

11-1-1982

The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law

Arval A. Morris

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Arval A. Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 Wash. L. Rev. 647 (1982).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol57/iss4/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

THE EXCLUSIONARY RULE, DETERRENCE AND POSNER'S ECONOMIC ANALYSIS OF LAW

Arval A. Morris*

Judge Posner holds economic theory demonstrates that the fourth amendment's exclusionary rule and other judicially developed doctrines implementing the Constitution impose excessive sanctions for governmental misconduct in criminal cases. This Article, focusing on the exclusionary rule, aims to place his economic argument in historical context and to assess it.

I. THE CONSTITUTIONAL DIMENSION OF THE EXCLUSIONARY RULE

The exclusionary rule, as I understand it, is of constitutional origin, and can be modified only by constitutional amendment or Supreme Court decision.

The exclusionary rule was born almost seventy years ago in *Weeks v. United States*,¹ which focused on judicial integrity and the constitutional necessity of effectively enforcing the fourth amendment. Writing for the Court, Justice Day emphasized constitutional fidelity, stating:

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority This protection reaches all alike, whether accused of crime or not, and *the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws*. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, *should find no sanction in the judgments of the courts*, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.²

Judicial fidelity to the Constitution was emphatically declared in 1961

* Professor of Law, University of Washington.

1. 232 U.S. 383 (1914).

2. *Id.* at 391-92 (emphasis added).

to be the basis of the exclusionary rule when the Supreme Court made it applicable to the states in *Mapp v. Ohio*:³

We hold that all evidence obtained by searches and seizures in violation of the Constitution is, *by that same authority*, inadmissible in a state court

Moreover, our holding *that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments* is not only the logical dictate of prior cases, but it also makes very good sense.⁴

Even Chief Justice Burger, an enemy of the exclusionary rule, acknowledges that it is of constitutional dimension.⁵ Although the rule has occasionally been limited by the Supreme Court, the Court has not disavowed the rule's constitutional foundation. It may be a "judicially created remedy,"⁶ but the exclusionary rule's constitutional underpinnings are clear.

II. THE RATIONALE OF THE EXCLUSIONARY RULE

Over the years, judges have asserted that not one, but two primary justifying considerations undergird the exclusionary rule. The first, and most important, is the principle of judicial integrity and faithfulness to the fourth amendment. This principle is sufficient to justify the existence of the rule by itself. It appeared early in the rule's history in *Weeks v. United States*.⁷ Justice Day further stated the principle of judicial fidelity to the fourth amendment for excluding illegally seized evidence: "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, in-

3. 367 U.S. 643 (1961). Prior to *Mapp*, the Federal courts (and the FBI) had operated successfully under the exclusionary rule for almost half a century, but the states, under *Wolf v. Colorado*, 338 U.S. 25 (1949), were held free to admit unconstitutionally seized materials into evidence in state courts. This pre-*Mapp* asymmetry, permitting state courts to admit illegally seized evidence, served to encourage state police and state courts to disobey the very Federal Constitution which they previously had sworn to uphold. As Justice Brandeis stated in *Olmstead v. U.S.*, 277 U.S. 438 (1928): "Our Government is the potent, the omnipresent teacher If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.* at 485 (dissenting opinion).

4. 367 U.S. at 655, 657 (emphasis added).

5. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971) (dissenting opinion).

6. *United States v. Calandra*, 414 U.S. 338, 348 (1974); cf. Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974) (discussing the constitutional premises underlying the *Calandra* theories of the exclusionary rule).

7. 232 U.S. 383 (1914).

The Exclusionary Rule and Posner's Analysis

tended for the protection of the people against such unauthorized action.”⁸

One of our finest scholars, Professor Francis Allen, has declared that the *Weeks* opinion “contains no language that expressly justifies the rule by reference to a supposed deterrent effect on police officials.”⁹ As the *Weeks* Court saw it, if a court could not authorize (“sanction”) a search or seizure in the first place, before the event occurred, because, for example, the police may have lacked probable cause or failed to describe with sufficient particularity the item sought, then a court could not later “affirm” (“sanction”) the search or seizure after the event took place: “The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [fourth amendment] principles”¹⁰

In *Silverthorne Lumber Co. v. United States*,¹¹ Justice Holmes, joined by Brandeis and five other justices, stated that unless the use of the exclusionary rule were available to suppress evidence obtained by means of an unconstitutional search and seizure, “the Fourth Amendment [would be reduced] to a form of words.”¹² Thus, fidelity to the Constitution defined the parameters of judicial integrity and necessitated the exclusionary rule, for “[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”¹³ If illegally seized evidence were permitted to be introduced into evidence, we would have “an instance where one may be . . . imprisoned on evidence *obtained* in violation of due process *and yet not be deprived* of life or liberty without due process of

8. *Id.* at 394.

9. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 536 n.90.

10. 232 U.S. at 393.

