Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule

AVANI MEHTA SOOD*

The exclusionary rule generally bars the use of illegally obtained evidence in a criminal case, regardless of the defendant’s crime. However, using a combination of doctrinal analysis, social psychology theory, and original experimental data, this Article proposes a more cognitively complicated picture of how the rule may actually operate. In cases of egregious crime that people are highly motivated to punish, the exclusionary rule and its continually expanding exceptions present a fertile entry point for “motivated cognition,” a psychological process through which decision makers unknowingly reason toward their desired outcomes, seemingly within the constraints of the law.

In this series of experiments, when research participants acting as judges were faced with pivotal but illegally obtained evidence of a morally repugnant crime, they unknowingly construed the circumstances of the case in a manner that enabled them to invoke an exception to the exclusionary rule—thereby “cognitively cleansing” the tainted evidence to admit it and achieve their punishment goals without flouting the law. By contrast, when an identical illegal search uncovered evidence of a less reprehensible crime, participants were significantly more likely to suppress the evidence, construing the circumstances of the case to support the use of the exclusionary rule without exception. Even people’s judgments about the investigating police officers, who conducted exactly the same illegal search in both scenarios, depended on the egregiousness of the crime that the search happened to uncover. Critically, however, introducing awareness-generating instructions that alerted participants to the possibility that criminal egregiousness could drive their suppression judgments significantly curtailed the influence of this doctrinally irrelevant factor.

* Assistant Professor of Law, University of California, Berkeley, School of Law; Ph.D. (Psychology), Princeton University, 2013; J.D., Yale Law School, 2003; B.A., Princeton University, 1999. © 2015, Avani Mehta Sood. For valuable comments and helpful conversations, I am thankful to Catherine Albiston, Michelle Wilde Anderson, Kenworthey Bilz, Andrew Bradt, Jesse Choper, Joel Cooper, John Darley, Donald Dripps, Susan Fiske, Friederike Funk, David Gamage, Jack Glaser, Andrew Guzman, Dan Kahan, Christopher Kutz, Katerina Linos, Tracey Maclin, Richard McAdams, Saira Mohamed, Pam Mueller, Melissa Murray, Janice Nadler, Anne Joseph O’Connell, Daniel Osherson, Elizabeth Levy Paluck, Victoria Plaut, Kevin Quinn, Jeffrey Rachlinski, Nick Robinson, Andrea Roth, Kim Lane Scheppele, Jonathan Simon, David Sklansky, Christopher Slobovin, Lawrence Solan, Rachel Stern, Stephen Sugarman, Kate Stith, Karen Tani, Tom Tyler, Jan Vetter, Charles Weisselberg, the students in my Fall 2013 Colloquium on Law and Psychology, and participants at Berkeley Law’s Center for the Study of Law and Society Speaker Series and Junior Working Ideas Group, the 2014 Conference on Empirical Legal Studies, the 2014 International Society for Justice Research Biennial Conference, and UC Berkeley’s Institute of Personality and Social Research Colloquium. Brittney Delgado, Amber Hannah, Elizabeth Ingriselli, Colin Jones, Iris Mattes, Liliana Paratore, Shira Tevah, and the librarians at Berkeley Law provided excellent research assistance, and it was a pleasure working with the editors of the Georgetown Law Journal.
Contributing to a growing body of empirical research on cognitive pitfalls in legal decision making, the results of these studies highlight why the justice system should not turn a blind eye to covertly motivated applications of the exclusionary rule, or any legal doctrine that is susceptible to the motivated cognition effect. Aside from the benefits of stability and legitimacy that arise from applying legal rules in a predictable and transparent manner, the finding that decision makers set aside their personal punishment goals to more objectively adhere to the law when an instructional intervention cognitively equipped them to do so reflects a conscious choice worth recognizing. Illustrating how the tools of social psychology can be mobilized to reveal new normative dimensions of longstanding doctrinal debates and stimulate data-driven prescriptions for reform, this Article proposes a path toward more informed, consistent, and cognitively realistic applications of the law.

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Suppose police officers illegally search a car and discover evidence of a morally egregious crime: large quantities of heroin that the car’s owner has been selling to high school students. Now imagine a more sympathetic scenario, in which the same illegal police search instead uncovers large quantities of...
marijuana that the car’s owner has been selling to terminally ill cancer patients to ease their suffering. The exclusionary rule holds that the evidence in both scenarios is “contaminated” by the illegality of the police search and should not be admitted in a criminal case, regardless of the type of crime it uncovers. Or at least that is the law on the books.

The law in action is a different story. Judges’ decisions about whether to exclude evidence or to invoke one of the exclusionary rule’s legal exceptions to avoid suppression may be unknowingly influenced by their desire to see morally egregious crimes punished. Indeed, legal scholars have for decades made anecdotal observations that the nature of a defendant’s crime (or alleged crime) seems to drive judgments about the suppression of evidence on a widespread de facto basis. Yet, the process underlying this phenomenon has not been experimentally identified nor psychologically explained, without which it cannot be effectively remedied.

Drawing upon theories and methodologies from the field of social psychology, this Article seeks to address that gap with a series of doctrinally inspired experiments. Part I begins by providing a brief introduction to the exclusionary rule and its jurisprudential tensions, which have long inspired prominent judicial decisions and vigorous academic debate. Moreover, the current Roberts Court’s holdings on the rule, which have controversially narrowed its reach, indicate that this is an active area of law that continues to be in tremendous flux. Part I reviews anecdotal observations of judges applying the exclusionary rule differently depending on the defendant’s underlying crime, analyzes the role that criminal egregiousness may have played even in some of the key Supreme Court precedents that established the doctrine, and discusses the implications of the Court’s recent decisions on the rule.

Part II then proposes a psychological explanation—the “motivated justice hypothesis”—that could account for the motivating influence of irrelevant factors across many areas of legal decision making, but is operationalized here to explain how and why criminal egregiousness might drive applications of the

1. See e.g., Donald Dripps, The Case for the Contingent Exclusionary Rule, 38 AM. CRIM. L. REV. 1, 2 (2001); Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 18 (1987); John Kaplan, The Limits of the Exclusionary Rule, 26 STAN. L. REV. 1027, 1036–37 (1974). A defendant’s crime is only alleged when judges make suppression judgments at the trial level as compared to the post-conviction appellate level, but this Article will hereafter generally refer without explicit distinction to the influence of the “defendant’s crime” or “criminal egregiousness” in suppression judgments. In the hypothetical scenarios used in these studies, the defendant was unambiguously guilty of the underlying crime.

2. See, e.g., Elkins v. United States, 364 U.S. 206, 216 (1960) (“The exclusionary rule has for decades been the subject of ardent controversy.”); Dripps, supra note 1, at 1 (“Few debates in American law are as sustained, or as bitter, as the debate over the exclusionary rule.”); Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. COLO. L. REV. 75, 75 (1992) (“From its inception, the exclusionary rule has spurred intense and often rancorous debate between liberals and conservatives.”).

exclusionary rule. The hypothesis posits that when the general commitment that judges and jurors have to following legal rules clashes with their own sense of justice in a given case, they may inadvertently perceive, interpret, or construct the circumstances of the case in a manner that enables them to achieve their desired outcome ostensibly within the stated parameters of the law. The underlying psychological process, a less-than-conscious tendency to reason toward one’s preferred result, is known as “motivated cognition” (or “motivated reasoning”).

This Article suggests that the malleable and continually expanding exceptions to the exclusionary rule make this doctrine highly susceptible to the covert operation of motivated cognition. If the exclusionary rule is triggered in a case involving a morally egregious crime that a judge is highly motivated to punish, he or she may unknowingly construe the circumstances of the illegal search as giving rise to a legal exception to the rule, so as to admit the tainted evidence with a clean conscience.

Providing empirical support for this hypothesis, Part III describes the methodology and results of two experiments that demonstrate motivated applications of the exclusionary rule through its “inevitable discovery” exception, which allows illegally obtained evidence to be admitted if a judge concludes that it eventually would have been discovered through lawful means. The participants in these studies were asked to play the role of judges and were randomly assigned to one of two experimental conditions. Both conditions presented the scenario of an illegal police search that was exactly the same except for the nature of the crime uncovered: the police found either heroin that the defendant had been selling to high school students or marijuana that the defendant had been selling to cancer patients. As predicted, participants judging the more egregious heroin case were more motivated than those judging the marijuana case to punish the defendant, and were therefore more likely to recommend that the contaminated evidence be admitted. The heroin participants did not, however, simply disregard the law. Rather, they were significantly more likely to construe lawful discovery of the evidence as inevitable, thereby “cognitively cleansing” the tainted evidence to achieve their punishment goals without consciously flouting the exclusionary doctrine.

Given that the Supreme Court’s most recent decisions on the exclusionary rule have turned on the degree of police wrongfulness in an illegal search, these experiments also tested whether the egregiousness of the defendant’s crime influences people’s perceptions of the investigating police officers. Al-

5. See infra Part I.D; Davis, 131 S. Ct. at 2429; Herring, 555 U.S. at 144.
though the police misconduct was identical in both the heroin and marijuana cases, participants saw the officers as less morally culpable and less deserving of negative consequences when their illegal search happened to uncover evidence of the more repugnant crime.

This Article uses the term “legal decision makers” to describe people who are asked to make law-related judgments in either experimental or real courtroom contexts. However, an important caveat to these studies is that the participants were lay decision makers, whereas in real criminal cases, suppression judgments are made by professional judges. Part III addresses this limitation by discussing the relevance of these findings to judicial actors. It previews recent studies inspired by this Article’s hypothesis and experimental paradigm that have conceptually replicated and enhanced the external validity of these results using real judges and actual search-and-seizure opinions. It also describes previous research showing that judges are not immune to inadvertent cognitive biases. Moreover, Part III considers how lay people’s responses to the suppression of tainted evidence in cases of egregious crime, as directly demonstrated in this Article’s experiments, may in some cases influence more deliberately strategic judicial applications of the exclusionary rule.

The Article then goes a crucial step further to address the question of what can be done to curb unintentional “cognitive cleansing” of tainted evidence. Part IV discusses relevant amendments and substitutes for the exclusionary rule that legal scholars have previously suggested, and highlights some limitations of these routes in light of this Article’s motivated justice hypothesis and findings. As an alternative to substantive doctrinal revision, Part IV then proposes and experimentally tests a psychological means of mitigating the underlying motivated cognition effect. The third and final study shows that using awareness-generating instructions to make participants explicitly confront the possibility that the egregiousness of a defendant’s crime could color their admissibility judgments significantly reduces the influence of this legally irrelevant factor. After receiving such “corrective” instructions, even those who were asked to judge the morally egregious heroin crime no longer cognitively attempted to admit the tainted evidence.

Having started the ball rolling on a data-driven approach to curtailing motivated applications of the exclusionary rule, Part V tackles the normative question of why this is a problem that needs to be addressed. Some may argue that an ostensibly strict rule that disregards criminal egregiousness in order to widely deter illegal searches, but is then applied by judges to achieve just punishment outcomes in a flexible manner, achieves a middle ground that the legal system is right to permit. However, this Article strongly cautions against the covertly motivated nature of this phenomenon. When applying a controversial doctrine like the exclusionary rule in the high-stakes context of criminal proceedings, consistency and transparency of legal rules are of critical importance for bedrock notions of fairness, legitimacy, and due process. Furthermore, the final study shows that when equipped to make a more conscious decision,
participants applied the law according to its neutral terms, even at the expense of their own punishment goals—and that is a choice worth recognizing. Part V concludes by drawing on the experimental results to propose some preliminary ideas for policy reform, such as empirically grounded awareness instructions and trainings for judges and juries.

This Article’s conclusions have clear implications for the exclusionary rule, but its focus on the cognitive process underlying motivated applications of the law arguably make its findings broadly relevant to many realms of legal decision making that may be similarly susceptible to the covert influence of legally extrinsic motivating factors. This research thus more generally aims to use the suppression context as a testing ground for employing the tools of social psychology to facilitate more informed, transparent, and consistent applications of the law.

I. DOCTRINAL OBSERVATIONS

A. THE EXCLUSIONARY RULE

The Fourth Amendment exclusionary rule, a judicially created law that stems from the U.S. Constitution’s protection against unreasonable searches and seizures by the government, 6 prohibits illegally obtained evidence from being admitted in a criminal trial. 7 Two rationales have been put forth for this doctrine: (1) to protect the “integrity” of the judicial process from being contaminated by tainted evidence, 8 and (2) to deter police officers from conducting illegal searches in the first place, “by removing the incentive” to do so. 9 Of these two goals, the Supreme Court has embraced deterrence as the “prime purpose” of the rule. 10

“[E]ither by virtue of the Supreme Court’s explicit rejection of crime severity as a valid Fourth Amendment consideration, or the Court’s pointed omission of that consideration from its analysis,” the exclusionary rule has been doctrinally established as governing illegal searches independent of the target’s alleged crime. 11 Tainted evidence must therefore be suppressed in criminal cases “regard-

6. See U.S. CONST. amend. IV.
11. Jeffrey Bellin, Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World, 97 Iowa L. Rev. 1, 17 (2011); see Atwater v. City of Lago Vista, 532 U.S. 318, 321–22 (2001) (rejecting the argument that the scope of a search and seizure is more limited for a minor offense); Mincey v. Arizona, 437 U.S. 385, 394 (1978) (stating that “the seriousness of the offense under investigation” does not create exigent circumstances that would justify warrantless searches of homes in homicide cases); Mapp, 367 U.S. at 655 (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is... inadmissible in a state court.”) (emphasis added); Christopher Slobogin, The Exclusionary Rule: Is It On Its Way Out? Should It Be?, 10 Ohio St.
less [of] whether the defendant is charged with shoplifting or skyjacking, bookmaking or bomb-throwing.” 12 But are human decision makers cognitively capable of applying the rule without being influenced by this legally irrelevant factor?

The studies in this Article put that question to the test by providing experimental data for what lawyers have thus far only anecdotally observed:

It is hard to read the mass of appellate search and seizure decisions without getting a distinct feeling that a police action which the courts would uphold that produced heroin would not always be held valid when only marijuana was found. Indeed this practice is much clearer in trial courts, where every defense lawyer knows that his chances on a motion to suppress will depend to a great extent on whether his client has been apprehended with marijuana or with heroin. 13

Trial court judges may be inclined to “tilt fact-finding against exclusion” 14 in cases where egregious crimes are alleged because they “have an eyewitness seat and get splattered with the blood.” 15 Appellate judges have more distance from the facts and characters of a case, but their judgments about the suppression of evidence may be just as influenced by the egregiousness of the underlying crime because, at that stage, the appellant has been found guilty beyond a reasonable doubt of that crime in the court below. 16 Thus, omitting the defendant’s crime from formal consideration in Fourth Amendment jurisprudence does not necessarily eliminate its influence. 17

Outcome-driven applications of the exclusionary rule by judges are often assumed to be purposeful, and there are surely instances in which this is true, especially when the circumstances of a police search would otherwise unequivocally point to suppression. 18 However, situations involving illegal searches can


There are very few Fourth Amendment cases in which the Supreme Court has overtly considered the gravity of the offense—cases that are “famous precisely because they are exceptional.” Stuntz, supra at 847 n.16; see, e.g., Tennessee v. Garner, 471 U.S. 1, 11 (1985); Welsh v. Wisconsin, 466 U.S. 740, 750 (1984).


13. Kaplan, supra note 1, at 1049 n.109 (citations omitted) (comparing United States v. Page, 302 F.2d 81 (9th Cir. 1962) with Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954)).


17. See Bellin, supra note 11, at 46 (discussing the omission of a crime severity variable in Fourth Amendment doctrine generally).

18. A colleague offered the following lore he heard from a judge: “[A] newly appointed judge calls a more senior judge to ask his advice about testimony he has just heard while conducting his first suppression hearing in a drug case. The arresting officer testifies that he stopped the defendant while
also be ambiguous, and therefore vulnerable to the less-conscious psychological explanation that this Article proposes. Consistent with this view, William Stuntz noted that it “requires no assumption of judicial dishonesty” to “suppose that the character of the claimant in an exclusionary rule proceeding tends to exacerbate bias that is naturally present in all after-the-fact proceedings.”\(^{19}\)

Additionally, Myron Orfield, who interviewed judges, public defenders, and prosecutors in Chicago courts about their encounters with the exclusionary rule, observed: “[I]t is not clear whether judges’ unwillingness to suppress evidence in serious cases is an entirely conscious process. . . . ‘The seriousness of the crime has a powerful subconscious effect on the way one evaluates testimony—it is inescapable.”\(^{20}\) Applications of the exclusionary rule have thus been described as suffering from “a serious psychological problem.”\(^{21}\)

There have been some prior efforts to corroborate these anecdotal observations in an evidence-based manner. After interviewing a range of legal actors, Orfield found that they consistently noted: “[P]olice testimony that would not pass muster in a small case suddenly becomes believable in a big case. . . . ‘If the same facts lead an officer to find a stick of marijuana in a trunk as a body, the marijuana will be suppressed, the body will not.’”\(^{22}\) Another empirical study examining cases that were “lost” due to the suppression of illegally obtained evidence found that over 85% of such cases involved possession of controlled substances and marijuana, whereas the “more serious crimes . . . account for a very small portion (less than 2%) of the cases with successful motions to suppress evidence.”\(^{23}\) These investigations help delineate the problem, but what has been missing is a comprehensive attempt to explain the underlying psychological process, demonstrate causality, and rein in the manner in which criminal egregiousness appears to drive applications of the exclusionary rule. The studies in this Article take on that task.

