UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 92 | Number 4 Article 10

5-1-2014

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INTRODUCTION

After a century of evolution, the Fourth Amendment's exclusionary rule may be in danger of extinction. Several recent Supreme Court decisions have threatened to dramatically curtail the suppression remedy,[1] yet the Court has not expressly abandoned it.[2] Instead, the Court has increasingly focused upon an element not inherent in the rule itself: proportionality.[3] This focus on proportionality shifts away from the traditional rule-exception paradigm and attempts to balance the social interests protected by enforcing Fourth Amendment rights against the social costs incurred by allowing guilty criminals to benefit from excluded evidence.[4]

Recent Supreme Court decisions also reflect a narrow view of the exclusionary rule's deterrence value, primarily assessing the deterrent effect on individual law enforcement actors instead of applying the rule as part of a larger social scheme.[5] By abandoning

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1. *See generally* Davis v. United States, 131 S. Ct. 2419 (2011) (holding that the exclusionary rule does not apply where law enforcement reasonably relied on binding appellate precedent in conducting an unreasonable search or seizure); Herring v. United States, 555 U.S. 135 (2009) (holding that a good faith exception to the exclusionary rule applies in cases of negligent law enforcement error); Hudson v. Michigan, 547 U.S. 586 (2006) (holding that the exclusionary rule does not apply in cases of knock-and-announce violations).

2. *See Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule . . . is not in doubt.").

3. *See, e.g., Herring*, 555 U.S. at 141 ("[T]he benefits of deterrence must outweigh the costs. 'We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.' " (quoting Pa. Bd. of Prob. & Patrol v. Scott, 524 U.S. 357, 368 (1998))).

4. *See, e.g., id.* (describing the "possible benefit" as deterrence and the social cost as allowing "guilty and possibly dangerous defendants [to] go free"); *see also* Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 243 (2010) ("For a small violation of Fourth Amendment rights, a dangerous and guilty criminal can obtain a tremendous benefit.").

5. *See, e.g., Davis*, 131 S. Ct. at 2427–28 ("In a line of cases beginning with *United States v. Leon*, we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the flagrancy of the police misconduct at issue. The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion var[y] with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly

the broader theory of systemic deterrence that underlies early exclusionary rule jurisprudence,[6] the Court potentially undervalues the benefits of exclusion. As a result, the proportionality test skews heavily to allow exceptions, further decreasing the rule's deterrence value.[7]

United States v. Fofana[8] is the Sixth Circuit's recent attempt to weigh deterrence against social costs to determine whether the suppression remedy should apply. *Fofana* could be interpreted a number of ways, including as confirmation that the exclusionary rule is useless as a remedy for Fourth Amendment violations.[9] A more generous reading of *Fofana*, however, suggests that the opinion exemplifies the incompatibility of a remedy justified by deterrence and a narrow, individual-centered theory of deterrence.

This Recent Development examines *Fofana* as an illustration of a flawed conception of deterrence and the resulting imbalance of the proportionality analysis. Analysis proceeds in four parts. Part I presents the essential background to the proportionality analysis and *Fofana*'s central facts and holdings. Part II critiques *Fofana*'s deterrence assessment and distinguishes deterrence from punishment. Part III examines individual and systemic deterrence and posits that systemic deterrence is the best rationale to empower the exclusionary rule. Part IV argues that the individual deterrence rationale, within a

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negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force . . . ." (alteration in original) (citations and internal quotation marks omitted)); *see also* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 254 (2013) (describing *Leon*'s exemption of judicial conduct as "remov[ing] an effective device for reviewing the Fourth Amendment decisions of magistrates and providing constitutional guidance to judges and law enforcement officials generally").

6. *See* Elizabeth Phillips Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 955–56 (noting the theory of "systemic deterrence" underlying the early jurisprudence of the exclusionary rule).

7. *See* David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 29–56 (2013) (explaining that the Court's current deterrence rationale has led to problematic doctrines in Fourth Amendment law, including the good faith exception, the cause requirement, and the standing requirement).

8. 666 F.3d 985 (6th Cir. 2012).

9. *Cf.* Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule,"* SCOTUSBLOG (June 25, 2011, 8:58 AM), http://www.scotusblog.com/2011/06/opinion-analysis-the-fading-exclusionary-rule/ (stating that the goal of the Court's majority is to ensure that less evidence is suppressed).

vigorous proportionality test as applied in *Fofana*, fundamentally undermines the rule itself.

I. ESSENTIAL BACKGROUND AND FACTS

A. Hudson*'s Framework for Proportionality in Applying the Exclusionary Rule*

The Fourth Amendment declares "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[10] Because the Constitution is silent on redress for Fourth Amendment violations, the Supreme Court has developed the principle known as the exclusionary rule: subject to certain exceptions, illegally obtained evidence cannot be admitted at trial against the victim of the unreasonable search or seizure.[11] Traditionally, the exclusionary rule has been applied to suppress evidence primarily or secondarily derived in violation of the Fourth Amendment, a concept known as the "fruit of the poisonous tree."[12] Evidence that might be excluded under the fruit of the poisonous tree principle may still be admissible under one of several recognized exceptions, such as the independent source,[13] inevitable discovery,[14] and attenuation doctrines.[15]

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10. U.S. CONST. amend. IV.