11. 251 U.S. 385 (1920); *see also* *Nardone v. United States*, 308 U.S. 338, 340 (1939) (recognizing that the purpose of the exclusionary rule is to protect constitutional rights to privacy); Henderson, *Justice in the eighties: the exclusionary rule and the principle of judicial integrity*, 65 JUDICATURE 354, 356 (1982) (original basis for the rule was “the principle that judicial integrity requires the exclusionary rule lest courts become accomplices in the violation of the Constitution they are sworn to uphold”).

12. 251 U.S. at 392. The Court further observed that:

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id.

13. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

law after all."¹⁴ But judicial fidelity to the fourth amendment has fallen on hard times lately.

The second justification, deterrence, has been advanced primarily by opponents of the exclusionary rule, who often seek to minimize or undermine the principle of the judicial-fidelity-to-the-Constitution rationale.¹⁵ Particularly, in the writings of the rule's opponents, the pragmatic concern with deterrence completely replaces the principle of judicial fidelity to the Constitution. The sole justification for the rule that they offer is a pragmatic, police-practice rationale, the efficacy of which, in principle, is subject to empirical measurement. The groundwork for this perspective was laid down by the Burger Court, which has spearheaded the attack on the exclusionary rule. Chief Justice Burger himself has led the attack, writing that:

the exclusionary rule has rested on the deterrent rationale—the hope that law enforcement officials would be deterred from unlawful searches and seizures if the illegally seized, albeit trustworthy, evidence was suppressed often enough and the courts persistently enough deprived them of any benefits they might have gained from their illegal conduct.¹⁶

Once the exclusionary rule's opponents have given it an exclusively empirical foundation, they can attack it. They erroneously claim the exclusionary rule extracts an unusually "high price" from society—"the release of countless guilty criminals."¹⁷ Then, ignoring the constitutional dimension, they seek to shift the burden by demanding that in light of

14. Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence In State and Federal Courts*, 43 MINN. L. REV. 1083, 1108 (1959).

15. See, e.g., Chief Justice Burger's comment:

[T]he exclusionary rule does not ineluctably flow from a desire to insure that government plays the "game" according to the rules. If an effective alternative remedy is available, concern for official observance of the law does not require adherence to the exclusionary rule. Nor is it easy to understand how a court can be thought to endorse a violation of the Fourth Amendment by allowing illegally seized evidence to be introduced against a defendant if an effective remedy is provided against the government.

Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (dissenting opinion).

16. *Id.* at 415 (Burger, C.J., dissenting). The notion that the exclusionary rule's purpose is to deter police illegality was probably introduced into fourth amendment law in *Wolf v. Colorado*, 338 U.S. 25 (1949). *Wolf* held that states were not bound by the exclusionary rule as federal courts were; the case was overruled in *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the fourth amendment's exclusionary rule to the states. See McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327 (1973). The clear motivating factor in *Mapp* was judicial integrity; thus, *Mapp* declared the exclusionary rule to be compelled by constitutional principle and secondarily supported by pragmatic considerations of deterrence. This view has been so much turned upside down by the Burger Court that Justice Powell could write in *United States v. Calandra*, 414 U.S. 338, 348 (1974) that "[i]n sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect."

17. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 416 (Burger, C.J., dissenting).

such a "high price,"¹⁸ the rule's proponents must produce some "clear demonstration of the benefits and effectiveness of the exclusionary rule."¹⁹ Finally, the rule's opponents rise up and triumphantly declare that "there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials."²⁰

18. There are considerable grounds leading one to question whether the "price" is high at all: In *Impact of the Exclusionary Rule On Federal Criminal Prosecutions* (Report of the Comptroller General, April 19, 1979), an empirical study of cases handled in 38 U.S. Attorneys' Offices from July 1–August 31, 1978, it was found that of 2,804 charged defendants only 30% involved a search or seizure and only 11% filed a motion to suppress on Fourth Amendment grounds. These motions were denied in the "overwhelming majority" of cases, so that in only 1.3% of the 2,804 defendant cases was evidence excluded as a result of a Fourth Amendment suppression motion. Moreover, over half of the defendants whose motions were granted in total or in part were convicted nonetheless. As for the cases during the sample period which the U.S. Attorneys declined to prosecute, in only 0.4% of them was a search and seizure problem the primary reason. Similarly, in Brosi, *A Cross-City Comparison of Felony Case Processing* 18–20 (1979), an LEAA-sponsored empirical study of state felony cases in various jurisdictions, it was found that "due process related reasons accounted for only a small portion of the rejections at [prosecutor] screening—from 1 to 9 percent." The rate ranged from 13% to 42% in drug cases, but in "felony cases other than drugs, less than 2 percent of the rejections in each city involved abrogations of due process." As for post-filing dismissals and nolle, "due process problems again accounted for little of the attrition, and again most of the due process problems were accounted for by the drug cases."

Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 221–22 n.c (5th ed. 1980).

