODEL EXCLUSIONARY RULE

The final Part of this Article will propose a model exclusionary rule, and explain how it should be interpreted and applied. The goal in this Part is to discuss the different principles and doctrines that could form part of an exclusionary rule in order to explain how these doctrines should or should not be incorporated into a model rule.

As Part I demonstrated, any exclusionary rule should attempt to balance policy objectives against societal costs. Simply stated, if the preceding argument within this Article is accepted then an exclusionary rule should lead to exclusion whenever exclusion will advance objectives of deterrence, dissociation, vindication or compensation, and the gains that exclusion will bring in one or more of these areas is larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. A model rule should not use a bright-line approach to categorically exclude evidence when certain criteria are met, but then admit evidence when other criteria are met, since this type of rule would not allow for the kind of case-by-case weighting of factors in favor of and against exclusion that a nuanced and principled exclusionary rule demands.

To say that a model exclusionary test must be flexible, and must always balance the benefits of exclusion in terms of deterrence, dissociation, compensation and vindication against the harms of exclusion in terms of public safety, efficiency, proportionality, and epistemic losses, is not to say that the test cannot include guidance to litigants and judges about how certain doctrines or

classes of cases will generally need to fit within the rule. It will therefore be helpful to review how some of the frequently encountered exclusionary doctrines discussed in Part II might factor into a model exclusionary rule.

The identity doctrine often operates to bar exclusion as a remedy in cases where rights are breached or disrespected by private actors instead of state agents.[175] The doctrine can, to a certain extent, be justified if an exclusionary rule only seeks to deter future rights breaches, but the doctrine would undermine any exclusionary rule that seeks to achieve dissociation, vindication, or compensation. Furthermore, none of the countervailing factors against exclusion depend on the identity of the individual who collects the evidence: no matter who collects tainted evidence, the calculation of benefits and harms of exclusion will not significantly depend on the identity of the transgressor. Thus, the overall balance of considerations indicates that the identity doctrine should form no part of a model exclusionary rule.

The standing doctrine often dictates that exclusion will not be available as a remedy except in cases where the accused's own rights are breached, rather than when a third party's rights are breached.[176] The deterrent effect of a rule will be stronger if the rule applies to the full range of police and state interactions with the population, not only to those interactions involving a small set of accused persons. Similarly, the need for courts to dissociate themselves from misconduct by evidence collectors is just as strong in the case of a third-party rights breach as in the case of a rights breach against the accused. Finally, although a third party receives no direct compensation from evidence being excluded, it is still possible for their rights to be vindicated when a State or society is deprived of evidence as a result of the rights breach, since this kind of exclusion expresses a measure of the importance of the right, and of the sacrifices that society is willing to accept in order to give meaning to fundamental rights. Thus, the collective of rationales for exclusion all suggest that a strict standing requirement should not form part of a model exclusionary rule. Furthermore, as with the identity requirement, no countervailing rationale against exclusion operates more persuasively in cases of third-party rights breaches than in cases where the accused's own rights are breached. Thus, the abandonment of any strict standing requirement within a model exclusionary rule would be salutary.

The importance of the evidence doctrine is equally difficult to incorporate into a principled exclusionary rule. This doctrine suggests that evidence should be excluded less frequently when it has special importance or centrality to the prosecution's case.[177] However, applying the doctrine cannot help to advance

175. *Supra* notes 62–67 and accompanying text.

176. *Supra* notes 78–83 and accompanying text.

177. *Supra* notes 89–96 and accompanying text.

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any dissociation, vindication or compensation goals of exclusion, and likely hinders the deterrent goal by admitting tainted evidence in a way that encourages future breaches by evidence collectors. No compelling public safety or efficiency arguments can be made against exclusion simply because of the importance of the evidence. However, there is room to argue that exclusion of central evidence would destroy the epistemic purpose of a trial, and that it would be a disproportionate remedy. Based on the fact that the doctrine cannot be justified on the basis of a known rationale for exclusion, the centrality of the evidence doctrine should not often form part of a model exclusionary rule. Nonetheless, in extreme cases, it is *possible* that the harm of excluding very important evidence in terms of epistemic or proportionality concerns would outweigh the benefits of exclusion. It is therefore conceivable that the centrality of the evidence doctrine would occasionally play a relevant role in exclusionary calculations.

The derivative evidence question asks whether an exclusionary rule should operate to exclude both evidence that was collected directly in connection with a rights breach, and evidence collected indirectly, but still deriving from, a rights breach.[178] The deterrent rationale for exclusion suggests that derivative evidence should be subject to an exclusionary rule, but other rationales for exclusion offer less clear answers: so long as some direct evidence is excluded, then a measure of dissociation, vindication and compensation will be achieved in respect of a rights breach, even if derivative evidence is admitted. Depending on the case, it might also be necessary to exclude derivative evidence if the exclusion of only directly tainted evidence is insufficient to achieve the objectives of an exclusionary rule, but this may not follow if countervailing factors against exclusion in a given case are strong. Thus, a principle-based exclusionary rule would extend the rule's reach to derivative evidence as a general matter, but would apply the same basic balancing test that is proposed in this Part to determine whether exclusion is required on the facts of a particular case.