11. For comprehensive treatment of the exclusionary rule's decisional history and the expansion and contraction of the suppression doctrine over time, see generally 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2012 & Supp. 2013–2014); MACLIN, *supra* note 5.

12. *See* Segura v. United States, 468 U.S. 796, 804 (1984) ("Under this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree." (citations and internal quotation marks omitted)); Nardone v. United States, 308 U.S. 338, 341 (1939).

13. *See* Nix v. Williams, 467 U.S. 431, 443 (1984) ("When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.").

14. *See id.* at 434 ("[E]vidence . . . was properly admitted on the ground that it would ultimately or inevitably have been discovered even if no violation of any constitutional or statutory provision had taken place.").

15. *See* Wong Sun v. United States, 371 U.S. 471, 487–88 (1963) ("We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (citation and internal quotation marks omitted)).

In *Hudson v. Michigan*,[16] the Supreme Court observed that tainted evidence could still be admissible if the "considerable" costs of suppression outweighed the gains of deterring unlawful conduct.[17] Under the majority's proportionality analysis, suppression depends on an assessment of the relative strength of deterrence and the availability of alternate remedies.[18] The cost-benefit approach has been applied in Supreme Court exclusionary rule cases since Justice White introduced this balancing test in *Alderman v. United States*.[19] But the tone of Justice Scalia's language in *Hudson* arguably expanded proportionality's significance by asserting that suppression "has *never* been applied except 'where its deterrence benefits outweigh its "substantial social costs." ' "[20] By describing the proportionality analysis as an inquiry independent of traditional exceptions, *Hudson* may invite lower courts to apply an expansive cost-benefit analysis that will forbid suppression in numerous contexts.

B. Fofana*'s Central Facts, Holding, and Rationale*

In November 2007, a man opened two bank accounts at U.S. Bank in Cincinnati, Ohio.[21] As proof of identity, he provided a passport with the name "Ousmane Diallo."[22] The IRS deposited tax refunds belonging to other individuals into "Diallo's" accounts between February 2008 and January 2009.[23] Upon discovering the fraud, U.S. Bank blocked the accounts, notified the IRS, and filed a police report.[24] According to the government, an investigation of the accounts began sometime before January 31, 2009.[25]

16. 547 U.S. 586 (2006).

17. *See id.* at 594–95 (noting that these costs include the release of "dangerous criminals," a "massive remedy" for what the Court considered a relatively trivial violation).

18. *See id.* at 596–99 (citing alternate remedies such as civil suits and police professionalism).

19. *See* Alderman v. United States, 394 U.S. 165, 174–75 (1969); *see also* MACLIN, *supra* note 5, at 264 ("White's opinion in *Alderman* introduced this [cost-benefit balancing] methodology, and it has been a mainstay of the Court's analysis in suppression cases ever since.").

20. *Hudson*, 547 U.S. at 594 (emphasis added) (citation omitted) (quoting Pa. Bd. of Prob. & Patrol v. Scott, 524 U.S. 357, 363 (1998)).

21. United States v. Fofana, 666 F.3d 985, 986 (6th Cir. 2012).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

That day in January, at the Port Columbus International Airport, a passenger named Fode Fofana was flagged for additional Transportation Security Administration ("TSA") screening.[26] Although passengers may be flagged for additional screening for several reasons, including "travel characteristics identified by the TSA as indicating potential security risks," there is no information to indicate why Fofana was selected.[27] After Fofana had been patted down and his luggage checked for explosive residue and weapons, TSA agent Tarah Stroud continued to search through fourteen to sixteen envelopes uncovered in the search.[28] Three of these envelopes contained passports, each with a different name, including "Ousmane Diallo."[29] Agent Stroud admitted that she was not searching the envelopes for weapons or explosives, but rather was "looking for contraband."[30] Law enforcement officers subsequently arrested Fofana.[31] Using the information received in the TSA search, U.S. Bank concluded that "Ousmane Diallo" was an alias belonging to Fofana.[32]

After he was indicted on three counts of possession of a false passport and two counts of bank fraud, Fofana filed a motion to suppress all evidence obtained by Agent Stroud, arguing that her search of the envelopes was illegal.[33] The district court granted the motion, recognizing that "the extent of the search went beyond the permissible purpose of detecting weapons and explosives and was instead motivated by a desire to uncover contraband evidencing ordinary criminal wrongdoing."[34] The district court granted a second motion to prohibit introduction of all evidence with Diallo's name—including the bank records—as fruit of the poisonous tree, concluding that the relationship between Fofana and his alias could not clearly be established through any exception.[35]