It is obvious that our current treatment of drugs and illegal searches and seizures are linked. Stephen H. Sachs, Attorney General of Maryland, who has had 20 years' experience with the exclusionary rule—half of it as a prosecutor—states:

I believe a fair summary of the Maryland experience to be that the rule has small effect on declinations by prosecutors, or loss at trial, in almost all categories of crime, including violent crime, except for a significantly higher incidence of suppression motions granted in drug possession cases resulting from spontaneous street encounters.

The Exclusionary Rule Bills, 1981: Hearings on S. 101 and S. 751 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (statement of Stephen H. Sachs) (official transcripts not yet printed at time of publication), reprinted in *YALE L.REP.*, Winter 1981–82, at 71, 72 [hereinafter cited as *Hearings*]. In an important sense, an application of the exclusionary rule only serves to put the police in the same position that they would have been in if they had obeyed the Constitution in the first place.

19. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). See also *Elkins v. U.S.*, 364 U.S. 206, 217 (1960) (statistics unable to demonstrate effectiveness of the exclusionary rule).

20. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 416 (Burger, C.J., dissenting). The favorite citation supporting this conclusion is always Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970). See Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 54. But cf. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740, 743–44 (1974) (criticizing a 1973 study which purported to demonstrate that the exclusionary rule was ineffective as a deterrent) [hereinafter cited as Critique, *Empirical Research on the Exclusionary Rule*].

III. EMPIRICAL RESEARCH AND THE EXCLUSIONARY RULE

It is true that the commentators are in considerable disagreement on whether the available social science studies prove or disprove that the exclusionary rule actually deters illegal conduct.²¹ There is, however, unequivocal testimony from some former prosecutors on the rule's deterrence ability. For example, Maryland's Attorney General, Stephen H. Sachs, has had twenty years' experience with the exclusionary rule, ten of those as a prosecutor. In his congressional testimony this year, he stated:

I have watched the rule deter, routinely, throughout my years as a prosecutor. When an Assistant United States Attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better "make" on the car; or that he has a "staleness" problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girl friend's apartment; or that he should apply for a search warrant from a magistrate and not rely on the "consent" of the suspect's kid sister to search his home—the rule is working. The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court.²²

Opponents of the exclusionary rule refuse to accept testimonial evidence, such as Mr. Sachs', on the deterrent impact of the exclusionary rule. Instead, they demand that the rule's proponents present ironclad,

21. E.g., Cannon, *The exclusionary rule: have critics proven that it doesn't deter police?*, 62 JUDICATURE 398 (1979); Kamisar, *The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than "an empty blessing,"* 62 JUDICATURE 337 (1979); Kamisar, *Is the exclusionary rule an "illogical" or "unnatural" interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Schlesinger, *The exclusionary rule: have proponents proven that it is a deterrent to police?*, 62 JUDICATURE 404 (1979); Wilkey, *A call for alternatives to the exclusionary rule*, 62 JUDICATURE 351 (1979); Wilkey, *The exclusionary rule: why suppress valid evidence?*, 62 JUDICATURE 214 (1978). A useful survey of earlier literature is found in Comment, *Trends in Legal Commentary on the Exclusionary Rule*, 65 J. CRIM. L. & CRIMINOLOGY 373 (1974).

22. *Hearings*, *supra* note 18 (statement of Stephen H. Sachs), *reprinted in* YALE L.REP., Winter 1981-82, at 73. Mr. Sachs also states that he does not "doubt that the rule works less well in street encounters. But here, too, the rule is at work because of the enormous increase in police training and education about constitutional rights directly attributable to the exclusion sanction." *Id.*, *reprinted in* YALE L.REP., Winter 1981-82, at 74.

New York City Police Commissioner Michael Murphy described part of the case's deterrent impact—not unique to New York—when he said that after *Mapp v. Ohio* came down, he "was immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp*." Murphy, *The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966). He indicated that "[r]etraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function." *Id.* He believed that "the framework of limitation" had been put there by the exclusionary rule: "[f]ollowing from the *Mapp* case is the issue of defining probable cause to constitute a lawful arrest and subsequent search and seizure." *Id.* at 943.

empirical studies which are a "clear demonstration of the benefits and effectiveness of the Exclusionary Rule."²³ When no impeccably sound social science study is found, they then declare that "there is no empirical evidence to support the claim that the rule actually deters."²⁴ But the basic demand of the rule's opponents is flawed because it neglects a fundamental consideration: no impeccably sound study will ever be produced that will meet the demands of the rule's opponents because, while such a study is possible in principle, it is impossible in fact.

There are several reasons why no conclusively sound social science study of the exclusionary rule's deterrent effect will actually be produced. First, the "design" of such a research project is more than a simple compendium of the setting and circumstances of data collection. The "design" of an empirical study provides the theoretical structure upon which the validity of inferences, deductions, and conclusions are grounded.²⁵ If a "design" is faulty, then the study's conclusions are unreliable. The importance of "design" in an empirical study cannot be overemphasized. A design for a study of the exclusionary rule, to qualify as "impeccable," would have to be quantitative, not qualitative. The quantitative requirement presents a formidable problem because the investigator would have to quantify non-events. Police compliance with the exclusionary rule produces a non-event which is not directly observable—it consists of *not* conducting an illegal search. Although empirical research is theoretically neutral, the simple truth is that some kinds of phenomena can be measured more easily than others, which in turn means that direct observation, or its impossibility, aids only one side. And that is the case with the exclusionary rule.