B. THE INEVITABLE DISCOVERY EXCEPTION

A primary way in which the exclusionary rule can be cognitively and “legally” circumvented is through its several judicially created exceptions. The

driving a car with a broken taillight. When the officer approached the car he noticed a briefcase in plain view on the back seat; the briefcase somehow levitated off the seat, sailed out through the open rear window, and fell to the street, spilling onto the pavement a powdery substance the officer believed to be heroin, as forensic tests subsequently confirmed. The newly appointed judge asks whether he should believe this testimony, to which the senior judge responds, ‘How much heroin was there?’” E-mail from Jann Vetter, Emeritus Professor, University of California Berkeley School of Law, to author (Sept. 9, 2014) (on file with author). This Article’s hypothesis does not apply to such circumstances because motivated cognition does not operate when facts clearly contradict a desired outcome. See infra note 99 and accompanying text.

20. Orfield, supra note 2, at 121 (quoting a public defender).
22. Orfield, supra note 2, at 118.
Supreme Court has held that evidence obtained through an illegal search can be admitted, inter alia, if the chain of causation between the illegal search and the tainted evidence is too “attenuated,”24 if the police relied reasonably and in “good faith” on an invalid search warrant,25 or if the evidence “inevitably” would have been discovered through lawful means.26 These pliable and continually expanding exceptions to the rule serve as fertile entry points for motivated cognition.

The experimental paradigm devised in this Article focuses on the inevitable discovery exception, because it presents a wide avenue through which a defendant’s crime can motivate suppression judgments without technically violating the exclusionary doctrine. In establishing this exception, the Court asserted that it “involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment.”27 However, as dissenting Justice William Brennan pointed out, “The inevitable discovery exception necessarily implicates a hypothetical finding.”28 Likewise, federal circuits and legal commentators have observed that the exception by its very nature requires speculation about “what the government would have discovered absent the illegal conduct.”29

Prosecutors invoking the inevitable discovery exception need only meet a low “preponderance of the evidence” standard,30 showing that it is more likely true than not true that lawful discovery of the evidence was inevitable. Moreover, there is currently no federal or state judicial consensus on how inevitable discovery should be established under this standard. Some circuits have an “active-pursuit” requirement that requires the prosecution to “show that the police possessed and were actively pursuing the lawful avenue of discovery when the illegality occurred.”31 Other circuits, by contrast, have held that there is no need for an “independent line of investigation” to have been underway.32 Lower courts have further expanded the inevitable discovery exception beyond

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27. Id. at 445, n.5.
28. Id. at 459 (Brennan, J. dissenting).
30. Williams II, 467 U.S. at 444.
32. United States v. D’Andrea, 648 F.3d 1, 12 (1st Cir. 2011); accord United States v. Larsen, 127 F.3d 984, 986–87 (10th Cir. 1997); United States v. Kennedy, 61 F.3d 494, 499–500 (6th Cir. 1995); United States v. Thomas, 955 F.2d 207, 210 (4th Cir. 1992); United States v. Boatwright, 822 F.2d 862, 864 (9th Cir. 1987).
its original scope by using it to admit both primary and secondary evidence. The exclusionary rule and its inevitable discovery exception thus provide a prime testing ground for the covert operation of motivated cognition in legal decision making. However, the type of malleability they present is seen in many legal rules, and in judgments made by both judges and jurors. Thus, the proposed psychological framework and policy implications that follow in the Parts below are not necessarily limited to the suppression context, and could be tested in other domains by future experimental work.

C. KEY HISTORICAL PRECEDENTS

Although never recognized as a legally relevant consideration in suppression judgments, the nature of a defendant’s underlying crime may have played a role even in the high-profile foundational Supreme Court cases that established the exclusionary doctrine. A close look at the stories behind some key precedents suggests the potential influence of criminal egregiousness not only in current applications of the exclusionary rule but also in parts of its historical emergence and evolution.


The first time the Court held that evidence should be excluded because of the unlawful manner in which it was obtained was in Boyd v. United States, an 1886 case involving the seizure of an individual’s private effects in a customs-revenue investigation. “Plainly the 1886 Supreme Court would not have suppressed a package of heroin capsules, counterfeit money or smuggled goods,” Chief Justice Warren Burger speculated decades later. Weeks v. United States, the 1914 case that fully established the exclusionary rule based on the Fourth Amendment alone, also involved the warrantless seizure of private papers from the home of a defendant who was convicted of using the mail to transport lottery tickets—again, not a malum in se crime that is inherently evil and would trigger a strong motivation to punish. But the extent to which the egregiousness (or lack thereof) of the defendant’s crime may have influenced the development of the exclusionary rule is perhaps best illustrated by Mapp v. Ohio, the 1961 case that extended this legal doctrine to state courts and “elevated [it] to the status of a constitutionally derived policy.”

33. See Eugene L. Shapiro, Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine, 39 GONZ. L. REV. 295, 296, 311 (2003–04) (defining “primary evidence” as “evidence discovered during the course of the illegality” and secondary or “derivative evidence” as “evidence subsequently obtained” as a result of the illegality).
34. 116 U.S. 616, 617–18 (1886).
Mapp involved a relatively sympathetic defendant, Dollree Mapp, and unsympathetic behavior by the police officers who conducted the search in question. When the case came before the Supreme Court, Mapp stood convicted of possessing “lewd and lascivious” materials in violation of an Ohio statute.\(^{39}\) The relative triviality of this victimless crime comes through in Justice William Douglas’s description of it in his concurring opinion: “[O]ne must understand that this case is based on the knowing possession of four little pamphlets, a couple of photographs, and a little pencil doodle—all of which are alleged to be pornographic.”\(^{40}\) In fact, the justices are said to have noted during their conference discussion of the case that the statute under which Mapp had been convicted was inconsistent with the First Amendment.\(^{41}\)

Furthermore, the manner in which the illicit materials were seized was disproportionately harsh and invasive: a number of police officers “forcibly” entered Mapp’s residence while she was home alone with her daughter, and Mapp’s request to see a search warrant resulted in a physical altercation, during which the police “[ran] roughshod over appellant,” “forcibly” took her upstairs in handcuffs, and searched through personal belongings across her entire house.\(^{42}\) The Court further observed that “[a]t the trial, no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for.”\(^{43}\)

These underlying circumstances may have played a role in the Court’s expansive holding in Mapp: that the exclusionary rule applies not just in federal courts, but in state courts too. Might the justices have been less disposed to so significantly expand the ambit of the rule through this case if it had involved a more morally egregious crime that triggered a strong motivation to punish? Relatedly, the sympathetic defendant and unsympathetic police conduct in Mapp may have influenced society’s acceptance of the decision when it was issued. The Court’s holding did of course invoke strong reactions from the law enforcement community.\(^{44}\) However, early responses from the general public and scholars “never reached the quantitative or emotional crescendo” that occurred following more controversial criminal procedure decisions of that decade.\(^{45}\) One commentator noted that Mapp initially “evoked considerable support, including occasional praise from otherwise vehement critics of the high

\(^{39}\) Mapp, 367 U.S. at 643.

\(^{40}\) Id. at 668 (Douglas, J., concurring).

\(^{41}\) Tracey Maclin, The Supreme Court and the Fourth Amendment’s Exclusionary Rule 87 (2013).

\(^{42}\) See Mapp, 367 U.S. at 645.

\(^{43}\) Id.


\(^{45}\) Canon, supra note 38, at 683 (comparing the public’s response to Miranda v. Arizona, 384 U.S. 436 (1966)).
court,” and was “rather calmly accepted if not universally applauded.”  

Mapp was not, however, the Supreme Court’s first opportunity to apply the exclusionary rule to state courts. In fact, despite having established the doctrine for federal courts in 1914, the Court originally declined to extend it to states in its 1949 Wolf v. Colorado ruling. Moreover, in the next twelve years before Mapp, the Court upheld Wolf in several memorable cases—like Rochin v. California and Irvine v. California—that involved arguably great disparities between the aggressiveness of the police misconduct and the nature of the defendant’s crime. It could be that some unjust outcomes resulting from the legal status quo were necessary to build the momentum that triggered Mapp’s sweeping extension of the exclusionary rule. In his concurring opinion in Irvine, Justice Tom Clark—who would later author Mapp—wrote: “In light of the ‘incredible’ activity of the police here, it is with great reluctance that I follow Wolf. Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction.”


Given, however, that Mapp’s far-reaching holding called for the suppression of tainted evidence in all state courts regardless of the defendant’s crime, 52

46. Id. at 683, 696.
49. In Rochin v. California, the Court addressed a search and seizure that it acknowledged “shocks the conscience.” 342 U.S. 165, 171 (1952). The case involved three state police officials who made a doctor “force[] an emetic solution through a tube into [the defendant’s] stomach against his will” in order to seize from his “vomited matter” two capsules he had swallowed, id. at 166, which contained morphine in an amount “so small that it was less than 1 milligram, not even enough to balance the chemist’s scales,” Petitioner’s Reply Brief at 5, Rochin, 342 U.S. 165 (No. 83), 1951 WL 81986. Rochin was convicted of the relatively minor offense of violating the California Health and Safety Code, while the Court noted that the officers were guilty of “unlawfully assaulting, battering, torturing and falsely imprisoning the defendant.” Rochin, 342 U.S. at 167. Nevertheless, rather than overturning Wolf by suppressing the evidence that had been illegally seized from the defendant’s body, Rochin “studiously avoided” the search-and-seizure question and instead reversed the defendant’s conviction on due process grounds. Irvine v. California, 347 U.S. 128, 133 (1954).
50. In Irvine v. California, the Court was again confronted with the question of suppressing tainted evidence in a state case, in which police officers made a duplicate key to the defendant’s home, repeatedly entered the dwelling to install secret microphones, and monitored the defendant’s conversations with his wife for over a month—all because they suspected him of “horse-race bookmaking.” Id. at 129–31. Although Irvine noted that the officers’ conduct “flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment,” it abided by Wolf in holding the illegally seized evidence in question (wagering stamp and documents) admissible in state court. Id. at 132.
51. Id. at 139 (Clark, J., concurring). Furthermore, one of Chief Justice Earl Warren’s law clerks anecdotally related that the Chief Justice, who signed the majority opinion in Irvine, later recalled it as one of the three decisions in his career on the Court that he most regretted, due to the underlying facts of the case. Interview with Jesse H. Choper, Emeritus Professor, University of California Berkeley School of Law (Apr. 21, 2015); see also Jesse H. Choper, Clerking for Chief Justice Earl Warren, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 263, 273 (Todd C. Peppers & Artemus Ward, eds.) (2012).
52. Id. at 655.
public and judicial responses to the exclusionary rule began to change as fact patterns arose involving defendants who more clearly “ought” to be punished.53 For example, in *Coolidge v. New Hampshire*, which came before the Supreme Court a decade later, *Mapp* required granting a reversal to a defendant whom a jury had found guilty of brutally murdering a fourteen-year-old girl, because the police had seized sweepings of hair and fiber samples from his car using a search warrant that was later found to be defective.54 The facts of this case aroused sympathies opposite to those invoked by *Mapp*. One legal scholar asserted, “[T]he police practices revealed in *Coolidge v. New Hampshire* are hardly incompatible with a moral society; yet letting the defendant in that case go free perhaps is.”55 In a partial dissent in *Coolidge*, Chief Justice Burger stated, “This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves.”56 Although empirical studies have found that reports of “lost” arrests resulting from the suppression of tainted evidence are “misleading and exaggerated,” especially in regard to violent offenses, the acutely negative publicity garnered by even a few such cases involving particularly horrifying, alongside changing political factors, crimes took a heavy toll on the exclusionary rule.57

Eventually, the Supreme Court began “narrowing the thrust” of the rule by both limiting its scope and “chipp[ing] away” at the doctrine through the development of exceptions.58 The inevitable discovery exception used in this Article’s experiments was adopted at a time when the Court is described as having “put aside its whittling knife, and [gone] after the exclusionary rule with a machete.”59 Notably, the case that established the exception, *Nix v. Williams*, involved underlying facts that, like *Coolidge* (and unlike *Mapp*), were particularly unfavorable for the defense.60

Robert Anthony Williams was accused of sexually assaulting and murdering a ten-year-old girl whom he allegedly abducted from a YMCA bathroom in Iowa on Christmas Eve.61 Williams turned himself in to the local police in

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55. Kaplan, *supra* note 1, at 1036.
61. *Id.* at 434.
Davenport, who agreed to drive him to Des Moines and not question him until he met with his attorney there. During the car ride, however, one of the detectives made a plea to Williams to help the child’s parents give her a “good Christian burial,” and Williams directed the officers to her corpse. Meanwhile, there was a large-scale search underway with 200 volunteers looking for the child, and one of the search teams was only two-and-a-half miles from where her smothered body was frozen to a cement culvert—“one of the kinds of places the teams had been specifically directed to search.” However, “the largely snow-covered body” was “barely discernable,” and the officers had difficulty finding the corpse even after Williams led them to the spot. As legal commentators observed, “A novelist could hardly have come up with a more wrenching scenario for a dispute over fundamental legal issues and basic social values.”

Williams’ attorney moved to suppress all evidence relating to the child’s body because it had been discovered through the detective’s unlawful conduct, but the trial court denied the motion and a jury convicted Williams of first-degree murder. The Eighth Circuit, however, granted a habeas corpus motion on the basis that the evidence had been wrongly admitted, and the case made its way to the Supreme Court. The Court initially held in favor of Williams, but a footnote in the majority opinion stated that in the event of a retrial, “evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams.”

Williams was retried and evidence of the body’s condition and postmortem test results were admitted under the argument alluded to by the Court in its now famous footnote. A second jury found the defendant guilty, the Eighth Circuit again reversed, and the Supreme Court once again agreed to hear the case. This time, the Court ruled in favor of the State by applying—and thereby establishing as national precedent—the inevitable discovery exception: “[I]f the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible.” That the discovery of the corpse in this case

62. Id. at 435.
64. Williams II, 467 U.S. at 435–36.
65. Id. at 449.
66. Wasserstrom & Mertens, supra note 59, at 130 n.324. Although Williams led the police to the corpse, he pled not guilty to murder on the theory that “someone else killed the girl and planted the body in Williams’s room at the YMCA.” Johnson, supra note 63, at 357.
69. Id. at 407 n.12.
70. Id. at 448.
72. Id. at 448.
was not obviously “inevitable,” however, is suggested by the fact that in his vigorous dissent from the Court’s first Williams holding, Chief Justice Burger criticized the “loophole” in the majority’s footnote as “an unlikely theory. . . . [that] renders the prospects of doing justice in this case exceedingly remote.”

The Court’s application of the exclusionary rule to reverse the first murder conviction in Williams I also provoked clamor off the bench; it was “one of the most written about criminal procedure decisions in U.S. history. . . . instigating wide discussion in both the academic literature and the popular media.”

Perhaps the egregiousness of the alleged crime in that case—“one of the most infamous and closely scrutinized crimes of its era”—played a role in prompting the Court to create an avenue for moral correction though the inevitable discovery exception when it revisited the case in Williams II.

D. RELEVANT RULINGS BY THE ROBERTS COURT

The exclusionary rule remains a controversial and evolving doctrine. The current Roberts Court has continued to retreat from Mapp, stating in its last opinion on the rule that “society must swallow this bitter pill when necessary, but only as a ‘last resort.’” In two other relatively recent opinions that declined to suppress illegally obtained evidence and narrowed the standard for police culpability—Hudson v. Michigan and Herring v. United States—the Court explicitly invoked the facts of Mapp to explain its departures from that case.