The Sixth Circuit reversed and declared the bank records admissible.[36] Struggling (and arguably failing) to find an independent

26. *Id.* at 987.
27. *See* United States v. Fofana, 620 F. Supp. 2d 857, 859 (S.D. Ohio 2009).
28. *Id.* at 859–60.
29. *Id.* at 860.
30. *Id.* at 860–61.
31. *Id.* at 861.
32. United States v. Fofana, 666 F.3d 985, 987 (6th Cir. 2012).
33. *Id.*
34. *Fofana*, 620 F. Supp. 2d at 863.
35. *See Fofana*, 666 F.3d at 987.
36. *See id.* at 987–88, 991.

source exception,[37] the court rested its decision primarily upon a cost-benefit analysis similar to the one modeled in *Hudson*.[38] While the Sixth Circuit did not cite to *Hudson* or expressly indicate that it would apply any standard outside the traditional exceptions, three of *Fofana*'s four rationales address deterrence and social policy concerns. First, the majority found that suppression served little deterrent effect when "the illegal search was not directed to the crime, or even the type of crime" at issue.[39] Second, suppressing the passports uncovered in the airport search provided "an alternate, more direct deterrent."[40] Finally, suppressing the bank records would "unduly burden[] the truth-seeking function of courts by effectively precluding relevant and legitimately obtained evidence from ever being used."[41] A closer inspection of the *Fofana* majority's assessment provides a helpful backdrop for evaluating the role of deterrence in the proportionality approach to exclusion.

II. *FOFANA*'S DETERRENCE ANALYSIS: A DOUBTFUL ANSWER TO A GOOD QUESTION

Ever since *United States v. Calandra*[42] confirmed that deterrence is the primary rationale for the exclusionary rule,[43] courts have applied this rationale as a basis either to uphold suppression or create an exception. Recognizing that deterrence may not be effective in all circumstances,[44] the Roberts Court in particular has applied a

37. The Sixth Circuit's first rationale relies upon the fact that the government already possessed the records bearing Diallo's name. *See id.* at 987–88. The majority analogized to *United States v. Ceccolini*, 435 U.S. 268 (1978), and to *United States v. Crews*, 445 U.S. 463 (1980), to characterize the bank records as independently obtained evidence with an independent capacity to identify Fofana as Diallo. *See Fofana*, 666 F.3d at 988–90. However, the court stopped short of specifically holding that the bank records fell within either of the *Ceccolini* or *Crews* exceptions. *See id.*

38. *Compare Fofana*, 666 F.3d at 991 ("Balancing this interest against the comparatively weak Fourth Amendment interests in this case compels the conclusion that the bank records be admitted."), *with* Hudson v. Michigan, 547 U.S. 586, 594 (2006) ("[T]he exclusionary rule has never been applied except 'where its deterrence benefits outweigh its substantial social costs.' " (quoting Pa. Bd. of Prob. & Patrol v. Scott, 524 U.S. 357, 363 (1998)) (internal quotation marks omitted)).

39. *See Fofana*, 666 F.3d at 988–89.

40. *See id.* at 988–90.

41. *See id.* at 988, 990.

42. 414 U.S. 338 (1974).

43. *See id.* at 348 (describing the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved").

44. *See* Eugene Michael Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33, 37–38 (1979) (noting situations where deterrence measures will not prevent unlawful conduct).

vigorous deterrence-focused analysis to determine whether the rationale supports excluding important evidence.[45] Justice Scalia rejected exclusion as a deterrent to knock-and-announce violations in *Hudson*, asserting that "we cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."[46] Justice Roberts wrote in *Herring v. United States*[47] that the degree to which deterrence justifies the suppression remedy "varies with the culpability of the law enforcement conduct,"[48] holding that the exclusionary rule "is not an individual right and applies only where it 'result[s] in appreciable deterrence.' "[49] However, *Fofana* illustrates just how precarious a deterrence analysis becomes as courts struggle to determine what deterrence is, to whom it should apply, or how broadly or narrowly the factual circumstances should be interpreted to render a conclusion.

The *Fofana* majority concluded that deterrence was minimally served, reasoning both that the illegal TSA search was not connected to the bank fraud and that suppressing the passports provided the most effective deterrent.[50] To support the first claim, the court analogized to *United States v. Ceccolini*,[51] where the Supreme Court relied on the attenuation doctrine to admit witness testimony obtained by a police officer following an illegal search.[52] In *Ceccolini*, a police officer entered a flower shop to converse with his friend, an employee at the shop.[53] The officer picked up and examined an envelope containing cash and policy slips.[54] Without explaining to his friend what he had found, the officer asked her to identify the owner of the envelope.[55] The Supreme Court determined that because the police officer did not enter or search with any intention of discovering

45. *See* MACLIN, *supra* note 5, at 325–27, 337–43 (examining the deterrence rationales and implications in *Hudson*, *Herring*, and *Davis*).