Since compliance with the exclusionary rule produces a limitation on police behavior not directly visible to an impartial observer, its deterrent impact can only be gleaned indirectly and inferentially from trends of other data. The act of drawing a valid inference can be the Achilles heel of an empirical study. The most promising research design compares change in police practices (i.e., illegal searches) through time, before and

23. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 416 (Burger, C.J., dissenting). They also refuse to accept testimony such as that of Detective Ken Anderson of St. Paul, Minn., on police practices prior to *Mapp v. Ohio*. There is no reason to believe the practices were unique to Minnesota:

[N]o police officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open . . . oftentimes we picked locks The Supreme Court of Minnesota sustained this time after time after time. . . .

[The] judiciary o.k.'d it; they knew what the facts were.

Quoted in Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436, 443 (1964).

24. *Bivens v. Six Unknown Named Agents*, 403 U.S. at 416 (Burger, C.J., dissenting).

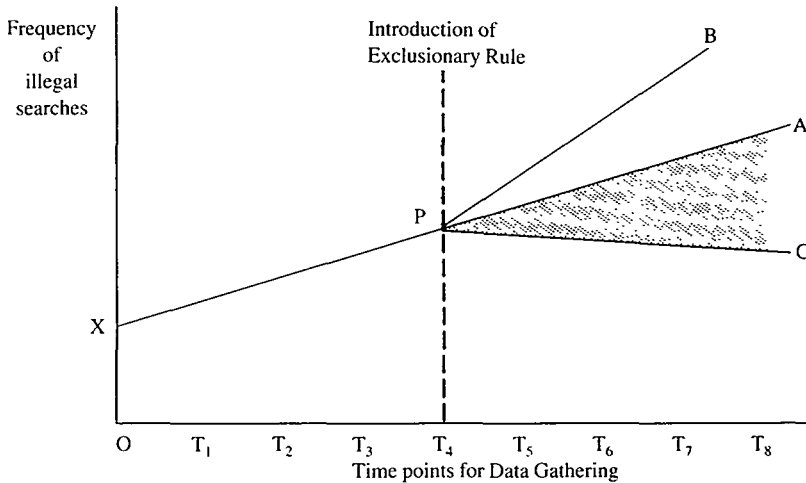
25. See, e.g., D. CAMPBELL & J. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1966).

after the introduction of the exclusionary rule.²⁶ Without the earlier pre-exclusionary rule statistics on illegal police searches, it is impossible validly to interpret the significance of the post-rule statistics on illegal searches. Under this design, an investigator first gathers data on the rate of illegal searches before the introduction of the exclusionary rule; then, assuming the same rate of pre-rule illegal searches to continue, she projects a "baseline" into the post-rule time period; finally, the investigator gathers data on illegal searches occurring after the introduction of the exclusionary rule and compares them with the baseline. If the frequency of illegal searches occurring during the post-rule period declines from the "baseline" projected into the post-rule period, the investigator may conclude that deterrence has occurred, *ceteris paribus*.²⁷

Since direct data are uncollectible non-events, the problem becomes this: what circumstantial measure shall be collected which will yield valid inferences about pre- and post-rule illegal searches?²⁸ Rather clearly, mo-

26. I draw here on Critique, *Empirical Research on the Exclusionary Rule*, *supra* note 20, and thank my colleague, Professor Wallace Loh, for calling it to my attention.

27.



X-P represents the frequency of illegal searches during the pre-rule period. P-A represents the projected "baseline"; i.e., the continuation of X-P into the post-rule period. If post-rule collected data also fell along line P-A, then the introduction of the exclusionary rule might be viewed as having no deterrent effect. If data fell on line P-B, the conclusion might be that the exclusionary rule's effect was not deterring, but worsening the situation and therefore counterproductive. If data fell along line P-C, the conclusion might be that the exclusionary rule has a deterrent effect. Examples of research using this type of design are Campbell & Ross, *The Connecticut Crackdown on Speeding: Time-Series Data In Quasi-Experimental Analysis*, 3 LAW & SOC'Y REV. 33 (1968) and Ross, Campbell & Glass, *Determining The Social Effects of a Legal Reform: The British "Breathalyzer" Crackdown of 1967*, 13 AM. BEHAVIORAL SCIENTIST 493 (1970).