Hudson involved a situation in which the police seized rocks of cocaine from the defendant’s home after waiting only three to five seconds between announcing their presence and bursting through the door. The parties agreed that this violated a knock-and-announce requirement, but the Court held that “[r]esort to the massive remedy of suppressing evidence of guilt [was] unjustified” in this case. Distinguishing Hudson’s present-day context from that of Mapp, the majority concluded that “extant deterrents” for police misconduct “are substantially—ina comparably greater than the factors deterring warrantless entries when Mapp

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73. Williams I, 430 U.S. at 416 n.1 (Burger, C.J., dissenting).
79. Hudson, 547 U.S. at 587.
80. See Richards v. Wisconsin, 520 U.S. 385, 387 (1997) (requiring officers to “knock on a the door and announce their identity and purpose before attempting forcible entry”).
81. Hudson, 547 U.S. at 599.
82. Id. at 598–99.
was decided.\textsuperscript{83} However, Justice Stephen Breyer’s dissent and various commentaries thereafter vigorously challenged the validity of this assertion.\textsuperscript{84}

\textit{Herring} further chipped away at the exclusionary doctrine through an expansion of the “good faith” exception to the rule.\textsuperscript{85} In this case, a police officer seized methamphetamine and an illegally held pistol from the defendant’s vehicle using a warrant that had been recalled without the officer’s knowledge due to an error in the police database.\textsuperscript{86} The Court held that this error was too attenuated and did not rise to a standard of “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” necessary to suppress the evidence.\textsuperscript{87} In so ruling, the Court differentiated the facts in \textit{Herring} from the “flagrant conduct” of the police officers in \textit{Mapp}: “[T]he abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional.”\textsuperscript{88} By essentially shielding ordinarily negligent police conduct from the reach of the exclusionary rule, \textit{Herring} seems to have moved the suppression determination from being about whether or not the police search was illegal, to being about \textit{how bad} the police’s illegal conduct was.\textsuperscript{89} Two years later, the Court “embraced and expanded”\textsuperscript{90} \textit{Herring} in \textit{Davis v. United States}, which extended the good faith exception to a police search that relied on a judicial precedent that had been subsequently overruled.\textsuperscript{91}

The judicial retreats from the exclusionary rule in \textit{Hudson} and \textit{Herring} were not motivated by evidence akin to the prototypical corpse traditionally cited by critics of the doctrine. However, the outcomes in those cases are consistent with observations that the Court’s Fourth Amendment jurisprudence has increasingly reflected the government’s “War on Drugs.”\textsuperscript{92} Tracking that trend, the scenarios in this Article’s studies use drug crimes, contrasting the sale of heroin (as the

\begin{itemize}
\item \textsuperscript{83} \textit{Id.} at 599. The Court highlighted “the increasing professionalism of police forces” and the advent of civil damages remedies for targets of illegal searches: “Dollree Mapp could not turn to . . . 42 U.S.C. § 1983 for meaningful relief.” \textit{Id.} at 597. Potential shortcomings of civil actions as an alternative to the exclusionary rule are discussed in Part IV.A.2.
\item \textsuperscript{85} \textit{Herring v. United States}, 555 U.S. 135, 137 (2009).
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.} at 144.
\item \textsuperscript{88} \textit{Id.} at 143.
\item \textsuperscript{89} \textit{See id.} at 147; Joshua Dressler & Alan C. Michaels, \textit{Understanding Criminal Procedure} 372 (6th ed. 2013); Bandes, supra note 84, at 6; George M. Dery III, \textit{Good Enough for Government Work: The Court’s Dangerous Decision, in Herring v. United States, To Limit the Exclusionary Rule to Only the Most Culpable Police Behavior}, 20 GEO. MASON U. C.R. L.J. 1, 2 (2009).
\item \textsuperscript{90} \textit{Maclin}, supra note 41, at 340.
\item \textsuperscript{91} 131 S. Ct. 2419, 2434 (2011) (upholding admissibility of an illegal weapon found in defendant’s vehicle).
\item \textsuperscript{92} \textit{See} Tracey Maclin, \textit{When the Cure for the Fourth Amendment is Worse than the Disease}, 68 S. CAL. L. REV. 31, 33–34 (1994).
\end{itemize}
more egregious crime) with the illegal sale of marijuana, to investigate the effect that the nature of a defendant’s crime has on judgments about the admissibility of tainted evidence. Furthermore, because the Herring standard for police culpability arguably increases the exclusionary rule’s susceptibility to motivated cognition by adding another potentially malleable determination into applications of the doctrine—namely, the egregiousness of the police illegality—the experiments in this Article also explore whether the nature of the defendant’s crime influences people’s perceptions of the police officers who conduct an illegal search.

II. PSYCHOLOGICAL FRAMEWORK

Previous empirical legal work on the exclusionary rule has focused largely on the rationales underlying the doctrine. Experimental studies have shown that people care more about the expressive, integrity-based justification for the rule than the deterrence goal that the Supreme Court has prioritized. In addition, empirical scholars have attempted to examine whether or not excluding illegally obtained evidence has actually had a deterrent effect on police misconduct. This Article approaches the exclusionary rule from a different angle: focusing on the cognitive process of decision makers applying the rule, to explain how and why the egregiousness of a defendant’s crime, despite its doctrinal irrelevance, can drive judgments about the admissibility of tainted evidence. This Part draws upon the psychological theory of motivated cognition to propose a “motivated justice hypothesis;” the experimental studies that follow in Parts III and IV provide empirical support for the hypothesis and for a potential means of curtailing the cognitive process it describes.

A. THE THEORY OF MOTIVATED COGNITION

The theory of motivated cognition suggests that when people have a preference regarding the outcome of a decision making task, they are more likely to arrive at that conclusion through “reliance on a biased set of cognitive processes—that is, strategies for accessing, constructing, and evaluating beliefs.” For example, they may be more likely to search through available

93. On scales categorizing drugs according to the degree of harm they cause, marijuana is classified on the mid to lower end, whereas heroin is considered one of the more damaging drugs. See David Nutt et al., Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse, 369 LANCET 1047, 1050–51 (2007).

94. See generally Kenworthey Bilz, Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule, 9 J. EMPIRICAL LEGAL STUD. 149 (2012); supra notes 8–10 and accompanying text.

95. Compare, e.g., Canon, supra note 38, at 698–725 (challenging findings that the exclusionary rule is an ineffective deterrent), with L. Timothy Perrin et al., If It’s Broken Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule, 83 IOWA L. REV. 669, 711–36 (1998) (empirically questioning deterrent value of the exclusionary rule).

96. Kunda, supra note 4, at 480.
information to find existing facts or rules that support their preferred outcome; or they may “creatively combine accessed knowledge to construct new beliefs that could logically support the desired conclusion.” Motivated cognition is not, however, without limits. People do not stretch their cognitive construal of information beyond what is necessary to reach their preferred outcomes. Furthermore, people do not engage in this process if there is clear evidence to the contrary.

Critical to the integrity of legal decision makers, motivated cognition operates under an “illusion of objectivity,” whereby “people do not realize that the process is biased by their goals, that they are accessing only a subset of their relevant knowledge.” The inadvertent nature of the phenomenon has been supported by experimental research using a variety of techniques, including behavioral, visual, and fMRI studies. Even when not entirely subconscious, motivated cognition may reflect an inadvertent loosening of standards in the service of a desired outcome, which distinguishes it from more deliberate forms of outcome-driven legal decision making like jury nullification or the purposeful expression of conscious biases.

Although motivated cognition can covertly operate in many realms of law, its effects are especially consequential for high-stakes doctrines that are characterized by controversial and evolving legal standards, of which the exclusionary rule is a prime example. Given how much is on the line in the suppression of criminal evidence—for defendants and their advocates, prosecutors, victims of crime, judges, and society at large—this is a legal arena in which motivated decision making merits rigorous experimental investigation.

97. Id. at 483.
98. Id. at 482–83; Lindsley G. Boiney et al., Instrumental Bias in Motivated Reasoning: More When More is Needed, 72 ORG. BEHAV. & HUM. DECISION PROCESSES 1, 19–20 (1997).
100. Tom Pyszczynski & Jeff Greenberg, Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model, in 20 ADVANCES EXPERIMENTAL & SOC. PSYCHOL. 297, 302 (Leonard Berkowitz ed., 1987); see also Eileen Braman & Thomas E. Nelson, Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes, 51 AM. J. POL. SCI. 940, 954 (2007) (“[N]othing we have found suggests a conscious effort to twist the law to serve one’s preferences.”).
101. Kunda, supra note 4, at 483.
104. See Sood, supra note 4, at 307.
B. A MOTIVATED JUSTICE HYPOTHESIS

Drawing upon the theory of motivated cognition, this Article proposes a psychological framework—the motivated justice hypothesis—to explain how judges and jurors might respond when their internal sense of the “right” outcome in a case conflicts with the requirements of an external legal constraint. Generally, people are consciously committed to following the law, especially when deciding legal cases. However, legal decision makers also have a less conscious drive to pursue their own intuitions about the morally just outcome in a case. When these legal compliance and personal justice goals point to the same result, the law is likely to function as intended. But what happens when the two goals clash? The motivated justice hypothesis suggests that decision makers in such situations will neither blatantly flout the law nor relinquish their own moral instincts. Instead, they will engage in motivated cognition—unknowingly processing information in an outcome-driven manner—to achieve their desired result, seemingly within the terms of the given legal doctrine. Figure 1 illustrates this hypothesis, which is applicable to decision making by either judges or jurors.

Figure 1. An illustration of the motivated justice hypothesis.

105. See Tom R. Tyler, Why People Obey the Law 31 (1990) (citing empirical studies showing that “[b]oth adults and children feel a strong obligation to obey the law”); Braman, supra note 99, at 310 (“[B]ecause legal decision makers have been subject to strong socialization emphasizing the importance of following stylized rules of decision making, they sincerely try to achieve ‘legal accuracy’ when making judgments.”).

106. See Saul M. Kassin & Samuel R. Sommers, Inadmissible Testimony, Instructions to Disregard, and the Jury: Substantive Versus Procedural Considerations, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1046, 1051 (1997) (“[J]urors may be influenced without realizing it . . . it is precisely because jurors seek just outcomes that they cannot resist the temptation to use information they see as relevant . . . .”); Samuel R. Sommers & Saul M. Kassin, On the Many Impacts of Inadmissible Testimony: Selective Compliance, Need for Cognition, and the Overcorrection Bias, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1368, 1369 (2001) (“Achieving a just verdict is a function of both being accurate about whether the defendant committed the acts in question and believing that the acts in question, if committed, merit punishment.”).
In the context of the exclusionary rule, the motivated justice hypothesis predicts that when judges are faced with illegally obtained evidence of a morally egregious crime, their dominant justice intuition will be to punish the defendant. If this can only be achieved by admitting the tainted evidence—which the legal doctrine prohibits—they may less-than-consciously construe the circumstances of the case as giving rise to an exception to the rule, such as inevitable discovery. This “cognitive cleansing” enables them to reach an outcome that is consistent with both their own punishment goals and the requirements of the law. However, the unintentionally backward reasoning process it entails can lead to different suppression outcomes for similar illegal searches based on the doctrinally irrelevant nature of the crime that each search happens to uncover.107

Robert Cover described the options of a “judge caught between law and morality” as follows:

In a static and simplistic model of law, the judge . . . has only four choices. He may apply the law against his conscience. He may apply conscience and be faithless to the law. He may resign. Or he may cheat: He may state that the law is not what he believes it to be and, thus preserve an appearance (to others) of conformity of law and morality. Once we assume a more realistic model of law and of the judicial process, these four positions become only poles setting limits to a complex field of action and motive.108

This Article’s motivated justice hypothesis adds a fifth pole: judges may unintentionally construe facts and apply law in a way that preserves the appearance—not only to others but also to themselves—of conforming to both the legal

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107. This cognitive response is different from hindsight bias, a psychological phenomenon whereby people are likely to see past events as inevitable and predictable after they unfold. See generally B. Fischhoff, Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty, 1 J. EXPERIMENTAL PSYCHOL. 288 (1975); Scott A. Hawkins & Reid Hastie, Hindsight: Biased Judgment of Past Events After the Outcomes Are Known, 107 PSYCHOL. BULL. 311 (1990). For this Article’s experiments, the prediction was not that participants would be more likely to see discovery of the evidence as inevitable once they knew that it had been discovered through lawful means, because lawful discovery of the evidence never in fact occurred. See also Dan M. Kahan, Laws of Cognition and the Cognition of Law, 135 COGNITION 56, 56 (2015) (“[U]nlike . . . ‘hindsight bias,’ ‘anchoring,’ and other familiar members of the behavioral-economics family, these dynamics do not feature reasoning defects that defeat Bayesian information processing. Rather they address how information can shape a variety of cognitive inputs that a Bayesian framework presupposes.”).

The motivated cognition effect demonstrated in this Article is more comparable to the phenomenon of casuistry—“specious reasoning in the service of justifying questionable behavior”—that psychologists have identified as operating in regard to “social category information,” such as race and gender. See Michael I. Norton et al., Casuistry and Social Category Bias, 87 J. PERSONALITY & SOC. PSYCHOL. 817, 817–18 (2004). A potential difference, however, is that people are loath to acknowledge their own biases relating to race or gender, whereas recognizing one’s motivation to punish morally egregious crimes more severely is not threatening to one’s self-perception. This may hold significant implications for how the influence of the respective motivating factors can be curtailed in contexts of legal decision making, a hypothesis that will be empirically tested in future work. See infra note 282.

doctrine and their own intuitions about justice. The tension that gives rise to this effect is likely to be especially strong in the exclusionary context for judges who are motivated to punish an egregious crime but concurrently support the values underlying the legal doctrine that calls for the suppression of tainted evidence.

Ironically, rather than acting as a check on the less-than-conscious motivated justice process, the competing aim to apply the law diligently could cause legal decision makers to come up with more nuanced ways in which to reach their preferred result. This prediction is consistent with psychologist Ziva Kunda’s suggestion that “accuracy goals, when paired with directional goals, will often enhance rather than reduce bias... because the more extensive processing caused by accuracy goals may facilitate the construction of justifications for desired conclusions.” 109 Dan Kahan has similarly noted that engaging in more reflection and deliberation can make people “even more adept at using technical information and complex analysis to bolster [preferred] beliefs.” 110 Moreover, political scientists have found that people with more expertise and knowledge about an issue at hand are more likely to see and/or draw upon evidence that supports their preferred outcome. 111 Especially given the illusion of objectivity under which motivated cognition operates, “the motivation and ability to think does not necessarily lead to correction attempts because even highly thoughtful people are not necessarily aware of the impact of any biasing variable(s).” 112

The inadvertent operation of motivated cognition does not, of course, rule out the possibility that judges applying the exclusionary rule may at times be driven by more deliberate, strategic considerations of the defendant’s underlying crime. Even when not susceptible to motivated cognition, judges may be good intuitive psychologists who implicitly understand how punishment goals triggered by the egregiousness of a criminal offense will shape the public’s reaction to their suppression holdings, especially in cases that are likely to garner significant attention. This type of judicial response (discussed further in Part III.D below) is not experimentally tested in these studies, but it capitalizes upon a motivated justice response from the lay public that is directly demonstrated herein.

III. EXPERIMENTAL DEMONSTRATIONS

This Part presents two original experiments that investigate how decision makers cognitively respond when their desire to punish an egregious crime clashes with the admissibility constraint of the exclusionary rule. Consistent with the proposed motivated justice hypothesis, these studies demonstrate that

109. Kunda, supra note 4, at 487.
people are more likely to construe a case as giving rise to a legal exception to the rule when they are faced with evidence of a morally repugnant crime as compared to a crime they are less motivated to punish, even if the illegal search is the same in both cases. A third experiment, described in Part IV, tests a psychology-based means by which to curtail this less-than-conscious response.

The use of the experimental method in the studies that follow—with random assignment to conditions that separate factors of interest while holding all else constant—“allows for the effective isolation of causal variables under different theoretically relevant circumstances.”113 Such research is therefore “a powerful inferential tool for addressing causal questions that purely statistical analyses cannot answer,” without the “logistical, legal, and ethical barriers” of conducting studies in real legal decision making settings.114

However, the road from the lab to the courtroom is a long one, with various steps between demonstrating and retrenching an effect in a controlled experimental context and then operationalizing those results in actual legal arenas. The first stage, seen in this Article’s studies, involves identifying and explaining the underlying psychological process through methods that prioritize internal validity—such as sparse hypothetical scenarios that minimize the risk of confounding variables, and continuous measures (questions asked on scales) that allow for varied statistical analysis. Subsequent work can then add ecological validity115 by, for example, introducing more complex fact patterns, employing dichotomous measures (yes-or-no questions) to better reflect actual legal decision making options (which was done in Study 2), and conducting field studies in real court settings. Furthermore, triangulation can be provided through conceptual replication with experimental work that uses real judges and with statistical analysis of actual legal cases—both of which have already been inspired by this Article’s studies, with consistent findings.116 Equipped with such converging data points from multiple stages of empirical work, as well as a realistic understanding of practical resource constraints, the legal system can then move toward pursuing systemic changes. The experiments that follow provide a critical starting point for this process.

116. See infra notes 181–85 and accompanying text.
A. STUDY 1: COGNITIVE “CLEANSING”

1. Methodology

The participants in Study 1 were recruited through Mechanical Turk, an online platform for human intelligence tasks. The final sample consisted of eighty-seven respondents, who were sixty-six percent female and ranged in age from eighteen to sixty-nine, with a mean age of thirty-nine.

All the participants were presented with the same factual scenario regarding an illegal police search of a car. They were then randomly assigned to one of two experimental conditions: (1) those assigned to the “heroin case” were told that the police discovered many bags of heroin and needles that the defendant had been selling to high school students; (2) those assigned to the “marijuana case” were told the police discovered many bags of marijuana that the defendant had been selling to terminally ill cancer patients to ease their suffering. Thus, although the police conduct was identical in both cases, the defendant’s offense differed in moral egregiousness due to the type of drug involved in the crime (“hard” versus “soft”), the purpose for which the defendant was selling it (recreational versus therapeutic), and the target buyers (high school students versus presumptively more mature consumers). These conditions were designed with the expectation that participants judging the heroin case would be more motivated than those judging the marijuana case to see the defendant punished for his crime. The experimental paradigm used drug crimes because previous empirical studies have indicated that motions to suppress physical evidence are

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117. Analyses of Mechanical Turk (MTurk) as a source of quality data have concluded that MTurk samples are more diverse and representative of the U.S. population—in terms of characteristics including race, education, income, gender, geographic region, and political views—than student samples and other types of local convenience samples. See Adam J. Berinsky et al., Evaluating Online Labor Markets for Experimental Research: Amazon.com’s Mechanical Turk, 20 Pol. Analysis 351, 352 (2012); Gabriele Paolacci et al., Running Experiments on Amazon Mechanical Turk, 5Judgment & Decision Making 411, 413 (2010). Moreover, MTurk participants have been found to be more attentive than participants in other types of surveys. Berinsky et al., supra, at 365.

118. All three of the studies reported in this Article excluded the data of participants who completed the survey too quickly and/or failed the checks on their understanding of the facts and law in the case. (The participants were asked whether the police officers’ search of the defendant’s car was legal, what the police officers found in the car, to whom the defendant was distributing the materials found in the car, and a true-or-false question testing comprehension of the exclusionary rule and its inevitable discovery exception).

119. The participants were told that police officers broke into and searched the defendant’s car without obtaining a proper search warrant. Although police officers with probable cause may search a car without a warrant, the participants were given no facts supporting a finding of probable cause. Rather, the participants were explicitly told that the search was illegal.