46. Hudson v. Michigan, 547 U.S. 586, 597 (2006).

47. 555 U.S. 135 (2009).

48. *Id.* at 143.

49. *Id.* at 141 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)) (citation and internal quotation marks omitted).

50. *See* United States v. Fofana, 666 F.3d 985, 989–90 (6th Cir. 2012).

51. 435 U.S. 268 (1978).

52. *See id.* at 279. To support its decision, the Court pointed to the substantial interval of time between the search and the live testimony, as well as the free will of the witness. *See id.* The Court emphasized the distinction between a live witness and physical evidence in declining to suppress the testimony. *See id.* at 278–79.

53. *Id.* at 269–70.

54. *Id.* at 270.

55. *Id.*

either illegal activity or a witness, "[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on [such] behavior."[56] In *Fofana*, the Sixth Circuit conceded that the TSA agent admitted to searching for contraband, which the court identified as the passports.[57] However, the court reasoned that the relevance of the passports—the link between Fofana and his alias—was "quite remote from what could reasonably have been expected to result from the search."[58] The court concluded that suppressing the link would have a "minimal deterrent effect in the future."[59]

The Sixth Circuit's comparison to *Ceccolini* is flawed for two reasons. First, as Judge Moore noted in her dissent, the TSA agent's activities were clearly "aimed at implicating Fofana in criminal wrongdoing. By finding the passports . . . the agent succeeded in this aim regardless of whether the agent specifically foresaw and intended this exact result."[60] Second, the court overlooked the dramatically disparate nature of an administrative TSA search and a police officer's happenstance discovery from a friend.[61] Judge Moore highlighted this disparity by emphasizing the greater deterrence purpose necessitated by the administrative function of the TSA search and the number of travelers subjected to it daily[62]:

> Given the incidental, casual encounter in *Ceccolini* between the officer and his friend, . . . it is easy to see how the Court was confident that there was no future misconduct to deter. In contrast, . . . [g]iven the broad discretion already granted to TSA agents to search the traveling public, it is important to deter unconstitutional conduct and to ensure that TSA's broad powers are not improperly exploited for law-enforcement purposes.[63]

As Judge Moore concluded, a more accurate assessment of suppression's true deterrence value would consider the TSA agent's knowingly wrongful conduct, as well as the TSA's broad scope of power and the potential for abuse.

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56. *See id.* at 279–80.
57. *See* United States v. Fofana, 666 F.3d 985, 989 (6th Cir. 2012).
58. *Id.*
59. *Id.*
60. *Id.* at 994 (Moore, J., dissenting).
61. *Compare Ceccolini*, 435 U.S. at 269–70 (describing a police officer's happenstance discovery of information through a friend), *with* United States v. Fofana, 620 F. Supp. 2d 857, 859–61 (S.D. Ohio 2009) (detailing the illegal TSA search).
62. *See Fofana*, 666 F.3d at 994 (Moore, J., dissenting).
63. *Id.*

The majority then adopted the *Hudson* strategy of evaluating other remedial measures[64] to determine that suppressing only the passports, but not the link to Fofana's alias, provided "an alternate, more direct deterrent."[65] Such a theory makes some sense, at least superficially: the unlawfully discovered passports could not be used as evidence, whereas the bank records, obtained independently and legally, were part of a "second, more remote" investigation.[66]

However, the Sixth Circuit's reasoning not only misses the essence of the *Hudson* Court's approach, it also creates an implausible distinction between tangible evidence and its relevance. In *Hudson*, the Court made the controversial assertion that alternative remedies to the exclusionary rule, specifically civil suits and police professionalism, were better deterrents for a knock-and-announce violation than suppression.[67] Regardless of whether the *Hudson* Court was correct in its evaluation of truly alternate remedies, the *Fofana* majority took a more radical approach by separating a suppression remedy into degrees.[68] Even though the passports should be suppressed, the court reasoned, the *significance* of the passports was still admissible.[69] For deterrence purposes, though, the distinction between the physical evidence and its relevance is illusory because the government retains an incentive to obtain the information illegally. Even if such a distinction can be made, the central problem is that both the passports and the link to Fofana's alias allow for "successful prosecution based on the fruits of this search," which in turn incentivizes law enforcement to engage in future misconduct.[70]

A failure to fully appreciate the underlying incentives for law enforcement subverts both of *Fofana*'s deterrence rationales. If deterrence is to be weighed in a fact-bound inquiry, it is critical that courts first understand how deterrence functions. While it seems that

64. *Compare* Hudson v. Michigan, 547 U.S. 586, 596–99 (2006) (evaluating alternative remedial measures to suppression—civil suits and increased professionalism in police forces), *with Fofana*, 666 F.3d at 989–90 (analyzing the effectiveness of suppressing the passports—the tangible evidence found during the illegal search—rather than the bank records).