28. The necessary characteristics of the measure are: (1) it must genuinely indicate illegal searches; that is, it must not be too remote from the actual searches and it must not be substantially influenced by factors other than police searches; (2) it must be uninfluenced by the introduction of the rule; that is, it must be a consistent measure before and after the rule is introduced, and (3) it must

tions to suppress evidence cannot be used because they do not accurately measure illegal searches before the introduction of the fourth amendment's exclusionary rule.²⁹ Jerome Skolnick has demonstrated that direct observation of police behavior in the field might provide a way of gathering data on the current operation of the exclusionary rule.³⁰ His investigation was not quantitative, but Albert J. Reiss' work indicates that a quantification approach can be used with direct observation in the field.³¹ Skillfully used, this methodology could identify the present (post-rule) level of illegal police searches in a given area. But current field observations cannot identify the pre-exclusionary rule level of illegal searches, which is crucial to evaluating the rule's deterrent effects validly. Thus, the method of field research must be jettisoned.

If fieldwork is not possible, the search for a useful measure of illegal searches turns to the existing records of the criminal justice system to generate the pre- and post-rule data. The viable candidates identified by Dallin Oaks³²—search warrants,³³ arrest and conviction statistics,³⁴ stolen property recovered statistics,³⁵ and contraband seized statistics³⁶—present substantial and disabling problems. After carefully analyzing Oaks' four data sources, as used by Oaks and by other researchers, one commentator concluded:

None completely meet the requirements for valid indicators of illegal searches. Further, the sources that have been utilized in extensive research present a complex maze of data. Variations exist everywhere. Each side can find statistics from some cities that will support its position. Clearly, local factors play an important role in the efficacy of the exclusionary rule. Yet, our knowledge of the linkages between the characteristics of local govern-

exist in some relatively permanent way so that subsequent researchers can check the research; that is, regenerate the pre- and post-rule data. A valid empirical assessment of the deterrent effects of the exclusionary rule is not possible without identifying a measure of illegal searches that reasonably meets these three requirements.

29. *Rochin v. California*, 342 U.S. 165 (1951); cf. *Irvine v. California*, 347 U.S. 128 (1954) (police entered locked home to plant microphone and eavesdropped on conversations within the home; admission of evidence thus obtained held not violative of the fourth amendment under the *Rochin* "shocks the conscience" test although the evidence would be inadmissible under the exclusionary rule).

30. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 211–29 (2d ed. 1966).

31. A. REISS, *THE POLICE AND THE PUBLIC* (1971).

32. Oaks, *Studying the Exclusionary Rule In Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

33. *Id.* at 713–14.

34. *Id.* at 689–91.

35. *Id.* at 692–93.

36. *Id.* at 693–96.

ments, court systems, and police behavior is still in its infancy. It is unlikely that the puzzle will be sorted out in the near future.³⁷

No research design yet conceived is capable of distinguishing between the number of nonoccurring illegal searches that can be attributed to police policies and the number of nonoccurrences correctly attributed solely to the effect of the exclusionary rule. Surely, the force of these complex, intertwined factors will vary depending upon whether a police unit is located in an upper-middle-class, small residential, or suburban city or whether it is located in a major metropolitan city like Los Angeles. But the exclusionary rule is of national application, and "impeccable" empirical research must draw valid national conclusions. The actual research task is factually hopeless. In short, "[w]hen all factors are considered, there is virtually no likelihood that the Court is going to receive any 'relevant statistics' which objectively measure the 'practical efficacy' of the exclusionary rule."³⁸

IV. POSNER'S ECONOMIC ANALYSIS AND THE EXCLUSIONARY RULE

Judge Posner, a scholar of law and economics, and an opponent of the exclusionary rule, enters the controversy at this point. He boldly advances a general economic point of view which, if adopted, would transform the entire study of law from an investigation into complex and interconnected social issues of fact, value, principle, and legal doctrine into a straight forward application of two "simple," economic hypotheses, one normative and one descriptive: (1) law ought to be efficient, and (2) the law is efficient.³⁹

37. Critique, *Empirical Research on the Exclusionary Rule*, *supra* note 20, at 762. For a further discussion, see *id.* at 758-62.

38. *Id.* at 763-64.

39. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977).

The key concepts for Posner's economic analysis of law, including analysis of the exclusionary rule, are efficiency and value. They are very technical terms, which are not commonly used, in Posner's sense, by judges. " 'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction *as measured by aggregate consumer willingness to pay* for goods and services—is maximized." *Id.* at 10. Willingness to pay, "the basis of the efficiency and value concepts," is materially affected by the existing distribution of wealth and income. Thus, the poor and lower-middle classes have less to say about what counts as an "efficient" allocation of economic resources than do the upper-middle classes and the rich. They have fewer "dollar ballots" in "marketplace voting." Economic resources are deemed to be "efficiently" allocated when a few lavish garden apartments are built, and the rich buy them. But, these same resources are not "efficiently" allocated by building many low income apartments if the poor buy them at a price lower than that which would otherwise be paid for the garden apartments. "Efficiency," Posner has declared, is "determined by willingness to pay" and where "resources are shifted pursuant to a voluntary transaction, we can be reasonably confident that the shift involves a net increase in efficiency." *Id.* at 11.