120. National polling data indicate that a greater percentage of respondents are opposed to the sale of heroin to young people than to the sale of marijuana for medical purposes. Compare CBS News/New York Times Poll, Roper Center for Public Opinion Res. (Jul. 1977), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html, with Associated Press/CNBC Poll, Roper Center for Public Opinion Res. (Apr. 2010), available at http://www.ropercenter.uconn.edu/data_access/ipoll/ipoll.html. There was no ambiguity about the fact that the defendants in the experimental scenarios had been illegally selling the drugs in question.
most likely to be raised in drug cases,” 121 and “[a]mong the legal profession and other Court watchers, it is common wisdom that the most serious casualty in the ‘War on Drugs’ is the Fourth Amendment.” 122

All the participants were told that during the illegal search of the defendant’s car, the police discovered that the car’s registration had expired. This information was intended to provide a potential avenue for law enforcement officials to engage with the car outside the context of the illegal search, without necessarily rendering lawful discovery of the evidence inside the car inevitable (or very probable). 123 Indeed, the facts presented to the participants in this experimental paradigm were intentionally sparse as compared to the information that would be available to a judge making a real admissibility decision. This was done not only to isolate the variable of criminal egregiousness but also to construct a stringent test of whether this variable would motivate participants in the heroin condition to admit tainted evidence and invoke the inevitable discovery exception despite having little factual basis for doing so.

Along with the facts, the participants received a simple explanation of the exclusionary rule and its inevitable discovery exception. In addition, they were informed that the defendant would be unlikely to receive any punishment if the tainted evidence were to be suppressed.

To check that the heroin case triggered a stronger motivation to punish than the marijuana case did, the participants were asked in their personal capacity to rate the morality of the defendant and the extent to which he should be punished. 124 The participants were then asked to put themselves in the role of a


122. Maclin, supra note 92, at 33–34.

123. Finding a car with expired registration may lead an officer to question a driver further and issue a citation. However, officers may not search a vehicle when they issue a citation but do not arrest the driver. See Knowles v. Iowa, 525 U.S. 113 (1998). Since a driver is not generally arrested for having an expired registration, it is unlikely that the car would be lawfully searched as part of a custodial arrest. See Arizona v. Gant, 556 U.S. 332, 351 (2009) (“Police may search a vehicle incident to a recent occupant’s arrest . . . if the arrestee is within reaching distance of the passenger compartment . . . or it is reasonable to believe the vehicle contains evidence of the offense of arrest”). Nor does driving a car with expired registration generally provide probable cause to search the vehicle; probable cause is required under the “automobile exception” to the warrant requirement. See Acevedo v. California, 500 U.S. 565 (1991). It is not entirely inconceivable, however, for an expired registration to result in an arrest and subsequent search of the car without violating the Fourth Amendment. See, e.g., Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (finding no Fourth Amendment violation in warrantless arrest for minor criminal offense that was punishable only by fine); Virginia v. Moore, 553 U.S. 164 (2008) (finding no Fourth Amendment violation in arrest based on probable cause, and search incident to the arrest, for misdemeanor of driving on a suspended license, even though state law did not allow an arrest for that offense); Colorado v. Bertine, 479 U.S. 367 (1987) (permitting “inventory search” of an impounded car without a warrant or probable cause). The participants in the studies were not provided with the legal standards for vehicular searches, nor were they expected to be familiar with them.

124. These variables were measured on seven-point scales ranging from “very immoral” to “very moral,” and “no punishment” to “severe punishment.” The morality measures asked about the morality of the defendant as a gauge for how the participants felt about his crime. Study 2 additionally asked participants directly about their attitudes toward the crimes used in the scenarios. See infra Part III.B.
judge and rate whether the tainted evidence should be admitted in the case and whether it would have been discovered through lawful means even if not for the illegal search. They were also asked to rate the morality of the police officers who conducted the search and the extent of negative consequences those officers deserved for their illegal actions. In addition, the participants were asked to indicate their level of agreement with the exclusionary rule and their confidence in the general integrity of police officers and judges in this country. Finally, demographic information (such as age, gender, and political ideology) was collected from all participants.

The primary prediction stemming from this Article’s motivated justice hypothesis was that the participants judging the heroin case would be significantly more likely than those judging the marijuana case to “cognitive cleanse” the tainted evidence by construing its lawful discovery as inevitable, thereby justifying its admission within a legal exception to the exclusionary rule. A secondary prediction was that the participants assigned to the heroin case would perceive the illegal actions of the police officers in a more forgiving light than would the participants assigned to the marijuana case.

2. Results

a. Manipulation Checks. Analyses of variance indicated that, as intended, the two experimental conditions triggered different punishment goals. As shown in Figure 2, the participants presented with the heroin case assigned significantly lower morality ratings to the defendant and, inversely, significantly

To parse out differences in admissibility judgments being motivated by the moral egregiousness of the criminal versus the crime, future studies could manipulate these two factors independently of each other (e.g., by presenting the same crime done by a defendant who is either more or less immoral for reasons unrelated to the crime).

125. These variables were measured on seven-point scales ranging from “no, the drug evidence definitely should not be admitted” to “yes, the drug evidence definitely should be admitted,” and “no, the drugs definitely would not have been discovered” to “yes, the drugs definitely would have been discovered.” Although the respondents were given perspective-taking instructions to answer the morality/punishment questions in their personal capacity and then directed to put themselves in the position of a judge when responding to the legal questions that followed, there is a potential risk that having overtly acknowledged a desired punishment outcome could exacerbate its influence on the subsequent admissibility and inevitable discovery judgments. This concern can be ruled out in future work by asking the morality and punishment questions toward the end of the experiment instead.

126. These variables were measured on seven-point scales ranging from “very immoral” to “very moral,” and “no consequences” to “severe consequences.” To ensure that this opportunity to recommend disciplinary measures for the officers would not undermine the deterrent value of the exclusionary rule, the questions about the police were asked after the participants had completed the admissibility and discovery measures. (The electronic survey did not permit the participants to go back and change their answers to previous questions.)

127. This variable was measured on a nine-point scale ranging from “strongly disagree” to “strong agree,” with the midpoint being “neither agree nor disagree.”

128. These variables were measured on seven-point scales ranging from “no confidence” to “complete confidence.”

129. See supra Part II.B.
higher punishment recommendations compared to the participants presented with the marijuana case.131

Regression133 and mediation134 analyses corroborated that the legal case to which the participants were randomly assigned predicted their morality and

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130. An analysis of variance (ANOVA) is a statistical test that examines the relationship between a discrete independent variable (e.g., case: heroin or marijuana) and a continuous dependent variable (e.g., morality rating of the defendant) by comparing the variances (averages of the squared deviations from the mean) in order to evaluate the probability of not rejecting the null hypothesis (i.e., that the predicted experimental effect is absent). GEOFFREY KEPPEL & THOMAS D. WICKENS, DESIGN AND ANALYSIS:
punishment ratings for the defendant, and the morality ratings mediated the relationship between case and punishment ratings. That is, the extent to which the case that participants judged (heroin versus marijuana) predicted their punishment recommendations for the defendant depended on their moral assessment of the defendant’s crime. As intended by the experimental manipulation, the participants judging the heroin case perceived the defendant as more morally egregious and therefore more deserving of punishment than did the participants judging the marijuana case.

b. Cognitive Cleansing of Tainted Evidence. Analysis of judgments about the admissibility of the tainted evidence and its likelihood of discovery through lawful means revealed a powerful effect consistent with the motivated justice hypothesis: people’s instinct to punish the more egregious crime motivated their...
applications of the exclusionary rule. The participants judging the heroin case were significantly more likely to admit the tainted evidence than those judging the marijuana case. Correspondingly, the heroin participants were significantly more likely to reason that the evidence in question would have been lawfully discovered even if not for the illegal search. These results are illustrated in Figure 3.

![Admissibility of Tainted Evidence](image1)

**Admissibility of Tainted Evidence**

<table>
<thead>
<tr>
<th></th>
<th>Admissibility</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Heroin</td>
<td>4</td>
<td>Marijuana</td>
</tr>
</tbody>
</table>

**Legal case**

![Application of Exception](image2)

**Application of Exception**

<table>
<thead>
<tr>
<th></th>
<th>Likelihood of Discovery</th>
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</thead>
<tbody>
<tr>
<td>Heroin</td>
<td>4</td>
</tr>
<tr>
<td>Marijuana</td>
<td>2</td>
</tr>
</tbody>
</table>

**Legal case**

Figure 3. Study 1—Admissibility of the evidence (upper figure) and likelihood of its lawful discovery (lower figure) by case (heroin vs. marijuana).

Regression analyses confirmed that the extent to which the participants wanted to punish the defendant for his crime predicted their judgments about

136. ANOVA for admissibility of evidence by case: $F(1, 85) = 33.94, p < .001, \eta^2 = .29$.
137. ANOVA for likelihood of discovery by case: $F(1, 85) = 25.73, p < .001, \eta^2 = .23$.
138. Regression for case predicting punishment of defendant: $B = -3.65$, $SE = .30$, $\beta = -.80$, $p < .001$. 
the admissibility of the tainted evidence and its likelihood of lawful discovery. Critically, punishment recommendations fully mediated the relationships between criminal egregiousness and determinations of admissibility and lawful discovery, as illustrated in Figure 4. This suggests that the participants' stronger desire to punish in the heroin case motivated their greater tendency to admit the tainted evidence and to reason that it would have been discovered even if not for the illegal search.

![Figure 4](image)

Figure 4. Study 1—Punishment ratings fully mediated the relationship between case (heroin vs. marijuana) and judgments about (a) admissibility of the tainted evidence (upper figure) and (b) likelihood of its lawful discovery (lower figure).

In sum, although all the participants in Study 1 were presented with the same legal doctrine and identical facts about the nature of the illegal police search, the egregiousness of the crime that the search happened to uncover provoked different moral judgments and punishment goals, which in turn seemed to

139. Regression for punishment predicting admissibility: $B = .49$, $SE = .08$, $\beta = .57$, $p < .001$; for punishment predicting likelihood of discovery: $B = .41$, $SE = .07$, $\beta = .54$, $p < .001$.

140. See supra note 135 (explaining complete mediation).

141. Regression analyses revealed significant results for case predicting admissibility: $B = -2.08$, $SE = .36$, $\beta = -.53$, $p < .001$, and for case predicting likelihood of discovery: $B = -1.68$, $SE = .33$, $\beta = -.48$, $p < .001$. When punishment was entered as a mediating variable into the case-admissibility relationship, the Sobel test of mediation was significant ($z = -5.48$, $p < .001$) and the direct relationship between case and admissibility was reduced to non-significance, indicating a complete mediation: $B = -0.03$, $SE = .02$, $\beta = -.11$, $p = .17$. Likewise, when punishment was entered as a mediating variable into the case-likelihood of discovery relationship, the Sobel test of mediation was significant ($z = -5.28$, $p < .001$) and the direct relationship between case and admissibility was reduced to non-significance, indicating a complete mediation: $B = -0.02$, $SE = .02$, $\beta = -.07$, $p = .39$.

142. These mediation analyses must be qualified by the acknowledgment that in real legal cases, judgments regarding admissibility of evidence and punishment are generally made at different stages of the legal process and by different decision makers (i.e., jurors decide on guilt, unless it is a bench trial; judges decide on admissibility of evidence and sentencing).
generate different perceptions about the likelihood of discovering the evidence through lawful means. Those who judged the more egregious heroin case performed a “cognitive cleansing” of the tainted evidence that rendered it admissible within the terms of the given law.

Notably, this finding cut across ideological lines. The participants’ self ratings of political ideology and political-party affiliation did not lead to significant differences in their judgments about the admissibility of the evidence or its likelihood of discovery. The data did reveal a main effect of gender, whereby female participants generally perceived lawful discovery of the evidence as more likely than male participants did. However, this finding consistently emerged across both the heroin and marijuana cases, so it did not impact the motivated cognition effect.

c. Attitudes Toward Law Enforcement. The egregiousness of the defendant’s crime significantly influenced not only the participants’ legal judgments about the evidence in question, but also their attitudes towards the police officers who illegally seized that evidence. Figure 5 reveals that the participants judging the heroin case saw the investigating officers as more moral and felt they deserved less negative consequences than did the participants judging the marijuana case—based not on the officer’s illegal actions (which were exactly the same in both cases), but rather, on the type of defendant wrongdoing that those actions happened to uncover.

Interestingly, the difference in perceptions of the investigating officers triggered by the egregiousness of the defendant’s crime also carried over to ratings of law enforcement officials in general. As shown in Figure 6, the participants who judged the heroin case expressed significantly greater confidence in the overall integrity of police officers in this country as compared to those who judged the marijuana case. The experimental manipulation did not, however, have any impact on people’s attitudes toward judges. Participants across the board expressed fairly high confidence in the integrity of the judiciary (with no significant difference between the heroin and marijuana conditions). They also expressed significantly greater general confidence in the integrity of judges as compared to the police.

143. Political ideology was measured on a seven-point liberal-conservative scale.
144. ANOVA for likelihood of discovery by gender: $F(1, 86) = 4.94, p = .03, \eta^2 = .07$.
145. ANOVAs for morality of police officers by case: $F(1, 85) = 21.32, p < .001, \eta^2 = .20$; for negative consequences by case: $F(1, 85) = 6.86, p = .01, \eta^2 = .08$. The participants were asked about the extent of negative consequences the police officers should face for their illegal search, and this data was reverse coded to graphically represent leniency toward the police in Figure 5.
146. ANOVA for confidence in integrity of police in general by case: $F(1, 85) = 5.72, p = .02, \eta^2 = .06$.
147. The mean rating of confidence in the judiciary, across conditions, was 5.94 on a 7-point scale, with a standard deviation of 2. This was similar to the mean general integrity rating given to the police officers in the heroin condition.
148. T-test for difference between police and judicial integrity ratings: $t(87) = -3.70, p < .001$. 


Figure 5. Study 1—Morality ratings of the investigating police officers (upper figure) and leniency toward them (lower figure) by case (heroin vs. marijuana).

Figure 6. Study 1—Confidence in the general integrity of police officers in this country by case (heroin vs. marijuana).
d. Agreement with the Law. Finally, the egregiousness of the defendant’s crime influenced levels of agreement with the exclusionary rule itself. As reflected in Figure 7, the participants who judged the heroin case expressed significantly less agreement with the exclusionary rule than those who judged the marijuana case.\footnote{149} Moreover, regression analyses suggested that the extent to which the participants in the heroin condition recommended admitting the tainted evidence and punishing the defendant predicted their level of agreement with the exclusionary rule.\footnote{150} When participants were highly motivated to see the defendant punished due to the morally repugnant nature of his crime, they expressed less agreement with the law that constrained this goal.

![Figure 7. Study 1—Agreement with the exclusionary rule by case (heroin vs. marijuana).](image)

Nevertheless, the mean level of agreement with the exclusionary rule was fairly high, even among the participants who judged the heroin case.\footnote{151} Consistent with the motivated justice hypothesis, this finding in conjunction with people’s general commitment to following the law helps explain why participants in the heroin condition engaged in a less-than-conscious motivated construal of facts that enabled them to admit the tainted evidence under a legal exception to the exclusionary rule, rather than just blatantly flouting the doctrine.\footnote{152}

\footnote{149. ANOVA for agreement with the rule by case: $F(1, 85) = 10.41, p = .002, \eta^2 = .11$.}

\footnote{150. Regression for admissibility predicting agreement with the rule: $B = -.58, SE = .11, \beta = -.50, p < .001$; for punishment predicting agreement with the rule: $B = -.44, SE = .10, \beta = -.44, p < .001$.}

\footnote{151. Heroin $M = 5.76$ (out of 9), $SD = 2.61$; marijuana $M = 7.26$, $SD = 1.60$.}

\footnote{152. See supra Part II.B.}
B. STUDY 2: ROBUSTNESS AND REASONING

Study 1 asked participants to rate the admissibility of the tainted evidence and its likelihood of lawful discovery on seven-point scales in order to allow for more nuanced measures and the use of certain statistical techniques to investigate causality. In the real legal world, however, applications of the exclusionary rule and its inevitable discovery exception require definitive answers: the evidence must either be admitted or be suppressed; its discovery through lawful means is either deemed inevitable or not. The next experiment was therefore designed to bolster ecological validity by replicating Study 1’s results with dichotomous yes-or-no questions.

Study 2 also introduced an important variation to rule out the possibility that the motivated cognition effect resulted from the order in which the questions were posed. The participants in Study 1 had been asked first about the admissibility of the tainted evidence and then about its likelihood of discovery through lawful means. If people were reasoning in a cognitively sequential way, perhaps they would respond differently (that is, not admit tainted evidence even when motivated to punish) if asked to commit first to the inevitability-of-discovery judgment. To test for this, Study 2 reversed the order of questions about admissibility and inevitable discovery for half the participants.

1. Methodology

The 119 participants in Study 2 were again recruited through Mechanical Turk. They were seventy-one percent female and ranged in age from eighteen to eighty-one, with a mean age of fifty-five. The design and measures of Study 2 were similar to those of Study 1, with two main differences as noted above: (1) the admissibility and inevitability-of-discovery questions were asked using dichotomous yes-or-no choices rather than continuous scales, and (2) half the participants answered the admissibility question first, whereas the other half answered the inevitable discovery question first. Therefore, participants in this experiment were randomly assigned to one of four conditions: heroin admissibility-first, heroin inevitability-first, marijuana admissibility-first, or marijuana inevitability-first.

After making these judgments, the participants were asked to explain why they thought discovery of the tainted evidence was or was not inevitable, as an open-ended qualitative response. In addition, the participants were asked toward the end of the experiment to report how they felt about the selling of heroin and marijuana as depicted in the experimental scenarios and the extent to which they thought their judgments had been influenced by their feelings about the defendant’s crime in the case they judged.