65. *Fofana*, 666 F.3d at 988.

66. *See id.* at 990.

67. *See Hudson*, 547 U.S. at 596–99; *see also* 1 LAFAVE, *supra* note 11, § 1.2(c) (noting the inadequacies of proposals to replace or limit the exclusionary rule).

68. *See Fofana*, 666 F.3d at 989–90.

69. *See id.* at 988; *see also id.* at 992 (Moore, J., dissenting) ("It is the establishment of the connection between Fofana and the alias Ousmane Diallo that is important for our analysis—not the prior legal possession of the bank records themselves.").

70. *See id.* at 994 (Moore, J., dissenting).

the *Fofana* court conceived of deterrence as a kind of punishment,[71] deterrence in the exclusionary rule context is more precisely the absence of incentives.[72] As one commentator explained, "[e]videntiary suppression has never been punitive in character .... Deterrence results from removing incentives for future illegalities—i.e., depriving the government of illegally obtained advantages."[73] Understood as a forward-looking device to prevent future wrongdoing, a proper deterrence analysis could neither ignore the exploitation of the TSA's broad powers nor divest evidence of its significance.

This crucial distinction between punishment and incentives has significance beyond semantics. A broad understanding of deterrence operates from the view that legislative bodies and law enforcement agencies have a duty to encourage and abide by constitutional restraints. The court's role, under a broad deterrence theory, is to remove any incentive to disregard these restraints and thereby prevent future violations within the system.[74] Thus, "application of the exclusionary rule on a systemic basis seeks to teach by example throughout all law enforcement agencies."[75] The aim of the exclusionary rule is not to punish or specifically deter police "in the same way that the criminal law deters illegal behavior by civilians," but rather to operate as a disincentive for illegal law enforcement conduct.[76]

III. THE REAL VALUE OF EXCLUSION: SYSTEMIC VERSUS INDIVIDUAL DETERRENCE

The Sixth Circuit's difficulty with its deterrence analysis demonstrates the confusion resulting from the Supreme Court's questionable deterrence theories and applications. The primary question surrounding the deterrence rationale is whether the

71. *See id.* at 989–90 (majority opinion) (stating that the deterrent effect of the passport exclusion is "particularly powerful since it effectively eliminates the possibility of convicting Fofana of the first three counts of his indictment").

72. *See* United States v. Peltier, 422 U.S. 531, 556–57 (1975) (Brennan, J., dissenting) ("[O]ne general fallacy in the reasoning of critics of the exclusionary rule is the belief that the rule is meant to deter official wrongdoers by punishment or threat of punishment.... [T]he exclusionary rule ... depends not upon threatening a sanction for lack of compliance but upon removing an *inducement* to violate Fourth Amendment rights.").

73. James J. Tomkovicz, Davis v. United States*: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 401 (2011).

74. *See* Marsh, *supra* note 6, at 956.

75. *Id.*

76. *See* MACLIN, *supra* note 5, at 98 (explaining that the decision to describe "the rule as a deterrent was a strategic and linguistic mistake").

exclusionary rule should deter illegal conduct at a systemic or an individual level.[77] Early exclusionary rule jurisprudence envisioned a systemic purpose for the remedy.[78] But beginning shortly after *Calandra* and continuing through *Herring*, the Burger, Rehnquist, and Roberts Courts have applied a backward-looking factual analysis to determine whether the suppression remedy satisfied its deterrent function in specific circumstances.[79]

The *Fofana* majority employs this narrow, backward-looking approach as well by focusing on the TSA agent's expectations. For the Sixth Circuit, the fact that the bank fraud investigation was not the object of the TSA search was critical to its holding that the deterrence value of suppression would be minimal.[80] By framing the bank fraud investigation as entirely independent of the illegal search, the court was able to deflect its analysis away from the fact that the TSA agent admittedly and illegally searched for "contraband."[81] The fact that the TSA agent's search was "aimed at implicating Fofana in criminal wrongdoing" and was successful even without intending this precise result became irrelevant for individual deterrence purposes once this questionable distinction between the search and the investigation had been made.[82]

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77. *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 342–47 (1982) (explaining the competing views of deterrence in the context of the good faith exception); *The Supreme Court, 1994 Term—Leading Cases*, 109 HARV. L. REV. 111, 135–37 (1995) (critiquing the Court's failure to appreciate the systemic-deterrent effect of the exclusionary rule in Arizona v. Evans, 514 U.S. 1 (1995)).

78. *See* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 669–71, 709–10 (1970) (noting that the exclusionary rule was designed to affect the behavior of not just an individual officer, but of "all law enforcement officials and society at large").

79. *See, e.g.*, Herring v. United States, 555 U.S. 135, 144 (2009) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."); Arizona v. Evans, 514 U.S. 1, 14 (1995) ("If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees."); United States v. Leon, 468 U.S. 897, 918 (1984) ("We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment.").