Economic analysis of law is practiced in at least two quite different ways. One way consists of analyzing and evaluating legal rules to identify which of them would be the most economically efficient in obtaining a specified outcome. For example, different tort rules might be assessed to identify which of them would be most efficient in obtaining a particular level of accidents specified by some noneconomic authority as optimal under real-life circumstances. But economic analysts of this type would insist that they have no economic criteria for recommending that any level of accidents be considered "good," "optimal," or "desirable." Goals are none of their economic concern. Their analytic task is to accept the goal given to them, make certain assumptions, and then identify which legal rule would be efficient in the abstract. This type of economic analysis of law consists of purely abstract, technical efficiency analysis. It is not normative, and it has nothing to say about the policies that government should or should not adopt, or about judicial decisions judges should make or opinions they should hold.⁴⁰

A second way of doing economic analysis of law is to make efficiency *and* normative judgments. These economic analysts believe that economic efficiency, as defined by an economic theory, is the proper and only policy prescription for social policy and judicial behavior. They recommend that government produce social change by intervening in social or human affairs, rearranging legal and political institutions, in order to achieve economic efficiency. These practitioners of economic analysis of law have much more to justify than the first group. In addition to their technical efficiency analyses, they can be required to justify their policy recommendations in social policy terms. We properly can expect them to provide an answer to the question: Why should we care whether our rules of legal liability are economically efficient? Surely, in some situations, there are other values to achieve.

Much, but not all, of Posner's work in economic analysis of law falls into this second category. He approves of the efficiency-normative-policy approach. Posner also believes that economic analysis "best" explains the law: that is, it also describes the law "best." When presenting his economic explanation/description of law, Posner relies on the principle of economic efficiency as the explanatory tool by which existing legal rules and judicial decisions might be rationalized or comprehended. He does

This assumes, however, that each person affected by the transaction must be a party to it, and as Posner recognizes and then dismisses: "strictly speaking, this requirement is almost never satisfied." *Id.* at 11 n.3.

40. For good examples of this way of practicing economic analysis of law, see Brown & Hohan, *Taxes and Legal Rules for the Control of Externalities When There are Strategic Responses*, 9 J. LEGAL STUD. 165 (1980); Polinsky, *Private versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980); Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

not claim that judges expressly articulate and apply the principle of economic efficiency when they decide cases. Instead, he claims that his economic explanation/description can “best” account for judicial decisions or legal rules; that is, they can best be reconstructed or rationalized by observers in light of his economic theory of adjudication. In the paper under review, Posner’s claim is strong. Stating that economic analysis of law has two possible uses, he contends:

One, of course, is to point the way to reform [the Normative]. The other, which is less obvious but from an academic standpoint more interesting, is to explain the law as it is. . . . [the Descriptive/Explanatory]

The hypothesis I shall explore . . . is that the common law remedies for governmental misconduct in criminal cases are best explained by assuming that judges are preeminently concerned with economic efficiency, even though the underlying norms defining that misconduct are often not economic.⁴¹

Posner nowhere argues for his claim of economic superiority, i.e., that legal remedies for governmental misconduct such as the exclusionary rule, are *best* explained by assuming judges are preeminently concerned with economic efficiency. There are other ways to explain the exclusionary rule as the first part of this Article demonstrates. Nor is it self-evident or intuitively obvious that the economist’s explanation is superior to that of a humanist, a sociologist, an anthropologist, a psychologist, or a lawyer. Like economists, they all have said some shrewd things from time to time about law which can be ignored only at the law’s peril. Like economists, other intelligent persons in other disciplines, honestly groping for understanding, have placed other matrices against the fabric of law and society, and have produced significant insights based on other assumptions, definitions, and expectations. I know of no argument—and Posner advances none—to suggest the primacy, or greater virtue or power, of economic explanation of judicial decision or legal rule over any of the explanations offered by lawyers, humanists, and social scientists. Thus, until convincing argument to the contrary is forthcoming, one must conclude that Posner’s economic explanation of law and the exclusionary rule, if it explains law at all, is not the “best,” but only one possible explanation among others.

Despite his claim that judge-made “remedies for governmental misconduct in criminal cases . . . are best explained by assuming that judges are preeminently concerned with economic efficiency,”⁴² Posner

41. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 635–36 (1982).

42. *Id.* at 636.

does not present an economic explanation for the reasons accounting for the original, judicial adoption of the exclusionary rule. He puts a straightforward historical question: "So we must ask why the exclusionary rule was ever adopted."⁴³ Posner then asserts that the actual, historical answer is "consistent" with economic analysis. He does not give us a description/explanation that is the result of economic analysis: "The answer is consistent with economic analysis: the rule was adopted because until recently there was no alternative sanction for violations of the fourth amendment that did not cause severe underdeterrence."⁴⁴

Posner's answer functions to shift the focus of the exclusionary rule onto deterrence, but as a matter of historical accuracy, his answer is simply wrong. As demonstrated in the first part of this paper, the judicial origins of the exclusionary rule in *Weeks*, *Silverthorne* and *Nardone* were not based on the deterrence rationale, but instead, the exclusionary rule's origins were premised on reasons that I have described as "the judicial-fidelity-to-the-Constitution rationale." It is only in recent years, due to the decisions of the Burger Court, that the exclusionary rule is seen as based on a deterrence rationale. Posner has not given us an economic explanation of the original exclusionary rule decisions or their reasons. I know of no way by which reasons such as "judicial integrity" can be "explained" by economic analysis, which does not purport to explain notions like integrity, love, or honor. This is not surprising since economic analysis was invented to explain quite different things. An economy is only one part of a total human society, and one should not expect its theory to explain the greater whole.