153. See supra notes 117–18.
154. This variable was measured on a seven-point scale ranging from “strongly in favor” to “strongly against.”
155. This variable was measured on a seven-point scale ranging from “not at all” to “very strongly.”
2. Results

a. Manipulation Checks. As expected, the participants in all four conditions expressed much greater disapproval of the heroin crime (mean of 6.86 on a 7-point scale) than the marijuana crime (mean of 3.09). Furthermore, as in Study 1, those who were randomly assigned to the heroin case rated the defendant as significantly more immoral and recommended more severe punishment for him as compared to the participants assigned to the marijuana case. The experimental manipulation of punishment goals thus once again had its intended effect.

b. Absence of Order Effects. The order in which the admissibility and inevitability-of-discovery questions were asked made no difference on the participants’ legal judgments. Chi-square analyses on the order variable were insignificant within each case and across both cases, indicating that there was no relationship between the sequence in which the admissibility/inevitability questions were asked and the responses to those questions. Thus, the order variable could be collapsed across the four conditions to consider the data simply by case—two conditions: heroin versus marijuana—as in Study 1.

c. Replication with Dichotomous Variables. Echoing the results of the first experiment, the participants judging the heroin case in Study 2 were significantly more likely than those judging the marijuana case to see the tainted evidence as admissible and discoverable through legal means—even though they now had to definitively commit to admitting the evidence and to finding that its lawful discovery was not just highly likely but inevitable. As shown in Figure 8, approximately 60% of the heroin participants categorically admitted the tainted evidence, compared to only about 15% of the marijuana participants. Correspondingly, approximately 55% of the heroin participants stated that discovery of the tainted evidence was inevitable, whereas only about 15% of the marijuana participants reached this conclusion.

Chi-square analyses for both the admissibility and inevitability-of-discovery measures were significant, indicating a dependent relationship between the case to which the participants were assigned (heroin versus marijuana) and their responses to these questions. Furthermore, binary logistic regression analy-
Figure 8. Study 2—Frequency of affirmative admissibility and inevitable discovery responses by case (heroin \( n = 62 \), marijuana \( n = 57 \)).

Ses\textsuperscript{160} showed that the assigned case significantly predicted the participants’ decisions to invoke the inevitable discovery exception and admit the tainted evidence.\textsuperscript{161}

Study 2 also replicated the first study’s findings in regard to the effect of the defendant’s criminal egregiousness on perceptions of the investigating police officers and the exclusionary rule itself. The participants who judged the heroin case once again gave significantly higher morality ratings to the officers, recommended greater leniency for their illegal actions, and expressed less agreement with the exclusionary rule than did the participants who judged the marijuana case.\textsuperscript{162}

In sum, the results of Study 2 provide further support for the motivated justice hypothesis, with more definitive measures. Even when people had to unequivocally commit to admitting the tainted evidence and to the inevitability of its discovery through lawful means, they were significantly more likely to do so when motivated to punish the defendant because of the egregiousness of his crime. Yet, when the participants in this experiment were asked to rate on a

\textsuperscript{160} Logistic regression is a type of analysis that allows for the prediction of discrete outcomes (such as yes-or-no answers rather than answers on a scale). See Tabachnick & Fidell, supra note 130, at 439. There is a categorical outcome for each predictor and the predictors can be categorical, continuous, or mixed.

\textsuperscript{161} Binary logistic regressions for case predicting admitting of tainted evidence: \( B = -2.00 \), \( S.E. = .45 \), Wald = 20.17, \( p < .001 \); for case predicting finding of inevitable discovery: \( B = -1.93 \), \( S.E. = .44 \), Wald = 18.92, \( p < .001 \).

\textsuperscript{162} ANOVAs for morality of police officers by case: \( F(1, 117) = 37.07, p < .001 \), \( \eta^2 = .24 \); for leniency toward police officers by case: \( F(1, 117) = 8.10, p = .005 \), \( \eta^2 = .07 \); for agreement with exclusionary rule by case: \( F(1, 117) = 4.02, p = .05 \), \( \eta^2 = .03 \).
The written explanations of participants in the heroin condition who said the tainted evidence would inevitably have been discovered focused most frequently on the fact that the defendant’s car registration had expired: 43% of these participants asserted that the police would inevitably pull the defendant over for his expired registration and thereby lawfully find the evidence in his car. However, that this factor did not necessarily render discovery of the evidence inevitable was reflected in the finding that 22% of participants in the marijuana condition specifically mentioned the expired registration as an insufficient basis for inevitable discovery of the evidence. Furthermore, among the minority of heroin participants who did not demonstrate the cognitive cleaning effect and instead suppressed the illegally obtained evidence, 26% noted that the expired registration did not render lawful discovery of the evidence inevitable. For example, one such participant reasoned, “The drugs could have been discovered if [the defendant] was subsequently stopped for a traffic violation or because his registration was expired and police officers then . . . found the drugs. But this is a highly contingent rather than certain chain of events. What if [the defendant] decides to renew his registration tomorrow?”

Another category of explanations for inevitable discovery, seen in the responses of 14% of participants in the heroin condition who invoked the exception, reflected optimistic assumptions about the police’s case against the defendant (for example, presuming the police had the ability to get a legal search warrant in such a case). However, 22% of the heroin participants who chose to suppress the tainted evidence as dictated by the exclusionary rule used the same facts to make assumptions about the weakness of the police’s case, making statements like: “If they [had] been able to find the drugs another way they would have.”

Importantly, there was nothing in the facts to suggest that the police officers had any antecedent knowledge about what crime their search would uncover, nor any indication of additional evidence or independent lines of investigation underway for the more egregious heroin crime. Furthermore, although some

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163. Mode n = 27. The mean objectivity score was 3.66 on a 7-point scale, with a standard deviation of 2. Notably, the extent to which participants in the marijuana condition thought they had been influenced by the defendant’s crime significantly predicted their morality and punishment judgments for the defendant, whereas this was not true for participants in the heroin condition (who actually engaged in motivated cognition). Regressions (in marijuana condition) for influence predicting morality of defendant: \( B = .42, S.E. = .11, \beta = .48, p < .001; \) for influence predicting punishment of defendant: \( B = -.22, S.E. = .10, \beta = -.27, p = .04. \)

164. Two coders independently coded the qualitative data and a third neutral coder resolved any discrepancies. The participants were not expected to be familiar with the legal standards for vehicular searches. See supra note 123. Given the limited facts provided, the experimental scenarios were designed to make lawful discovery of the evidence possible but not inevitable.
participants in the heroin condition who saw lawful discovery as inevitable did express presumptions about the potential indiscretion of the students who purchased the heroin (“I think that eventually one of the high school kids would tell someone about the drugs”), this explanation was also seen among the few participants who invoked the inevitable discovery exception in the marijuana condition (“It might be discovered that [the defendant] was providing drugs to cancer patients because of people talking to each other”). Future studies could, however, more directly negate concerns about lawful discovery of the evidence seeming objectively more probable in the heroin condition by presenting the same type of drug and target buyers in both experimental scenarios, but manipulating moral egregiousness by varying only the purpose for which the drug was being illegally sold (such as therapeutic versus recreational use).

C. DISCUSSION OF FINDINGS

The results of Studies 1 and 2 provide experimental evidence that the moral egregiousness of a defendant’s crime cognitively matters in judgments about suppressing illegally obtained evidence. Participants who were more motivated to punish the defendant—those judging the heroin case as compared to the marijuana case—were more likely to construe lawful discovery of the evidence as inevitable, which ostensibly justified their decision to admit the tainted evidence, even though the illegal search in both cases was exactly the same. This result held true regardless of whether the participants were asked first about the admissibility of the evidence or its likelihood of discovery, indicating that the motivated cognition process was more global than sequential.

Given the unambiguous illegality of the police search in the scenarios, along with the paucity of facts for construing lawful discovery of the evidence as inevitable, the most doctrinally faithful response in this experimental paradigm should have been to exclude the tainted evidence in each case. The cognitive cleansing effect was thus propelled by the participants in the heroin condition, who were likely to invoke the inevitable discovery exception because they were more motivated to punish the defendant. Consistent with this Article’s hypothesis, motivated cognition was triggered when decision makers’ justice intuitions conflicted with a legal constraint with which they also want to comply. Meanwhile, participants in the marijuana condition were significantly more likely to recommend suppressing the evidence as called for by the exclusionary rule, because this suited their inclination against punishing the defendant for an act that many believe should not even be criminalized. When the law furthered an outcome that these participants perceived as just (that is, letting the marijuana defendant “off the hook”), they were significantly more likely to exclude the tainted evidence and express stronger agreement with a legal rule that they

165. See supra notes 123 and 164 and accompanying text.
166. See Associated Press/CNBC Poll, supra note 120.
too might have less-than-consciously circumvented if confronted with a more reprehensible crime.

The difference in punishment goals triggered by the experimental manipulation also led the participants in the heroin and marijuana conditions to construe the implications of the car’s expired registration in markedly different ways. This is consistent with motivated cognition theory’s prediction that people will use the same facts to “access different beliefs and rules in the presence of different directional goals, and that they might even be capable of justifying opposite conclusions on different occasions.”

In real legal cases, decision makers have access to far more factual details than were available to the participants in these experiments. Rather than helping with doctrinal consistency, this could amplify the motivated cognition effect by presenting even more avenues for less-than-consciously arriving at desired outcomes. While one might argue that real courtroom environments and the severe consequences of conviction faced by criminal defendants could increase efforts toward more doctrinally committed decision making, “the other decision error—falsely acquitting a guilty defendant—is also considerably more costly in actual trials.”

Moreover, the tangible harms caused by a real-life egregious crime could trigger even stronger motivations to punish than the hypothetical heroin scenario in these studies.

The experimental condition to which participants were randomly assigned influenced not only their likelihood of perceiving lawful discovery of the evidence as inevitable, but also their attitudes towards the police officers who conducted the unlawful search. Participants who judged the heroin case rated the offending officers as more moral and expressed greater leniency toward them than those who judged exactly the same police misconduct in the marijuana case. This finding is of particular relevance to the Supreme Court’s most recent rulings on the exclusionary rule in *Herring* and *Davis*, which expanded the doctrine’s good faith exception by restricting suppression of tainted evidence to “egregious” police misconduct. Although “what matters” in applications of the exclusionary rule and its good faith exception is supposedly “the extent to which the police have deviated from prescribed norms, not the

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168. See MacCoun, *supra* note 114, at 513–14 (concluding “it is hard to identify compelling reasons why mock and actual juror reasoning might differ systematically in kind, rather than degree”).
169. See Mook, *supra* note 113, at 386 (discussing the Milgrim obedience research as an example of how the “differences between lab and life” can be seen as strengthening the impact of experimental findings); Jeffrey J. Rachlinski et al., *Probable Cause, Probability, and Hindsight*, 8 J. EMPIRICAL LEGAL STUD. 72, 97 (2011) (“We suspect that in actual cases, judges would find it much more difficult to suppress damning evidence against a defendant whom they strongly believe to be guilty than they would in our hypothetical scenarios.”); infra notes 184–85 and accompanying text (supporting this Article’s findings through analysis of real search-and-seizure decisions).
extent to which the defendant has,’”172 this Article’s results indicate that doctrinally irrelevant feelings about the defendant’s crime may also drive judgments about the police’s misconduct.173 If judges making suppression determinations are cognitively less likely to perceive an illegal search by the police as meeting Herring’s test of “deliberate, reckless, or grossly negligent conduct”174 in cases involving egregious defendant crime, the heightened police culpability standard arguably renders applications of the exclusionary rule without regard to the defendant’s offense even more elusive.175 It would be fruitful for future work to further explore this by directly testing the good faith exception, and manipulating not only the egregiousness of the defendant’s crime but also the egregiousness of the police misconduct.

The judgments about the police officers in these studies additionally present a noteworthy contribution to the vast literature on procedural justice, which has shown that the fairness and legality of police conduct affects the perceived legitimacy of the legal system.176 The malleability of the participants’ attitudes toward the police suggests that how people feel about the justness of law enforcement may be shaped not only by the conduct of police officers themselves (which in these experimental scenarios was unambiguously illegal), but also by people’s own feelings about the type of crime the police conduct is targeting. Here, the participants who judged the more egregious heroin case not only expressed more leniency toward the police who conducted the illegal search but also expressed higher confidence in the overall integrity of police forces in the country—which accords with previous findings that people are “confident in transferring or applying their motivation-influenced estimates to other, independent decisions.”177

Finally, it bears noting that not all the participants judging the heroin case were susceptible to the motivated cognition effect. In Study 2, for example, approximately 60% of participants in the heroin condition admitted the tainted

173. This Article’s studies did not directly test the good faith exception to the exclusionary rule, but the above-discussed finding points toward one possible way in which that exception could also present an entry point for motivated cognition in suppression judgments. See also Bellin, supra note 11, at 46 (noting in regard to Fourth Amendment doctrine generally that “the Supreme Court’s omission of a crime-severity variable . . . does not mean that the underlying intuition—that police officers act more reasonably (or less intrusively) when, all things being equal, their investigations target grave crime—disappears. To the contrary, the intuition is simply pushed underground, causing courts to gravitate toward other mechanisms for protecting society.”).
174. 555 U.S. at 144.
175. This proposition is consistent with previous work suggesting that people take crime dangerousness into account in assessing the privacy interests implicated in police investigations, because an investigative method is rated as relatively less intrusive when used to pursue a more dangerous crime. See Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,” 42 DUKE L.J. 727, 767–68 (1993).
177. Boiney et al., supra note 98, at 20.
evidence and construed its lawful discovery as inevitable, which was in significant contrast to the mere 15% of participants who did so in the marijuana condition but was not a uniform response to the more egregious crime. Thus, even in circumstances that trigger a high motivation to punish, not all legal decision makers are equally likely to be influenced by outcome-driven construal and reasoning. This individual difference could lead to major inconsistencies between cases that involve the same types of searches and crimes, the implications of which will be discussed in Part V.A.

D. JUDICIAL APPLICATIONS

Although asked to put themselves in the role of a judge, the participants in this Article’s experiments were lay decision makers, and thus more akin to jurors. The exclusionary rule, however, is applied by judges, and one might wonder if their legal training, repeat experience with large numbers of cases, and institutional constraints of precedent and appellate review would better equip them to suppress tainted evidence irrespective of the defendant’s underlying crime. If so, the present bifurcated system in which judges decide on the admissibility of evidence, followed by jurors generally deciding on the defendant’s guilt, arguably provides an inbuilt safeguard against the motivated cognition effect demonstrated in these studies.

Yet, judges too are human beings with emotional and punitive instincts of their own. They are also political beings, who are incentivized to align themselves with the punishment goals of the public. This Article’s findings are therefore relevant to judicial applications of the exclusionary rule in two ways: First, previous and ongoing work on judicial decision making suggests that, like the participants in these studies, judges may be unknowingly susceptible to motivated cognition when their own punishment intuitions clash with the constraints of the law. Second, especially in cases that are likely to attract broad public attention, judges may more consciously consider criminal egregiousness in their admissibility rulings due to an expectation that lay people will respond to their suppression judgments in the motivated manner illustrated by these studies.


179. See, e.g., Andrew J. Wistrich et al., Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?, 93 TEx. L. Rev. 855, 911 (2015) (“Judges are not computers. By design, the justice system is a human process, and, like jurors, judges are influenced by their emotions to some degree . . . however sincerely they may try to prevent it.”); In re L.C., 41 A.3d 1261, 1264 (D.C. 2012) (holding that the report-of-rape exception to the hearsay rule applies in bench trials as well as in jury trials because: “Judges, like jurors, are part of our society. Although they differ in some respects—mainly that judges, unlike the average juror, are specially trained in the reasons animating the rules of evidence—we cannot presume that judges are immune from the societal assumptions. . . .”).

180. See notes 196–200 and accompanying text.
1. Judicial Susceptibility to Motivated Cognition

Drawing upon an earlier draft of this Article, judicial scholars Andrew Wistrich, Jeffrey Rachlinski, and Chris Guthrie tested a variation of its heroin-marijuana paradigm with real judge participants.181 Their study provides support for the external validity of this Article’s experimental findings in regard to actual judges. Replicating the results reported with lay participants in Studies 1 and 2 above, Wistrich et al. found that judges who were asked to rule on a motion to suppress evidence were also significantly more likely to admit the evidence when the case involved heroin than when it involved marijuana:

The judges responded as if there is a Fourth Amendment for marijuana that is different than the Fourth Amendment for heroin. The fruits of the search are irrelevant. . . . The defendants are obviously different, however . . . . And the judges treated them differently. . . . In effect, even though the exclusionary rule does not permit judges to consider the gravity of the offense, judges nevertheless seem to use a sliding scale that takes it into account.182

The study was one among a series of varied experiments with judges that led Wistrich et al. to conclude: “Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike, but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants . . . without their conscious awareness and despite their best efforts to resist it.”183

Adding further external validity through another methodological approach, an empirical project that I am a co-authoring with political scientists Jeffrey Segal and Benjamin Woodson has run over 500 real search-and-seizure decisions through a statistical model to examine whether crime egregiousness predicts the outcome of suppression decisions, after controlling for judicial ideology and intrusiveness of the police search.184 Consistent with the experimental findings in this Article, the results of that study “show a similar pattern using a sample of Federal Court of Appeals cases: for highly intrusive searches, judges are more likely to admit challenged evidence when the case involves a crime against a person than when it involves other less egregious types of criminal activity.”185

181. Wistrich et al., supra note 179, at 890–93. Wistrich et al.’s scenario that was based on the present Article’s experimental paradigm involved a motion to suppress evidence in a disciplinary proceeding after a questionable locker search uncovered either marijuana, or heroin plus “a list of contacts at a local high school.” Id. at 892; cf supra Part III.A.1 (describing this Article’s original heroin-marijuana paradigm).
182. Wistrich et al., supra note 179, at 893.
183. Id. at 911.
185. Id. at 4. Although both the present and forthcoming projects sought to test the influence of more versus less egregious crime on suppression judgments, this Article’s paradigm did so within the
More generally, prior research on judicial decision making has revealed that judges are vulnerable to many of the same “informational, cognitive, and attitudinal blinders” as lay decision makers, but may be better able to resist the influence of extra-legal factors and cognitive biases in some types of judgments. For example, another series of experiments by Wistrich et al. found that real judges were influenced by five out of seven kinds of inadmissible information, such as demands that a party had made during a settlement conference or privileged information reviewed in camera. The judges were, however, able to disregard inadmissible information that implicated a defendant’s constitutional rights, such as a reliable confession that was obtained after a defendant in a robbery case was denied legal counsel. Yet, the nature of the defendant’s crime may have played a role in judicial responses to that scenario too: “Judges noted that the crime was ‘only a robbery,’ no one was hurt, and that not much cash was stolen. Thus, the cost of suppressing the evidence—a lost conviction for a relatively minor crime—was lower than it would have been for a more serious crime.”