80. *See* United States v. Fofana, 666 F.3d 985, 989 (6th Cir. 2012).

81. *See id.*

82. *See id.* at 994 (Moore, J., dissenting).

Justice Brennan, dissenting in 1975 against the emergence of a subjective deterrence inquiry, argued that the deterrence rationale should not be so limited:

> Deterrence can operate in several ways. The simplest is special or specific deterrence—punishing an individual so that *he* will not repeat the same behavior. But "[t]he exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement official who has broken the rule. . . . The exclusionary rule is aimed at affecting the wider audience of all law enforcement officials and society at large. It is meant to discourage violations by individuals who have never experienced any sanction for them."[83]

Dissenting again a few years later in *United States v. Leon*,[84] one of the first cases to narrow the scope of deterrence, Justice Brennan reiterated that "the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally."[85] Seen from a broader perspective, the exclusionary rule serves to remedy the dispute that arises "not between the arresting officer and the defendant, but rather between the defendant and the state."[86]

Thinking of deterrence as a systemic force changes the framework of the debate. The central question is no longer whether "there is some specific deterrent consequence which is to be *gained* by *excluding* the illegally obtained evidence. Rather, it is whether in such circumstances there is something to be *lost* . . . by *admitting* the evidence acquired in violation of the [F]ourth [A]mendment."[87] Thus, in assessing the costs to society, the *Fofana* majority overlooked the important fact that the real burden imposed upon courts derives from the Fourth Amendment itself.[88] The government is not justified in using "relevant and trustworthy evidence"[89] it has obtained illegally. The "truth-seeking function of the courts"[90] must encompass all the truth. It is not enough to consider only that a criminal defendant will

83. United States v. Peltier, 422 U.S. 531, 556–57 (1975) (Brennan, J., dissenting) (quoting Oaks, *supra* note 78, at 709–10).

84. 468 U.S. 897 (1984).

85. *Id.* at 953 (Brennan, J., dissenting).

86. *See* LaFave, *supra* note 77, at 350.

87. *Id.* at 347.

88. *See* U.S. CONST. amend. IV.

89. *See* United States v. Fofana, 666 F.3d 985, 990 (6th Cir. 2012).

90. *Id.*

walk away completely free when it is equally true that the government has violated a constitutional boundary.

Whereas a narrow view of deterrence tends to look backward at specific actors in a factual inquiry, a broader view looks forward to preventing future constitutional impropriety among all entities, not just those in the instant case. This systemic view better reflects the scope and focus of the Fourth Amendment itself:

> Rather than mandating that the police shall not undertake unreasonable searches and seizures, the Amendment declares that the right of the people to be free from unreasonable searches and seizures shall not be violated. The focus of the Amendment is on the rights of the citizen, not the conduct of the police. Indeed, at the time of the adoption of the Fourth Amendment, the "police" as we know them did not even exist. Thus, a narrow application of the exclusionary rule that focuses only on deterring police misconduct, not on preventing future violations of the Amendment, is inconsistent with the spirit of the Fourth Amendment, and fails to enforce its full command.[91]

Under a systemic deterrence framework, the characters in a criminal case play only a minor role. The suppression remedy is applied to deter the justice system itself, not just to sanction an individual officer.[92] The individual officer's actions and motivations become irrelevant. Likewise, the defendant becomes only an "incidental beneficiary"[93] in the hope of reducing future violations and securing more citizens in their persons, effects, homes, and papers.

One scholar compares this theory of deterrence with the colorful example of branding televisions to make them less valuable if stolen and resold:

> Of course a branded television set may nonetheless be stolen by someone who does not notice it is branded, or who thinks that he can sell it even with the brand, or who simply wants to watch the Superbowl on it. But at least the effort to depreciate its worth makes it less of an incitement than it might be.[94]

The deterrent effect, then, is achieved through principled boundaries that remove the incentive to disregard constitutional limits. It vests the responsibility for constitutional safeguards in "those who

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91. *The Supreme Court, 1994 Term—Leading Cases*, *supra* note 77, at 135–36.

92. *See supra* note 78.

93. LaFave, *supra* note 77, at 346.

94. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974).

formulate law enforcement policies, and the officers who implement them" in the hope that legislative bodies and enforcement agencies will adopt better procedures and professional practices.[95]

While opinions differ over the actual deterrent effect of the exclusionary rule, there is some reason to believe that *Mapp v. Ohio*,[96] which applied the exclusionary rule to the states,[97] did instigate better police professionalism practices. Justice Scalia wrote in *Hudson* that the past half-century had seen an "increasing professionalism of police forces, including a new emphasis on internal police discipline."[98] Consequently, the analysis for the rule's application should "consider more than its ability to alter the conduct of the arresting police officer. Instead, the exclusionary rule should be invoked whenever the police (or prosecutors) are able to encourage the prevention of future Fourth Amendment violations at an acceptable cost, regardless of the source of the original error."[99] The full deterrence potential of the exclusionary rule, and possibly the rule's survival as a non-illusory legal remedy, relies on a broader understanding of the rule's purpose and deterrence value.