By placing the exclusionary rule solely onto a deterrence foundation and then attacking that foundation, Posner aligns himself with the foes of the rule. But his attack is different from others. They claim the exclusionary rule does not actually deter. Posner uses economic analysis normatively to recommend social change:⁴⁵ namely, that the exclusionary rule ought to be abandoned for two reasons, first, because it overdeters and second, because it produces a deadweight loss.

V. THE ECONOMIC OVERDETERRENCE ARGUMENT

When Posner uses the word "overdeters," as his first ground for aban-

43. *Id.* at 638.

44. *Id.*

45. *But cf.*: "The economist's competence in a discussion of the legal system thus is strictly limited. He can predict the effect of legal rules and arrangements on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth. *He cannot prescribe social change.*" R. POSNER, *supra* note 39, at 10 (emphasis added).

doing the exclusionary rule, he does not mean to use “deter” in its customary empirical sense, as it was used in the first part of this Article. He assumes the exclusionary rule “deters” in that sense. Posner uses “deter” in a technical, more limited, “economic” sense relating arbitrarily assigned dollar amounts to each other in order to conclude that the rule “overdeters”:

[the exclusionary rule] produces overdeterrence because the private (and social) cost imposed on the government may greatly exceed the social cost of the misconduct.

. . . [Suppose an] illegal search imposes a cost of \$100 on the person searched in terms of lost time spent cleaning up after the searching officers, but that the loss to society from not being able to convict him can be valued at \$10,000. If the probability of apprehending and convicting the illegal searcher is one, a fine of \$100 would prove optimal . . . deterrence of such illegal searches. The much larger “fine” that is actually imposed will overdeter, causing the government to steer too far clear of the amorphous boundaries of the fourth amendment compared to what it would do at the optimal fine level.⁴⁶

This example needs to be “unpacked.” For Posner, it contains the correct standard, i.e., the “optimal fine,” for identifying the desirable amount of deterrence that should be put behind the fourth amendment’s prohibition of illegal searches and seizures. The standard is the economic cost to society of the police officer’s misconduct when he illegally searches (assuming the probability of apprehending and convicting the illegal searcher is one). The economic cost to society; i.e., the lost production of goods and services because of the illegal search is, for Posner, measured by the loss to society of the victim’s economic production. It is the “lost time spent cleaning up after the searching officers,” or the “lost” economic time of hired housecleaners if the victim does not do the cleanup. In any event, the dollar value of that “lost” economically productive time, occasioned by the illegal search, will not be high, and that weights the economic scale. Posner arbitrarily assigns it the value of \$100.00, and this becomes the dollar amount of the “private and [social cost] of the misconduct.” Given his apprehending-and-convicting assumption, it equals the amount of the optimal fine that should be assessed against a police officer who illegally searches in violation of the fourth amendment. The real harm to society⁴⁷ is ignored, and the victim’s “lost time cleaning up” controls. That, then, is all the deterrence Posner believes the fourth amendment is entitled to—the cleanup cost.

46. Posner, *supra* note 41, at 638.

47. The real harm to society is the loss of judicial integrity. See notes 7–14 and accompanying text *supra*.

The amount of deterrence that Posner's "optimal fine" would actually produce is not necessarily related to any realistic factor or consideration that may be necessary actually to deter police from making illegal searches. Indeed, it is only tangentially and indirectly linked to the police. Instead, the optimal fine is linked directly to "lost" economic production by the victim occasioned by the unlawful search, without any consideration of factors that may deter police from making illegal searches. It is obvious that the actual amount of deterrence obtained by Posner's "optimal fine" would be accidental, and it could be none. It will vary from police officer to police officer, depending on many factors. Consider the deterrence of police officers produced by Posner's "optimal fine" when the police are persons who neither destroy anything when gaining entry to search, nor leave an untidy mess to be cleaned up later, or who are willing to (and do) clean up the mess on their own "private," off-working-hours time. In such circumstances, on Posner's assumptions, the amount of deterrence secured by his optimal fine would be zero. If a police officer believed an illegal search would break a case and result in an increase in his salary, or his promotion, worth more to him than the "optimal fine," then a "rational" economic maximizing police officer would simply see payment of the fine as the price of getting ahead. He would illegally search and pay the fine. Again, the amount of deterrence would be zero. In no case would Posner's recommendation of an economically "optimal fine" place more than only low levels of deterrence behind the exclusionary rule, and in some cases it would place none.