Previous studies have additionally indicated that judges hold stronger illusions of objectivity about their decision making than lay people. One such experiment found that although inadmissible information in a civil case similarly influenced the judgments of both judge and juror participants, both samples felt that the judges had a greater capacity to be unbiased. Ironically, this judicial self-confidence could lead to less objective decision making: “[T]here is evidence that believing ourselves to be objective puts us at particular risk for category of drug crimes (heroin versus marijuana), whereas the Segal et al. collaboration does so across different categories of crime (crimes-against-people versus other criminal activity that is regarded as less egregious).

189. Id. at 1321.
190. Jeffrey J. Rachlinski et al., Altering Attention in Adjudication, 60 UCLA L. Rev. 1586, 1610 (2013). In a follow-up experiment, the same researchers manipulated the severity of both the defendant’s crime and the police misconduct that resulted in the confession. Almost all the judge participants suppressed the confession, but their ultimate conviction judgments were nevertheless motivated by this inadmissible information when judging the more serious crime: “When the defendant had committed murder, . . . the judges who had heard confessions, however obtained, were consistently more willing to convict.” Id. at 1614. Although that study differs from this Article’s experiments—which held the police misconduct constant and focused on how punishment goals drive judgments about admissibility of evidence, rather than on how inadmissible evidence influences convictions—the findings of both projects are congruous.
192. Landsman & Rakos, supra note 191, at 125.
behaving in ways that belie our self-conception.” Moreover, as noted in Part II.B above, the motivated cognition effect may be more powerful among decision makers who can draw upon a more sophisticated level of knowledge about the issue at hand and “who display a greater disposition to use reflective and deliberative . . . forms of reasoning”—characteristics that are seen in judges.

2. Judicial Responses to the Motivated Public

Beyond judges’ own susceptibility to motivated cognition, the motivated manner in which members of the general public respond to the exclusionary rule as demonstrated in Studies 1 and 2 may in some cases indirectly influence judicial engagement with the doctrine. Commentators have noted that judges of all kinds, not only those who are elected but also those who are appointed, have reason to care about public opinion. So, even when judges do not themselves fall prey to motivated cognition, they may be good intuitive psychologists who understand what will make their suppression holdings cognitively palatable to the general public.

It is not surprising, then, that legal scholars have observed judges showing “a remarkable ability in the most serious cases to stretch legal doctrine to hold doubtful searches and seizures legal” not only when applying the exclusionary rule would “offend their own sense of proportionality,” but also when it would “reach beyond the view of what the public would tolerate.” One interview-based study found that the “most frequent explanations for [a] judge’s failing to suppress evidence in serious cases” included not only the judge’s “personal sense of justice” but also “fear of adverse publicity.” Thus, in addition to the less-than-conscious cognitive difficulties inherent in applying a legal doctrine that clashes with their own intuitions about punishment, judges may be more strategically reluctant to suppress evidence in cases of morally egregious

193. Jerry Kang et al., Implicit Bias in the Courtroom, 59 UCLA L. REV. 1124, 1173 (2012); see also Wistrich et al., supra note 188, at 1278 (noting judges’ confidence in their ability to disregard inadmissible information may make them “ disinclined to undertake the extra effort necessary” to avoid being influenced by it).
194. Taber & Lodge, supra note 111, at 755–56; Taber et al., supra note 111, at 137.
197. See, e.g., Akhil Reed Amar, The Future of Constitutional Criminal Procedure, 33 AM. CRIM. L. REV. 1123, 1125 (1996) (“[M]ajorities elect Presidents, and Presidents, with the advice and consent of Senators, pick federal judges.”); Dripps, supra note 1, at 21 (“[T]he pressure to circumvent the exclusionary rule is not confined to state courts or elected judges.”); Kaplan, supra note 1, at 1040 (noting that even the Supreme Court is “only temporarily isolated from public opinion” because “it is clear that the Presidents who appoint Supreme Court Justices follow the election returns”).
198. Kaplan, supra note 1, at 1036 (emphasis added).
199. Orfield, supra note 2, at 121.
200. Id. at 121–23.
crime where the outcome would severely clash with the punishment goals of the community at large. The costs inherent in making this compromise will be discussed in Part V.

IV. A POTENTIAL REMEDY

This Article has thus far argued that there exists a legal rule requiring judges to exclude illegally obtained evidence regardless of the defendant’s crime, but doctrinal observations, the proposed motivated justice hypothesis, and supporting experimental data indicate that in cases involving morally egregious offenses, the rule is likely to be cognitively circumvented in a covertly motivated manner. This gives rise to the following questions: First, can something be done about this phenomenon? And second, if so, should something be done to curtail it?

Addressing the first question, this Part considers some relevant revisions and substitutes to the exclusionary rule that other scholars have previously suggested. This is not intended to be a comprehensive review of all such proposals, nor does it purport to identify the best approach. Instead, the discussion highlights some potential limitations of these remedies in light of the Article’s hypothesis and findings. This Part then proposes a novel psychology-based solution that aims not to substantively change the exclusionary doctrine, but rather, to directly target the motivated cognition underlying its operation. Critically, evidence from a third and final study will show that decision makers can potentially overcome motivated applications of the exclusionary rule when cognitively equipped to do so.

A. PROPOSED LEGAL ALTERNATIVES

1. Revising the Rule

Countering the doctrinal irrelevance of crime severity, some jurists have asserted that the seriousness of a defendant’s offense should be considered in suppression judgments, as courts seem to be doing anyway, “albeit covertly.”201 However, proposals to revise the exclusionary rule to explicitly take the underlying crime into account202 have been met with strong criticisms.203 A comprehen-

201. See, e.g., Kaplan, supra note 1, at 1046; see also Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 802 (1994); Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

202. See, e.g., Kaplan, supra note 1, at 1045–49 (proposing a modification whereby “the rule [would] not apply in the most serious cases—treason, espionage, murder, armed robbery, and kidnaping by organized groups,” unless “the violation of civil liberties were shocking enough”); Eugene R. Miller, Debunking Five Great Myths about the Fourth Amendment Exclusionary Rule, 211 Mich. L. Rev. 211, 232–37 (2012) (reviewing proposed modifications by various commentators for limiting exclusion in cases of serious crime).

203. See, e.g., Tonja Jacobi, The Law and Economics of the Exclusionary Rule, 87 Notre Dame L. Rev. 585, 652 (2011) (pointing out that “a defendant’s rights [would] decrease as the length of the potential sentence he is facing increases”); Kamisar, supra note 1, at 23 (questioning whether “a short
sive assessment of this discourse is beyond the scope of this Article, but it bears noting that factoring in crime severity alone may not fully address the experimental findings discussed above, because the moral egregiousness of a crime (which motivated applications of the exclusionary rule in these studies) is not necessarily commensurate with the legal severity of a crime; moral egregiousness may even differ across cases involving the same criminal charge. Thus, settling on the types of criminal cases in which to permit illegally obtained evidence would be a thorny task, further complicated by the vehemence and persistence of debate on whether the nature of the defendant’s crime should be explicitly considered in admissibility decisions.

One might also argue that rather than retrenching the exclusionary rule in cases of severe or egregious crime, entry points for motivated cognition could be reduced by strengthening the doctrine instead. For example, this Article’s experimental demonstrations of the cognitive malleability of concepts like “inevitable discovery” suggest that perhaps the standard of proof for exceptions to the rule should be raised. Justice Brennan’s dissenting opinion in Williams II called for the government to be held to a “clear and convincing” standard for invoking the inevitable discovery exception (rather than the lower preponderance-of-evidence standard that the majority adopted), and some state courts have followed this practice. Going further, Canadian courts have embraced the argument that suppression of tainted evidence should be more strictly enforced in cases where there is reason to believe the police could have obtained the evidence through lawful means. Others have endorsed eliminating the ever-broadening good faith exception to the exclusionary rule. However, the Supreme Court’s recent rulings expanding that exception indicate that the American doctrine is currently moving in the opposite direction.

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204. For example, the moral egregiousness of and subsequent motivation to punish two defendants who both committed murder may differ based on the circumstances of each killing. Moreover, decision makers may be more motivated to punish a defendant who assaulted an elderly victim than a defendant who murdered a serial killer, even though assault is a less severe crime under the law than murder. See also Kaplan, supra note 1, at 104 (noting that “some non-victim crimes . . . may cause great public indignation”).


210. See supra Part I.D.
2. Civil Damages Substitutes

Some critics of the exclusionary rule have suggested replacing the rule with broader reliance on civil damages actions against police officers who conduct illegal searches, such as through Section 1983 civil suits against state and municipal actors for constitutional violations, Bivens actions to hold federal agents personally liable for unconstitutional conduct, or common law torts actions. However, the motivated justice hypothesis would predict that decision makers will be just as susceptible to motivated cognition in civil damages determinations as they are in applications of the exclusionary rule. Tracey Maclin questioned: “If a majority of the public is willing to sacrifice the Fourth Amendment to stop illegal drug use, why should anyone believe that jurors in civil damages cases will protect the Fourth Amendment rights of guilty drug couriers?” The targets of illegal searches and seizures are “often despised,” “often have prior criminal records . . . [or are] guilty of a crime in the very situation that precipitated the suit,” and their reputation “may be called into question simply because the case arises from a confrontation with the police.” Meanwhile, members of the public often “have great respect for police officers, empathize with them because of the difficulty of their jobs, and want them to have a great deal of discretion to enforce the law.”

A felonious petitioner who was involved in a repugnant crime may thus be at as much of a disadvantage against offending police officers in a civil damages action as the heroin defendant was shown to be in the suppression context of

213. See Amar, supra note 197, at 786.
215. Id. at 56.
218. Casper et al., supra note 216.
219. See OFFICE OF LEGAL POLICY, DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE 41 (1986) (attributing lack of success by plaintiffs in Bivens actions in part to juries sympathizing with law enforcement officers, especially over plaintiffs “charged with or convicted of crimes”); Guido Calabresi, The Exclusionary Rule, 26 HARV. J.L. & PUB. POL’Y 111, 114 (2003) (“Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights.”); Casper et al., supra note 216, at 298 (discussing experimental findings that “knowledge of the guilt or innocence of the suspect appears to have an effect on juror decisions about whether to make a damage award and how large it ought to be”).
220. The number of Section 1983 and Bivens actions filed each year is relatively small, and the number of cases that result in successful damage awards is even smaller, especially when compared to the number of criminal cases that are dismissed due to violations of the Fourth Amendment. See Memorandum from King and Spalding LLP, for the Am. Bar Assoc., Ctr. for Human Rights (May 16, 2013) (on file with author); David Alan Sklansky, Is the Exclusionary Rule Obsolete?, 5 OHO ST. J. CRIM. L. 567, 580 (2008) (comparing filings and success of 1983 cases with Fourth Amendment dismissals and noting that while the numbers “do not tell us the whole story . . . they do tell us something”).
this Article’s experiments. Indeed, the participants who exhibited the motivated cognition effect in these studies were lay decision makers, as jurors in a civil trial would be. And although the illegal police search was identical in both the experimental scenarios, the participants explicitly said the officers were less deserving of negative consequences when their unlawful search uncovered evidence of the more egregious crime.220

That finding may also shed light on another potential limitation of replacing the exclusionary rule with a civil damages alternative: the difficulty of bringing lawsuits against individual officers due to the expanding doctrine of qualified immunity, which shields government officials from damages actions for conduct that was “objectively reasonable.”221 The motivated justice hypothesis would predict that judicial determinations of reasonableness for qualified immunity could present as much of an entry point for motivated cognition as admissibility judgments do.

A potential illustration is seen in the Supreme Court’s 2012 decision reversing the denial of qualified immunity to police officers in *Messerschmidt v. Millender*.222 This case involved police reliance on an excessively broad search warrant against a defendant who was a known gang member being investigated for domestic assault.223 The majority concluded that the police actions were not “objectively unreasonable,”224 but Justice Sonia Sotomayor asserted in a dissent that “[t]he Court reaches this result only by way of an unprecedented, post hoc reconstruction of the crime.”225 In particular, she noted: “Police officers perform a difficult and essential service to society, frequently at substantial risk to their personal safety. And criminals like Bowen are not sympathetic figures. But the Fourth Amendment ‘protects all, those suspected or known to be offenders as well as the innocent.’”226 Justice Sotomayor’s comments reflect the possibility that legally irrelevant considerations could influence qualified-immunity determinations and subsequent rulings against criminal petitioners in much the same inadvertently motivated way that the egregiousness of a defendant’s crime has been shown here to influence suppression judgments. Replacing the exclusionary rule with civil damages remedies could thus merely relocate the covert operation of motivated cognition to another decision making venue.

220. See supra Parts III.A and III.B.
223. Id. at 1241.
224. Id. at 1244.
225. Id. at 1254 (Sotomayor, J., dissenting).
226. Id. at 1261 (Sotomayor, J., dissenting) (citing Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)).
B. STUDY 3: COGNITIVE “CORRECTION”

Given the pitfalls and controversies surrounding proposed revisions and alternatives to the exclusionary rule, it will not be easy to reach consensus on substantive changes to the doctrine. So, to the extent that the legal system wants to avoid motivated applications of the law as it stands, is there a psychological means of achieving this goal? One answer might lie in piercing the illusion of objectivity under which motivated cognition operates. If decision makers are consciously committed to objectively adhering to the law, explicitly drawing their attention to a legally irrelevant factor that unconsciously undercuts that commitment might curb the competing influence of the motivating factor.

The potential for a solution based on this approach was suggested by my previous experimental work on the plasticity of the “harm principle.”227 When participants wanted to criminally punish a “harmless” act,228 such as public nudity, but were constrained by a legal “rule” that called for a finding of harm in order to criminalize, they imputed harm to the conduct where harm was not previously reported.229 These motivated criminalization and harm judgments were further exacerbated when the nudist was promoting an abortion message that was contrary to the participants’ own positions on abortion, even though the participants did not recognize the influence of this legally irrelevant factor.230 However, when the ideological aspect of the scenario was made salient by presenting two identical scenarios that differed only in whether the nudist was carrying a pro-life or pro-choice sign, participants no longer imputed harm to the conduct based on their favored position.231 So, making decision makers confront the potential that they might want to punish the nudist more based on their personal disagreement with his message rather than the harm inherent in his act removed the influence of that ideological factor on their judgments.232

Building upon these findings in the context of a real legal doctrine and in a manner more feasible to implement in actual legal settings, this Article now presents a final experiment that used awareness-generating instructions to “cognitively correct” motivated applications of the exclusionary rule. The proposed remedy draws upon Duane Wegener and Richard Petty’s psychological theory of the flexible correction model, which suggests that people must be both aware

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228. These were acts that people reported in a preliminary study as harmless but nonetheless deserving of criminal punishment. Sood & Darley, supra note 227, at 1325–28.
229. Id. at 1328–36.
230. Id. at 1336–42.
231. Id. at 1342–45.
232. See also Janice Nadler, Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame, 75 L. & Contemp. Probs. 1, 25–26 (2012) (finding that although judgments about an actor’s character drove blame and punishment decisions, making moral character explicit by asking people to judge individuals of both good and bad character in the same situations eliminated the motivating influence of this factor).
of a potential “bias” and motivated for accuracy, legal, or procedural reasons to counteract it in order for correction to take place. As previously discussed, legal decision makers are generally motivated to comply with the law, which is why this Article’s hypothesis predicted they would less-than-consciously engage in motivated cognition to achieve their punishment goals ostensibly within the terms of the given doctrine rather than blatantly flouting it. So, directly drawing people’s attention to a legally irrelevant factor that could influence their judgments—thereby providing the other critical awareness component called for by the flexible correction model—should help combat the motivating effect of that factor. The awareness-generating instructions thus sought to equip decision makers to more consciously recognize and choose between their competing legal compliance and punishment goals. Study 3 also tested other instructional interventions, offering either legal rationales for the exclusionary rule or psychological findings on the motivated cognition effect, as alternative paths for cognitive correction.

1. Methodology

The 344 participants in Study 3 were recruited at a university and through Mechanical Turk. They were fifty-four percent female and ranged in age from eighteen to eighty-two, with a mean age of thirty-two. This experiment used the same exclusionary rule paradigm as Studies 1 and 2 (described in Part III.A), with the participants being randomly assigned to judge either the heroin or the marijuana case. In addition, the participants in Study 3 were randomly assigned to one of four instruction conditions: “awareness,” “law,” “research,” or “control.”