IV. EXCEPTIONS AND DETERRENCE: WHEN SOLUTIONS CREATE THE PROBLEM

A developing and "unnecessarily restrictive"[100] view of the exclusionary rule's deterrence value, along with the Court's increasing propensity to apply a proportionality test,[101] has resulted in the proliferation of exceptions to the exclusionary rule.[102] *Fofana* illustrates the uncertainty that results from an analysis that heavily favors exceptions, which in turn decreases deterrence. More judicial clarity is essential to achieve systemic deterrence and empower the exclusionary rule to function as an effective remedy.

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95. *See* Stone v. Powell, 428 U.S. 465, 492 (1976) ("[T]his demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage [these groups] . . . to incorporate Fourth Amendment ideals into their value system.").

96. 367 U.S. 643 (1961).

97. *See id.* at 655.

98. Hudson v. Michigan, 547 U.S. 586, 598 (2006).

99. *The Supreme Court, 1994 Term—Leading Cases*, *supra* note 77, at 138.

100. *Id.* at 140.

101. *See* Stanley Ingber, *Defending the Citadel: The Dangerous Attack of "Reasonable Good Faith,"* 36 VAND. L. REV. 1511, 1518 (1983).

102. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) (introducing the good faith or reasonable mistake exception); New York v. Quarles, 467 U.S. 649, 651 (1984) (introducing a possible public safety exception); Nix v. Williams, 467 U.S. 431, 448 (1984) (introducing the inevitable discovery exception).

The deterrence theory supporting the exclusionary rule has shifted over time. Early exclusionary rule cases took a broad view of deterrence, explaining that "the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies."[103] *Mapp v. Ohio* explained that exclusion deters by " 'compel[ling] respect for the constitutional guaranty ... by removing the incentive to disregard it.' "[104] The systemic concept of deterrence is closely aligned with an interest in the role of the judicial system and law generally to "nurtur[e] respect for the right through creation of a system that in no way supported or encouraged the right's violation."[105] However, two cases decided shortly after *Calandra* demonstrate a marked shift away from a systemic deterrence rationale. *United States v. Leon*, which created the "good faith" exception to the exclusionary rule,[106] and *Massachusetts v. Sheppard*,[107] a companion case, explicitly based their holdings on the culpability or good faith of the individual actor.[108] Recently, *Herring v. United States* narrowed the deterrence analysis to focus on law enforcement culpability as a dispositive factor, explaining that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[109]

Justice Brennan cautioned the *Leon* majority that the "shifting sands of the Court's deterrence rationale" were creating "a curious world where the 'costs' of excluding illegally obtained evidence loom to exaggerated heights and where the 'benefits' ... are made to disappear with a mere wave of the hand."[110] Indeed, the individual-deterrence proportionality test now skews significantly in favor of admitting evidence and has subsequently allowed numerous

103. *See* Weeks v. United States, 232 U.S. 383, 398 (1914); *see also* Elkins v. United States, 364 U.S. 206, 210 (1960) (applying the rule from *Weeks*).

104. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting *Elkins*, 364 U.S. at 217).

105. *See* Ingber, *supra* note 101, at 1537. For a comprehensive discussion of the exclusionary rule and deterrence prior to *Calandra*, see Oaks, *supra* note 78, at 709–12.

106. *See Leon*, 468 U.S. at 926.

107. 468 U.S. 981 (1984).

108. *See id.* at 989 (noting that "[t]he officers in this case took every step that could reasonably be expected of them"); *Leon*, 468 U.S. at 919–20 (reasoning that suppression would not deter "objectively reasonable law enforcement activity" because "the officer is acting as a reasonable officer would and should act in similar circumstances").

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

110. *Leon*, 468 U.S. at 929–30 (Brennan, J., dissenting).

exceptions to be read into Fourth Amendment law.[111] Creating yet another exception for knock-and-announce violations, the Court affirmed in *Hudson* that exclusion is a "last resort, not our first impulse."[112]

The Sixth Circuit applied a *Hudson*-like proportionality test in *Fofana* to deny the suppression remedy.[113] However, unlike *Hudson* or other similar Supreme Court precedent, *Fofana* assessed only the factual circumstances without clearly holding that a specific exception—old or new—applied.[114] It is accordingly difficult to determine exactly how the Sixth Circuit is applying or modifying the exclusionary rule. One possibility is that *Fofana* extends the *Hudson* proportionality test to apply as a case-by-case analysis that independently determines exclusion, regardless of whether the factual circumstances fit into an existing exception. Another possibility is that *Fofana* represents the emergence of a new exception, one that allows the *relevance* of illegally obtained evidence to be applied to prior, legally acquired evidence. A third possibility is that *Fofana* is simply a casualty of the tangled and unsettled implications of *Hudson*.