The hypothetical clean path doctrine provides that tainted evidence can be admitted if police could, hypothetically, have obtained the same evidence by some other means that would not have led to a rights breach.[179] If one accepts that a rights breach is even more egregious when the breach was likely unnecessary in order to obtain the evidence, then the hypothetical clean path doctrine would undermine all of the recognized rationales for exclusion. Furthermore, no countervailing argument against exclusion is any more persuasive in cases where a hypothetical clean path to the tainted evidence

178. *See generally* JSD Thesis, *supra* note 108.

179. *Supra* notes 121–129 and accompanying text.

existed. Consequently, the hypothetical clean path doctrine should not form part of a model exclusionary rule.

The good faith doctrine often operates to allow tainted evidence to be admitted in cases where a right was breached in good faith by the state.[180] This doctrine is justifiable on the basis of deterrence and dissociation theories, in that good faith mistakes and accidents by police cannot easily be deterred, since they were unintentional from the start, and they do not always necessitate judicial dissociation. However, the doctrine is problematic from vindication and compensation perspectives, since it leaves rights breaches to stand without compensation to the accused, and without meaningful reassertion of the importance of the right. In this sense, a good faith exception to an exclusionary rule would frustrate some objectives of exclusion (vindication and compensation), while other objectives would be impossible to promote through exclusion of evidence obtained through good faith rights breaches. Thus, without yet considering the impact of countervailing factors in a good faith rights breach scenario, the good faith exception could be justifiable in cases where vindication and compensation for a rights breach have already been achieved or could otherwise be achieved through some other means, such as a domestic tort or public damages remedy. Exclusion would nonetheless be necessary in cases where it is the only way to vindicate a right and compensate the accused. In terms of countervailing factors, proportionality concerns would favor a good faith exception within a model exclusionary rule, since the harm of a good faith rights breach—while perhaps substantial to an accused—is somewhat reduced from a societal perspective, and therefore may call for a less drastic remedy than exclusion in many trials. As this discussion demonstrates, the good faith exception should sometimes play a role in balancing the benefits and harms of exclusion as part of a model exclusionary rule.

The seriousness of the offense doctrine suggests that evidence should be excluded less frequently in cases where the accused is charged with a particularly serious offense.[181] However, when this doctrine is examined from a principled perspective, it is apparent that it cannot be justified on dissociation, vindication, or compensation grounds. On deterrent grounds, it generates an outcome (admission of tainted evidence) that likely undermines rather than strengthens the deterrent effect of the basic rule. While a few persuasive public safety and proportionality arguments could be advanced against exclusion in cases of serious offenses, the overall dissonance within exclusionary theory that this doctrine would create suggests that the seriousness of the offense doctrine should not form part of a model exclusionary rule.

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180. *Supra* note 133 and accompanying text.

181. *Supra* notes 156–159 and accompanying text.

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In summary, an application of the basic exclusionary test that is proposed within this Article to different classes of cases or exclusionary doctrines reveals that some accepted doctrines should clearly form part of a model exclusionary rule, some should clearly not form part of the rule, and some doctrines should contextually influence the outcome of exclusionary decisions in certain types of cases, but not others.

CONCLUSION

The forgoing examination of the rationales for exclusion, the countervailing arguments against exclusion, and the most common exclusionary doctrines from around the world shed light on how a more sophisticated approach to the exclusion of tainted evidence could develop. By understanding the theory upon which this Article is grounded, one can also see how many exclusionary rules fail to achieve their stated or implied purposes, and how a model exclusionary rule could avoid the same pitfalls by adhering to the principles set forth in this Article.

The basic test proposed within this Article is that evidence obtained through a rights breach should be excluded whenever exclusion will advance objectives of deterrence, dissociation, vindication or compensation, and the gains that exclusion will bring in one or more of these areas are larger than any social costs of exclusion in terms of public safety, efficiency, proportionality, or epistemic sacrifices or risks. This test can be applied to any known or new class of evidence, and any aspect of an exclusionary doctrine borrowed from another jurisdiction, because it is simple and based on easily understood principles of exclusion. Over time, it should lead to predictable and logical results, and it lends itself well to judicial justifications for exclusionary decisions. In short, the test proposed within this Article offers courts a solution to common problems of exclusionary uncertainty and lack of principle by offering judges a model rule upon which they can base future development of their own exclusionary rules.