The awareness instructions were of primary theoretical interest in this study. The participants assigned to this condition were told:

You will be asked to make some decisions about evidence in a legal case. Factors that are not legally relevant to these decisions—such as your feelings about the defendant’s crime or your desire to punish or not to punish the defendant—may influence your judgments. However, this would violate the purpose of the law. It is important that you think about your responses carefully and not let your personal feelings about legally irrelevant factors influence your decisions about the evidence in this case. Please keep this in mind and try to be as objective as possible in your judgments.


234. See supra note 105 and accompanying text; supra Part II.B.
These instructions were designed to make the participants explicitly aware of the doctrinally irrelevant criminal egregiousness factor that motivated applications of the exclusionary rule in Studies 1 and 2.

Study 3 also tested two other types of instructions for sake of comparison. The law instructions informed participants of both the deterrence and judicial integrity rationales behind the exclusionary rule to see if these justifications would strengthen people’s commitment and ability to apply the doctrine in an objective manner. The research instructions informed participants about prior findings on motivated cognition in this very context of the exclusionary rule to see if this knowledge would immunize them from falling prey to the effect. Finally, participants assigned to the control condition were simply told that they would be asked to make some decisions about evidence in a legal case and were given the same generic instruction included in all the conditions to “be as objective as possible.”

The experiment varied whether the corrective instructions were delivered before or after the facts and law in the case. However, the results revealed no order effects based on timing, so this variable was collapsed across the instruction conditions. The participants answered the same admissibility and likelihood-of-discovery questions used in Study 1. Additionally, those who received corrective instructions were asked toward the end of the experiment to rate the extent to which they thought the instructions had made them more objective in judging the case.

2. Results

The results of Study 3 revealed a significant interaction between the case and instruction variables when it came to judgments about whether the tainted

235. The law instructions stated:

You will be asked to make some decisions about evidence in a legal case. If evidence was obtained through an illegal search, the law forbids it from being used because using tainted evidence would damage the reputation of the court. Furthermore, if police officers know that evidence obtained through an illegal search cannot be used, they will be less likely to engage in illegal searches. In some cases the rule may lead to outcomes you disagree with, but its enforcement creates a more honest and fair justice system. Please keep this in mind and try to be as objective as possible in your judgments.

236. The research instructions stated:

You will be asked to make some decisions about evidence in a legal case. Research has shown that people’s judgments can be inappropriately influenced by the outcome they desire, without their awareness. One study found that people were more likely to admit tainted evidence and see its discovery as inevitable if they strongly disapproved of the defendant’s crime and wanted to make sure he was punished. Meanwhile, people were less likely to admit tainted evidence and see its discovery as inevitable if they wanted to let the defendant ‘off the hook.’ Please keep this in mind and try to be as objective as possible in your judgments.

237. This variable was measured on a seven-point scale ranging from “not at all” to “very strongly.”
evidence should be admitted. That is, the extent to which the egregiousness of the case—heroin versus marijuana—influenced the participants’ admissibility judgments depended on the instruction condition to which they were randomly assigned. If they received either the law or the research instructions, participants judging the heroin case continued to be significantly more likely to admit the tainted evidence than those judging the marijuana case, just as when they received no instructions at all (in the control condition). So, those instructions did not appear to work in curtailing the motivated cognition effect. However, the difference in admissibility judgments between those judging the heroin and marijuana cases was markedly reduced when participants received the awareness instructions, suggesting that the remedy based on the flexible correction model trended toward having its predicted effect.

A closer comparative look at the data of the 171 participants in only the awareness and control conditions (setting aside the data from the law and research conditions) confirmed a statistical interaction between the case and instruction variables on these participants’ admissibility judgments. Post hoc tests revealed that the heroin participants who received the awareness instructions were significantly less likely to admit the tainted evidence than the heroin participants in the control condition, who did not receive these instructions (the difference between the dark bars in Figure 9 was significant). Moreover, the difference in admissibility judgments between the participants judging the heroin case and those judging the marijuana case was reduced to non-significance when both groups received the awareness instructions (the difference between the dark and light bars on the right “awareness” side of Figure 9 was not statistically significant). By contrast, among the participants in the control condition (who received no corrective instructions), those judging the heroin case continued to be far more likely to admit the tainted evidence than those judging the marijuana case, just as in Studies 1 and 2 (the difference between the dark and light bars on the left “control” side of Figure 9 was

238. ANOVA: \( F(3, 343) = 2.86, p = .037, \eta^2 = .03 \). An interaction is present when outcomes of a dependent variable are different at each level of an independent variable. KEPPEL & WICKENS, supra note 130, at 196-97.

239. ANOVA: \( F(1, 85) = 17.47, p < .001, \eta^2 = .17 \).

240. ANOVA: \( F(1, 86) = 24.61, p < .001, \eta^2 = .22 \).

241. ANOVA: \( F(1, 82) = 31.43, p < .001, \eta^2 = .28 \).

242. ANOVA: \( F(1, 87) = 3.88, p = .052, \eta^2 = .04 \).

243. Because all the instruction conditions were run independently of each other, omitting the law and research instruction conditions did not impact the integrity of this analysis. The 171 participants in just the awareness and control conditions were 60% female and ranged in age from eighteen to eighty-two, with a mean age of thirty-two.

244. ANOVA: \( F(1, 170) = 7.69, p = .006, \eta^2 = .04 \).

245. When an ANOVA reveals an interaction, post hoc tests are conducted to “look separately at the effects of one factor at the individual levels of the other factor—the simple effects—systematically determining which are significant and which are not.” KEPPEL & WICKENS, supra note 130, at 247.

246. Post hoc test: \( p = .02 \).

247. Post hoc test: \( p = .06 \).
significant).\textsuperscript{248}

Figure 9 may appear to suggest a difference between the admissibility judgments of the marijuana participants in the awareness condition and the control condition (the light bars), with marijuana participants perhaps seeming \textit{more} likely to admit the tainted evidence upon receiving the awareness instructions. However, this difference was not statistically significant.\textsuperscript{249} Had it been, it would have illustrated the potential risk of “over-correction,” which will be discussed in Part IV.C below.\textsuperscript{250}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Admissibility_of_Tainted_Evidence.png}
\caption{Study 3—Admissibility of the evidence by case (heroin vs. marijuana) and instruction condition (control vs. awareness).}
\end{figure}

Notwithstanding the influence of the corrective instructions in this experiment, the participants judging the heroin case were still intuitively more motivated than those judging the marijuana case to see the defendant punished. Just as in Studies 1 and 2, the heroin participants across all four of the instruction conditions in Study 3 rated the defendant as significantly less moral and more deserving of punishment than the marijuana participants did.\textsuperscript{251} This suggests that the awareness instructions did not change the effect of criminal egregiousness on people’s underlying punishment goal. The intervention seemed to work,

\begin{itemize}
\item \textsuperscript{248} Post hoc test: \( p < .001 \).
\item \textsuperscript{249} Post hoc test: \( p = .15 \).
\item \textsuperscript{250} See \textit{infra} note 267 and accompanying text.
\item \textsuperscript{251} ANOVAs across all four conditions for defendant morality: \( F(1, 343) = 1014.15, p < .001, \eta^2 = .76 \); for punishment severity: \( F(1, 343) = 458.97, p < .001, \eta^2 = .58 \). ANOVAs across just the awareness and control conditions for defendant morality: \( F(1, 170) = 7.41, p < .001, \eta^2 = .75 \); for punishment severity: \( F(1, 170) = 27.64, p < .001, \eta^2 = .54 \).
\end{itemize}
instead, by strengthening people’s guard against letting that goal cognitively color their judgments about the admissibility of the tainted evidence. Once the heroin participants who received the awareness instructions were able to resist their punishment-driven impulse to admit the tainted evidence, it was no longer necessary for them to construe lawful discovery of the evidence as inevitable. There was thus no significant interaction between the drug and instruction conditions on the likelihood-of-discovery measure.

C. DISCUSSION OF FINDINGS

Study 3’s awareness instructions, which were grounded in a theoretical understanding of bias correction, succeeded in curtailing the motivated cognition effect demonstrated in Studies 1 and 2. Participants who were forewarned that they could be influenced by the egregiousness of the defendant’s crime and encouraged to confront this legally extrinsic motivation were largely able to succeed in thwarting its impact on their admissibility decisions. Meanwhile, neither the law nor the research instructions were able to curb the cognitive cleansing of tainted evidence.

Previous studies on “admonitions to disregard evidence,” which have tended to focus on situations where mock jurors are exposed to inadmissible or limited-use information through pretrial publicity or information revealed in court, have had mixed results. In a review paper on this subject, Joel Lieberman and Jamie Arndt suggested that the challenges of making such instructions work can best be explained by two theories of social psychology: (1) ironic process theory—which predicts that “the very processes that are engaged to distract the individual from the thought also monitor the possible recurrence of that thought,” so can ironically make the thought more accessible; and (2) reactance theory—which predicts that if the instructions “are perceived as restricting a juror’s decision freedom, jurors may be motivated to assert that freedom and attend more strongly” to the off-limits information. So how would these theories account for why the awareness instructions in Study 3 did succeed?

The ironic process theory is most relevant here because, like the motivated justice hypothesis, it assumes that legal decisions makers are inherently motivated to follow legal directives: “[T]he failure of limiting instructions stems not from the jurors’ attempt to assert their decision freedom but from the unfortunate and ironic consequences of their attempts to comply with those instruc-


Lieberman and Arndt suggested that one way in which to rein in this response could be “to essentially trump the ironic process with further irony, that is, to actually have the individuals focus on the to-be-suppressed thought.” This is essentially what the awareness instructions in Study 3 did. They generated explicit awareness about the potentially motivating factor (egregiousness of defendant’s crime) and then advised the participants to “think about [their] responses carefully” in this context.

To the extent that reactance theory is also applicable here, prior experimental work has found that decision makers are likely to have a resistant response when presented with severe admonitions, such as being told that inadmissible testimony “must play no role” in their consideration and that they “have no choice but to disregard it.” In contrast, the awareness instructions in Study 3 were more mildly worded—telling the participants that legally irrelevant factors “may influence” their judgments and asking them to “try to be as objective as possible.” The success of the intervention is therefore consistent with the observation that “it may be more effective to provide a weak soft-sell approach to admonishing jurors to prevent reactance from occurring rather than using a strong and absolute promulgation.”

Psychologists have suggested that including “explanations of how inadmissible testimony can influence people” could also help decision makers “defend against” that influence. Yet, the research instructions in Study 3, which attempted to do this by presenting participants with findings on motivated cognition, did not succeed in curtailing the effect. One reason for this may have been that the research instructions were written in the third person—describing how other people have been shown to engage in motivated applications of the exclusionary rule—thus potentially triggering the psychological phenomenon of naïve realism, whereby people are readily able to see biased processes in others but not in themselves. By contrast, the awareness instructions that did succeed addressed participants directly in the first person (stating “you” may be influenced, rather than describing the behavior of others). It would be worthwhile for future work on curtailing motivated cognition to more directly test this distinction.

Meanwhile, Study 3’s law instructions, which informed participants of the rationales behind the exclusionary rule, may have been ineffective because the

254. Lieberman & Arndt, supra note 252, at 700.
255. Id. at 699–700.
257. Lieberman & Arndt, supra note 252, at 704.
258. Id. at 705 (emphasis added).
participants were not persuaded by the justifications underlying the doctrine. Prior research has suggested that when people are provided with explanations for why to disregard evidence, they respond based on the perceived “fairness of using the . . . evidence items to assess guilt,”\textsuperscript{260} or comply “only to the extent to which they agree with” and “understand or appreciate” the reasons.\textsuperscript{261} In regard to the exclusionary rule, Chief Justice Burger observed, “The [negative] impact of the doctrine is dramatic and easily understood, while the important reasons underlying it are almost beyond comprehension to most laymen.”\textsuperscript{262} Even if the participants fully understood the doctrinal justifications, previous experimental work has found that lay people do not support the deterrence rationale that the Court has embraced as the primary purpose of the exclusionary rule\textsuperscript{263}—and this repudiation might have dominated even though the law instructions also presented the judicial integrity rationale.

Although null effects must be interpreted with caution, the instructions that were seemingly ineffective at curtailing the motivated cognition effect in Study 3 are arguably just as noteworthy as the awareness instructions that did work, because they underscore the importance of theoretically based interventions and illustrate how subtle differences in wording can trigger very different psychological responses. Study 3 also found no effect for the timing of the corrective instructions; whether they were delivered before or after the facts and law in the case made no significant difference. This result is consistent with the flexible correction model’s expectation that “corrections for bias need not occur only following initial reactions to the target, but people might also attempt to avoid an anticipated bias by changing how information about the judgment target is gathered, how the information is scrutinized, or by avoiding the biasing factor, if possible.”\textsuperscript{264} Thus, although the term “correction” usually refers to “adjustment of existing reactions,” decision makers may also engage in “preemptive corrections.”\textsuperscript{265}

Of course, given that not all people are equally susceptible to being motivated by their own punishment goals in the face of a legal constraint to the contrary,\textsuperscript{266} a potential drawback of the awareness-generating remedy is that decision makers who are warned of a potential bias when none exists might “over-correct” for it.\textsuperscript{267} Thus, attempts to be completely impervious to one’s intuitions could lead to overly stringent applications of the law. In the context of suppressing tainted evidence, for example, judges who are trying to avoid any

\textsuperscript{261} Steblay et al., supra note 252, at 473.
\textsuperscript{262} Burger, supra note 35, at 12.
\textsuperscript{263} See Bilz, supra note 94, at 149; supra notes 8–10 and accompanying text.
\textsuperscript{264} Wegener & Petty, supra note 233, at 152.
\textsuperscript{265} \textit{Id.}
\textsuperscript{266} See supra Part III.C.
\textsuperscript{267} See Petty et al., supra note 112, at 93, 107; Sommers & Kassin, supra note 106, at 1370.
risk of being influenced by their urge to punish an egregious crime may be reluctant to invoke an exception to the exclusionary rule even in circumstances when it would be doctrinally fitting to do so. Alternatively, over-correction could lead to under-suppression of evidence in cases of less blameworthy crime if judges are overly focused on resisting the urge to let a sympathetic defendant off the hook. Further experimental research thus needs to better define the parameters of cognitive “correction” in order to guard against these potential risks.

It also bears noting that this Article’s experimental scenarios may have unintentionally manipulated variables besides criminal egregiousness. For example, perhaps the participants made different assumptions about the race, gender, or class of the defendant depending on whether the police search uncovered heroin or marijuana, such that these factors may have contributed to the motivated cognition effect in Studies 1 and 2. However, because the same heroin-marijuana paradigm was used across all three studies, any additional unintended manipulations would not undermine Study 3’s cognitive correction results.

This research did not directly test for the illusion of objectivity under which motivated cognition operates, but Study 3’s finding that making people aware of a potentially motivating factor removed its influence on their admissibility judgments provides indirect evidence for the unintentional nature of the cognitive cleansing phenomenon. More importantly, this result shows that regardless of the level of consciousness underlying the motivated cognition seen in these studies, people were not willing to let it influence their admissibility judgments when equipped to prevent it. This is perhaps the most crucial finding of this research, for it speaks not only to how motivated applications of the exclusionary rule can be addressed, but also to why the legal system should address their covert occurrence. Part V will elaborate on both these points.

V. USING PSYCHOLOGY TO STIMULATE LEGAL CHANGE

A. NORMATIVE IMPLICATIONS

This Article’s doctrinal observations and empirical demonstrations of motivated applications of the exclusionary rule may lead some to question whether this phenomenon should even be regarded as a problem. If judges align their suppression judgments with their own punishment intuitions, or those of society at large, is that something that needs to be “corrected?” Rather than being an undesirable process, one argument is that the operation of motivated cognition in this context is an acceptable response to a law that would otherwise lead to unjust outcomes.268

268. For example, motivated applications of the exclusionary rule could be seen as reflecting the potential benefit that can result from an “acoustic separation” between conduct rules that guide public (or, in the case of the exclusionary rule, police) behavior, and decision rules, “which are directed to the
Fundamental principles of due process, however, call for legal rules to be applied in uniform, predictable ways to all individuals, according to the given terms of those rules.\textsuperscript{269} Especially when applying a high-profile doctrine that turns on judicial discretion and leads to sometimes controversial results, concrete and transparent legal principles that are specified in advance and “consistently applied across people and situations” are critical to ensuring respect for the justice system.\textsuperscript{270} In the suppression context, commentators have noted, “Official disregard for the law—made evident when misconduct can be openly exploited to prosecutorial advantage in court—is the kind of behavior that, the research establishes, tends to weaken perceived legitimacy and willingness to cooperate with law enforcement.”\textsuperscript{271}

So, applying the exclusionary rule differently in the cases of two defendants who were illegally searched in the same manner, based on a factor that the doctrine does not recognize as relevant and that judges do not explicitly acknowledge as influencing their determinations, could have a destabilizing effect on the legal system—especially given that this practice is widely known or assumed to occur.\textsuperscript{272} Moreover, while experimentally demonstrating motivated applications of the exclusionary rule, the studies in this Article also revealed that not all participants were equally susceptible to this effect when judging the more egregious crime.\textsuperscript{273} The presence of this individual difference, if applicable to judges too, suggests that defendants may be deprived of even informal notice that criminal egregiousness matters in suppression determinations if this factor drives the admissibility of tainted evidence in some cases but not in others, with legal outcomes arbitrarily depending on the judge assigned to the case.