Regardless of the Sixth Circuit's rationale, *Fofana* illustrates the uncertainty that results from a vigorous application of a proportionality test that ignores the systemic component of deterrence. As courts have applied the test to deny the suppression remedy in various Fourth Amendment contexts, they have created "[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions."[115] Fourth Amendment doctrine may be virtually incomprehensible to law enforcement agencies and " 'literally impossible of application by the officer in the field.' "[116] The exclusionary rule thus becomes porous, increasingly stripped of any

111. *See* Rychlak, *supra* note 4, at 248 (citing examples to demonstrate that American jurisprudence itself has "blunted the [deterrence] impact of the exclusionary rule by creating numerous exceptions").

112. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006).

113. *See* United States v. Fofana, 666 F.3d 985, 989–91 (6th Cir. 2012).

114. *See id.* at 987–91.

115. LaFave, *supra* note 77, at 320.

116. Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (quoting United States v. Robinson, 471 F.2d 1082, 1122 (D.C. Cir. 1972) (Wilkey, J., dissenting)); *see also* Ingber, *supra* note 101, at 1545 ("The deterrence problem lies not with the rule, but rather with its judicial administration. Admittedly, the Court has made difficult its responsibility of finding a remedy for [F]ourth [A]mendment violations by erroneously focusing on the rule's deterrent value rather than on its ability to remedy the constitutional violation, and then by negating that deterrent value through unclear opinions.").

deterrence value and further skewing the proportionality test to allow more exceptions.

The robust application of proportionality to create numerous exceptions is therefore directly antithetical to the purported goal of deterrence.[117] If the exclusionary rule is to survive as a meaningful remedy, the proportionality assessment must be recalibrated to weigh systemic deterrence and generate predictable guidelines for law enforcement officials. Had the *Fofana* majority upheld the district court's ruling suppressing both the passports and the connection to Fofana's identity, the Sixth Circuit would have reinforced the message that law enforcement agencies should have nothing to gain from knowingly unlawful conduct. Instead, the *Fofana* decision perpetuates the "subtle nuances and hairline distinctions" that erode parameters and increase incentives for unconstitutional conduct by the TSA and other government agencies.[118]

To achieve deterrence, the law surrounding the exclusionary rule is "more in need of greater clarity than greater sophistication."[119] The best way to support the exclusionary rule's deterrent value "is not to treat the constitutional violations with indifference, but rather to clarify [F]ourth [A]mendment standards through opinions drawing simple and understandable 'bright lines' for police conduct."[120] The ambiguity in *Fofana*'s approach illustrates the need for judicial clarity that will enable officers to clearly understand and fulfill their constitutional responsibilities.[121]

CONCLUSION

The Sixth Circuit's *Fofana* opinion reveals the shortcomings implicit in a conceptually flawed deterrence rationale. The exclusionary rule's systemic-deterrent potential is arguably the rule's most effective guard against future constitutional violations. The broad, systemic theory of deterrence encourages a broad audience of law enforcement and legislative entities to decrease incentives for misconduct and improve professional practices.

However, the Supreme Court's current understanding of deterrence focuses almost exclusively on a narrow application that assesses individual impropriety in a backward-looking, factual

117. *See supra* notes 45, 111 and accompanying text.
118. *See* LaFave, *supra* note 77, at 320.
119. *Id.* at 321.
120. Ingber, *supra* note 101, at 1545.
121. *See id.*

inquiry.[122] This limited view shifts the analysis away from the privacy protections of the Fourth Amendment to consider only the actions of the individual actors. Furthermore, when applied in a proportionality test, the individual-deterrent theory easily skews the test in favor of exceptions.[123] When courts apply the proportionality test more vigorously, as the *Fofana* court did, the resulting exceptions further undermine the deterrence value of the exclusionary rule.

The *Fofana* opinion reveals the uncertainty and inevitable contradiction that result from assessing the systemic-deterrent exclusionary rule through an individual-deterrent test for proportionality. For the exclusionary rule to realize its full potential as a remedy for constitutional violations, courts must be willing to recalibrate the proportionality assessment to incorporate a broader view of deterrence. A systemic theory of deterrence that looks forward to preventing future violations and imposes reasonable and understandable limits on law enforcement is necessary to preserve a functional remedy that adequately secures the promises of the Fourth Amendment.

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122. *See supra* note 79 and accompanying text.

123. *See supra* notes 101–02 and accompanying text.

** Winner of the *North Carolina Law Review*'s 2013 Joint Journal Competition. Special thanks to Professor Jon P. McClanahan for his mentorship and advice, to Professor Robert P. Mosteller for his thoughtful comments on the original draft, to Elaine Hartman, Thomas Will, and the other editors and staff of the *North Carolina Law Review* for their deft critique, and to Ben Milam for his support and encouragement.