The discrepancy between doctrinal expectations and cognitive reality calls for an “accounting” in regard to the exclusionary rule.\textsuperscript{274} If consensus can be reached that the egregiousness of a defendant’s crime should matter in suppress-
sion judgments, then this factor should be considered in a transparent, systematic, and reviewable manner through substantive revisions to the law. Despite the risks and shortcomings of this route, discussed in Part IV.A above, it would still be preferable to surreptitious considerations of criminal egregiousness, because “[t]ransparency or openness about how decisions are being made facilitates the belief that decision making procedures are neutral.”275 Advocating for an explicit crime severity exception to the rule, John Kaplan observed: “For by purporting to apply the exclusionary rule in all classes of cases without actually doing so, the courts are paying the full political price without any real gain. Unfortunately, a major disadvantage of an empty threat is that sooner or later its objects realize its hollowness.”276 Alternatively, if rather than changing the law the justice system wants to adhere to the goals and protections underlying the exclusionary rule according to its current terms, it can draw upon the tools of psychology to confront and curtail inadvertently motivated applications of the doctrine.

Illustrating a potential remedy in this latter direction, the results of Study 3 also provide further cause for rejecting indifference toward motivated cognition in legal determinations. Participants who received the awareness instructions did not let the egregiousness of the defendant’s crime drive their admissibility judgments when their attention was drawn to this potential influence, which shows a commitment to upholding the law even when strict rule application thwarts personally desired punishment outcomes. This is a conscious choice worth respecting. It is consistent with the procedural justice literature277 as well as prior research on the flexible correction model that has shown “concerns for procedural legitimacy or for following the law per se can drive corrections” even when other motivations must be sacrificed.278

Thus, in addition to providing some evidence that the cognitive cleansing phenomenon demonstrated in Studies 1 and 2 can be corrected, Study 3 provides an argument for why motivated applications of the exclusionary rule psychological findings may require “either altering the law to comport with more accurate models of thinking and behavior or providing a transparent explanation of ‘the prudential . . . reasons for retaining a less accurate and outdated view.’”).


276. Kaplan, supra note 1, at 1046; see also Bellin, supra note 11, at 48 (arguing in regard to Fourth Amendment doctrine generally: “The real question, then, is not whether a certain scheme for incorporating crime severity is flawed, but whether the scheme is more flawed than one that ignores crime severity altogether.”).

277. See Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 ANN. REV. L. & SOC. SCI. 171, 171 (2005) (“[C]itizens care enormously about the process by which outcomes are reached—even unfavorable outcomes . . . .”); see generally Tyler, supra note 105.

278. Fleming et al., supra note 233, at 198. But see Sommers & Kassin, supra note 106, at 1374 (“[R]eaching a just verdict is often the strongest motivator of jurors . . . it seems to require unusual trial circumstances to overwhelm this motivation with procedural concerns . . . .”).
present a problem that merits correcting. Although decision makers may inadvertently tend toward prioritizing their own punishment goals, the finding that awareness-generating instructions can trigger a conscious reversal suggests that motivated cognition may be producing judgments that are inconsistent with how legal decision makers would choose to operate if cognitively equipped to do so. This is not intended to be an argument for faithful formalistic obedience to the law.279 Instead, the present work challenges the dichotomy between legal formalism and legal realism by showing that decision makers may be susceptible to a psychological phenomenon that drives their legal judgments without their full awareness, thereby limiting their capacity to be either full formalists or full realists.

The possibility of other more unambiguously objectionable factors driving suppression judgments underscores the normative implications of motivated cognition in the exclusionary context. Consider, for instance, how the discussion would change if admissibility decisions were shown to be covertly motivated not only by crime severity, but also by the race of the defendant. Racial inequality is certainly no stranger to applications of the Fourth Amendment and the administration of criminal justice.280 And although variation by race was not tested in this Article’s experiments, psychologists have noted that “aversive racism”—which is seen among people who have “good intentions [but] negative intergroup biases”—is often reserved for those circumstances in which actions are protected through plausible deniability,281 which the malleable legal exceptions to the exclusionary rule easily provide. If decision makers were found to be more likely to construe tainted evidence as admissible under an exception to the exclusionary rule in a case involving a black defendant rather than a white defendant, there would be no question as to whether this phenom-


enon should be regarded as a problem. 282

B. MOVING TOWARD REFORM

If successfully replicated in real-world settings, Study 3’s finding of a potential remedy that curtailed motivated cognition through instructional intervention could be operationalized for real judges and jurors through trainings or courtroom instructions that are grounded in psychology theory and empirical data. This section provides some preliminary thoughts on how the experimental findings could be put to practical use in various legal contexts, although significantly more empirical work and logistical investigation is needed before any of these possibilities can be actualized.

Awareness-generating instructions delivered by judges to jurors at the beginning and/or end of a trial, or even incorporated into the voir dire process as a “pre-cleansing” of legally extrinsic factors, could help more closely align the focus of lay decision makers with the goals of the law. Jurors do not apply the exclusionary rule, but this Article’s experimental findings are relevant to jury determinations in Section 1983, Bivens, and tort actions (discussed in Part IV.A above), where petitioners seeking civil damages for police misconduct are at risk of an adverse ruling based on the egregiousness of their own criminal activity. The playing field might be leveled for such petitioners if judges delivered awareness-generating instructions to cognitively orient jurors’ attention toward the police officers’ illegal conduct and away from the legally irrelevant nature of the defendant’s crime.

Countering the widely held skepticism about the efficacy of instructional interventions in courtroom settings, David Sklansky has argued in the context of evidentiary instructions that “the real myth” is that they do not work—which

282. In future work, I hope to experimentally test the role of race in suppression judgments in order to better understand the variations in interventions that might be necessary for curtailing different types of motivating factors. Civil damages alternatives to the exclusionary rule, discussed supra Part IV.A.2, would likely not provide a solution to the motivating influence of race. Compounding the general jury bias against criminal defendants, commentators have worried that jurors in civil cases “will often fear the robbers more than the cops because the robbers tend to be mostly poor and/or members of minority groups.” Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 850 (1994). Others have expressed concern that jurors may even applaud police officers who target such suspects, while “not respect[ing] the rights” of young, black defendants. Maclin, supra note 92, at 30–31.

Unfortunately, the awareness-generating instructions demonstrated in Study 3 may also be ineffective in countering aversive racism or other biases that stem from people’s personal, group, or cultural identities. When the underlying motivation is just as threatening for people to acknowledge as its influence on their judgments, calling attention to it could trigger a defensive, resistant response. See, e.g., Dan M. Kahan, Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases, 158 U. PA. L. REV. 729 (2010); Anca M. Miron et al., Motivated Shifting of Justice Standards, 36 PERSONALITY & SOC. PSYCHOL. BULL. 768 (2010). But see Kang et al., supra at 193, at 1175–77 (discussing attempts to address implicit racial bias in judicial decision making through awareness). In contrast, the motivating factor of criminal egregiousness in this Article’s experiments may have been conducive to cognitive correction via awareness-generating instructions because people know and are comfortable expressing their greater condemnation of morally repugnant crimes, even if they do not consciously intend for those feelings to motivate their admissibility decisions.
subsists to “spare[] us the messy but important task of assessing when . . . instructions are most likely to fail, how they can be made more effective, and what should follow from a recognition that they work, at best, imperfectly.” This Article’s studies, with further work in this direction currently underway, represent a step toward engaging in this task. As Sklansky noted, “Thinking about juries as groups of people—inhominently flawed, just as people are inherently flawed, but capable of reason, just as people are capable of reason—would allow us to think more sensibly, and more responsibly, not only about evidentiary instructions but about adjudication more generally.”

The same could be said of judges—who are, after all, people too. Therefore, the results of Study 3 suggest that perhaps judges should read awareness-generating instructions aloud in court, and/or place written instructions in the record for all to see, before rendering their own rulings too. Although further research conducted upon real judges in courtroom contexts is needed to confirm whether this strategy would yield useful results, prior psychology findings indicate that people who make a public commitment to acting in a certain way are more likely to then act in that particular way.

Judges may, however, be resistant to the suggestion that they need to explicitly remind themselves of the motivating influence of legally extrinsic factors before making determinations. They might assume that their years of legal training and repeated applications of legal rules have made them fully cognizant of such factors that jurors are less likely to recognize. Indeed, the studies on judicial decision making described in Part III.D above found that judges have stronger illusions of objectivity about their own judgments than lay people do, even when such confidence is not warranted.

Thus, a more feasible approach might be to focus on first educating judges, through conference workshops and training programs, about their susceptibility to motivated cognition. Judicial conferences are increasingly offering sessions in which psychologists inform judges about potential cognitive biases in their decision making, through a combination of empirical data presentations and experimental exercises with the judges in the audience. In addition, some state courts have undertaken initiatives to train judges and court staff “to recognize implicit bias as a potential problem[,] which in turn should increase

283. Sklansky, supra note 252, at 409.
284. Id. at 410.
285. See, e.g., Lieberman & Arndt, supra note 252, at 705; Anne Marike Lokhorst et al., Using Tailored Information and Public Commitment to Improve the Environmental Quality of Farm Lands: An Example from the Netherlands, 38 HUM. ECOLOGY 113, 116 (2010); Prashanth U. Nyer & Stephanie Dellande, Public Commitment as a Motivator for Weight Loss, 27 PSYCHOL. & MARKETING 1, 9 (2010); Roxanne Parrott et al., Communicating to Farmers About Skin Cancer: The Behavior Adaptation Model, 24 HUM. COMM. RES. 386, 399-400 (1998).
286. See Landsman & Rakos, supra note 191, at 125; Redding & Reppucci, supra note 187, at 49.
motivation to adopt sensible countermeasures.” Such venues present good opportunities to also begin meaningfully addressing motivated applications of specific legal doctrines, like the exclusionary rule.

As a next step, the practice of reading awareness-generating instructions aloud in court and into the record could be “pitched” to judges as serving the added purpose of bolstering public confidence in the judiciary. The need for this is suggested by national polling findings that public faith in courts is lower than it used to be, with three-quarters of Americans across ideological lines expressing concern that judges are influenced by their personal or political views rather than by legal analysis alone. As discussed in Part V.A above, evidence that authorities are making decisions fairly is a key component of procedural justice, which leads people to “rate the courts and court personnel more favorably, indicating higher levels of trust and confidence in the court system.” A courtroom practice of judges engaging with awareness-generating instructions that explicitly confront the potential influence of legally irrelevant factors on their own decision making could thus serve not only to actually curtail motivated cognition, but also to symbolically convey judicial commitment to informed and transparent adjudication—thereby potentially strengthening both the actual and perceived integrity of the legal system.

One might question whether lay people’s punishment goals, as exhibited in Studies 1 and 2, would make stricter judicial adherence to the exclusionary rule in cases of egregious crime cause greater harm to the legitimacy of courts than circumventing the doctrine via motivated cognition. As then-Judge Benjamin Cardozo famously objected: “The criminal is to go free because the constable has blundered . . . . The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society.”

288. Kang et al., supra note 193, at 1175.
290. Tyler & Jackson, supra note 275, at 7; see also Tyler, supra note 176, at 284 (“[P]eople’s reactions to legal authorities are based to a striking degree on their assessments of the fairness of the process by which legal authorities make decisions . . . .”); Andrew E. Taslitz, Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule, 10 OHIO ST. J. CRIM. L. 419, 459 (2013) (“The failure of the judiciary to meet either the objective (consistency in reality) or subjective (perceived consistency) requirements of integrity eats away at the judiciary’s purity of identity as one committed to the rule of law in a democracy.”).
291. People v. DeFore, 242 N.Y. 13, 21, 24 (1926); see also Burger, supra note 35 at 22 (“If a majority—or even a substantial minority—of the people in any given community . . . come to believe that law enforcement is being frustrated by what laymen call ‘technicalities,’ there develops a sour and bitter feeling that is psychologically and sociologically unhealthy.”); Dallin H. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 737 (1970) (noting that the exclusionary rule creates “resentment” and “destroys respect” for the law); Christopher Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. ILL. L. REV. 363, 436 (1999) (arguing that the exclusionary rule is doing “more damage to public respect for the courts than virtually any other single
On the other hand, judges who admit tainted evidence bear the risk of being “perceived by the public as having failed to protect citizens from abuses of the police.” 292 And more generally, advocates of the exclusionary rule have countered that “the relevant sort of public perception is confidence that courts are acting as courts should, regardless of whether the public agrees with any particular decision.” 293 Indeed, as noted earlier, one of the rationales for the exclusionary rule (albeit less favored by the Court than the deterrence goal) was to “maintain respect for the law” by “preserve[ing] the judicial process from contamination” of tainted evidence. 294 Scholars have argued that empirical literature on procedural justice “provide compelling support” for this position. 295 Moreover, this Article’s findings that lay participants expressed high confidence in the integrity of judges, 296 and themselves chose to apply the law according to its neutral terms when cognitively equipped to do so (even when this conflicted with their personal punishment goals), 297 suggests that members of the public may be inclined to laud rather than disrespect judges for honoring those same values.

At a methodological level, the studies in this Article call into question the binary (yes-no, admissible-inadmissible) format in which legal decisions are made. The experimental results accord with previous findings of motivated cognition in the perceived likelihood of events, with “[m]ore desirable events . . . perceived as more likely to occur.” 298 Explaining this phenomenon, Kunda suggested:

One possibility is that the bias affect[s] not subjects’ probability estimates, but rather the subjective interpretation of these estimates. Thus, people may interpret their belief that an event has a 60% probability of happening to mean that the event is either slightly likely or somewhat likely to happen, depending on whether they want to view it as likely. Such an interpretation, in turn, may affect their willingness to assume and bet that the event will occur. 299

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293. Taslitz, supra note 290, at 468.
294. Olmstead v. United States, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting); see supra notes 8–10 and accompanying text.
295. Schulhofer et al., supra note 271, at 363–64 (“To be sure, a prosecutor’s ability to use illegally seized evidence increases her capacity to secure a conviction and a long sentence, an unequivocal crime control benefit if viewed strictly in the short term. But the strong and consistent finding of the relevant research is that the net effect of law enforcement disregard for the law is likely to be the opposite, because judicial tolerance for Fourth Amendment violations will generate disrespect for authority, chill voluntary compliance, and discourage law-abiding citizens from offering the cooperation that makes it possible to apprehend and convict other offenders in future cases.”).
296. See supra notes 147–48 and accompanying text.
297. See supra notes 244–48 and accompanying text.
298. Kunda, supra note 4, at 488.
299. Id.
Here, the participants judging the heroin case may have had a lower threshold for what would make discovery of the evidence “inevitable” as compared to those judging the marijuana case, particularly when required to definitively commit one way or the other. In Study 1, which used continuous scales, just 7% of the participants in the heroin condition selected the extreme end of the scale labeled “yes, the drugs definitely would have been discovered.” Whereas when presented in Study 2 with only the dichotomous option of reporting whether lawful discovery of the evidence was “inevitable” or not, 57% of the heroin participants stated that such discovery was inevitable.

There is a practical necessity for definitive answers in legal cases, but the difference in the responses produced by these two question formats suggests that perhaps the legal system should consider alternative ways for decision makers to express their judgments in order to reduce the impact of motivated cognition. For example, where feasible, there could be a double-layered decision making process that would enable jurors (or panels of judges) to report their individual judgments on continuous scales that are then formulaically calculated into a definitive outcome (as long as such measures do not impinge on the jury’s ability to autonomously render a general verdict). Some form of the awareness-raising remedy identified in Part IV.B, however, would still be a necessary accompaniment given that Studies 1 and 3 revealed a significant motivated cognition effect even when the participants made judgments on continuous scales.

Finally, although this Article has focused on the exclusionary doctrine as a testing ground for experimentally demonstrating and curbing motivated cognition, this psychological process can infiltrate many types of legal decision making—by both judges and jurors, across any area of law, through a number of legally extrinsic motivating factors. Future studies could therefore empirically test and expand upon the preliminary proposals sketched above in a variety of adjudication contexts beyond the suppression of tainted evidence. Additional experimental work is also needed to investigate whether the interpersonal dynamics of group decision making in juries or panels of appellate judges exacerbates, ameliorates, or perhaps has no effect on the motivated cognition demonstrated at the individual level in these studies. Furthermore, research on repeat players would be helpful in determining the value of instructional interventions with judges, and whether reiteration makes such remedies more or less effective over time. There are of course no guarantees (nor expectations) that psychology-based reforms will succeed at entirely putting an end to motivated legal decision making. However, especially in light of the promising

300. See, e.g., supra Parts III.D.1, V.A, and V.B; Sood, supra note 4.
301. See generally Norbert L. Kerr et al., Bias in Judgment: Comparing Individuals and Groups, 103 PSYCHOL. REV. 687 (1996) (discussing a meta-analysis of empirical literature revealing no clear answer as to whether decision making is more biased among individuals or groups); Sklansky, supra note 252, at 433 (suggesting “studies that include group deliberation have been more likely to find that limiting instructions work”).
results of Study 3, this is an arena in which it is worth applying the “important distinction . . . between working perfectly and working at all.”

CONCLUSION

This Article has sought to experimentally confront, psychologically explain, and propose a potential cognitive pathway toward curtailing the unintended influence of criminal egregiousness in applications of the exclusionary rule. Its findings caution against letting legally irrelevant factors drive law-related judgments in a covert manner, especially given that decision makers may choose not to engage in this inadvertently motivated process when cognitively empowered to resist it. This research does not seek to advocate for or against any particular law. Rather, it strives to combine doctrinal understanding with the theoretical and methodological tools of social psychology to facilitate informed legal decision making that is more consistent with the values of the justice system and the realities of human cognition.

302. Sklansky, supra note 252, at 415, 419.