Posner does not come forth openly and identify any underlying justificatory reason lying behind his policy. Instead, his policy recommendation to abandon the exclusionary rule is couched solely in economic analysis terms. His justification for it cannot be "economic efficiency" because that does not tell us why we should be socially concerned with economic efficiency and adopt it as social policy in this instance. After all, we do not follow the dictates of economic efficiency when we practice representative democracy as our constitutional form of government. Representative democracy may be economically inefficient, but we keep it for other reasons. Posner has offered us no policy reason on why courts ought to adopt his version of economic efficiency as controlling when enforcing the Constitution's fourth amendment.

Several more things must be noticed about Posner's economic example of overdeterrence. First, it is hypothetical and arbitrary. If his arbitrarily assigned dollar amounts were reversed, so, too, would be his conclusion. The exclusionary rule, then, would economically underdeter. Posner presents neither evidence of the actual dollar amounts that realistically might be assigned to his economic deterrence formula nor any method whereby

they might reliably be ascertained. Without reliably ascertained actual dollar amounts to factor into Posner's formula, even accepting his mode of economic analysis, his assertion that the exclusionary rule "produces overdeterrence" rests only on his arbitrary decision to assign the dollar amounts as he did, and proves nothing about the real world.

Second, is Posner's formula workable in fact? Can one reliably place a nonarbitrary dollar amount on such things as judicial integrity in enforcing the fourth amendment or on one's interest and society's interest in freedom from illegal searches and seizures? Clearly, Posner's suggestion of the cost of an illegal search—the victim's lost time in cleaning up—doesn't even begin to cope with the actual social costs created by illegal searches and seizures. And where might we obtain actual, reliable figures of the "probability of apprehending and convicting the illegal searcher" which we must use to calculate the "optimal fine"? Posner offers nothing here. It is not apparent that Posner's formula is workable in fact.

Third, Posner's "overdeterrence" caused by the exclusionary rule rests squarely on the "high cost" case where conviction cannot occur unless the illegally seized evidence is used at trial. Unfortunately for Posner, that case is not nearly as common as opponents of the exclusionary rule proclaim and, therefore, the "price" of the rule is not nearly as high.⁴⁸

Ultimately, Posner's argument of overdeterrence boils down to an assessment of actually existing alternatives to the exclusionary rule and their actual deterrent effects. The important point, for him, is that "the tort remedy for unlawful searches and seizures is now practical where once it was practically unavailable."⁴⁹ Posner cites and relies only on his recent article,⁵⁰ claiming that "[a]s a result of the growing practical availability of the tort remedy, I would predict a shift away from the exclusionary rule."⁵¹ He "doubt[s] that the rule will survive in anything like its present form much longer."⁵² But, in his earlier article, Posner was not nearly so sure that the tort remedy is efficacious. He wrote:

If the principle of *Norton* is rejected, if punitive damages are awarded in proper cases, if judges deal firmly with jury prejudice, if imagination is used in valuing intangible items of damage such as loss of mental repose, and if class-action treatment and injunctive relief are granted in appropriate cases, then, I believe, the tort remedy will bring us closer to optimum deterrence of Fourth Amendment violations than the exclusionary rule.⁵³

48. See note 18 *supra*.

49. Posner, *supra* note 41, at 639.

50. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49.

51. Posner, *supra* note 41, at 639.

52. *Id.*

53. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 68. The case referred to

If ever there were a grudging admission that, currently, the tort remedy is grossly inadequate, the above quotation is it. Moreover, there is grave doubt that the tort remedy will ever become adequate. Consider again the testimony of Maryland's Attorney General, Stephen Sachs:

Exclusion from evidence is almost certainly the only effective deterrent in the vast majority of unconstitutional intrusions. Even critics of the rule are quick to acknowledge the severe limitations of police self-discipline or court damage actions as deterrents when crime fighting police officers are in the dock. In rare cases involving especially gross misconduct, a police disciplinary board or a court or jury in a damage action might, *might*, impose sanctions, at least if the victim of the trespass is innocent and the police misconduct truly outrageous.

But most of the suppression cases do not deal with such outrageous conduct. They deal with undramatic Fourth Amendment concerns—the sufficiency of “probable cause” in a given case, whether “exigent circumstances” excuse the necessity of a warrant, whether there is a sufficient corroboration of the tip of an anonymous informer to justify intrusion into a suspect's apartment. These requirements are not the stuff to move police disciplinary boards, or judges and juries accustomed to awarding damages on the basis of “fault.” But they are our constitutional rules of the road and only the suppression sanction, the exclusionary rule, will force prosecutors and police to obey them.⁵⁴

VI. THE ECONOMIC “DEADWEIGHT LOSS” ARGUMENT

Posner's second reason why the exclusionary rule should be abandoned is that from an economic point of view it is excessive in that “it violates the Pareto-superiority criterion because it imposes a deadweight loss—the suppression of socially valuable evidence—that would have been avoided if the misbehaving government official . . . had been fined instead.”⁵⁵

is *Norton v. United States*, 581 F.2d 390 (4th Cir. 1978), holding under the Federal Torts Claims Act a governmental agency's liability is purely derivative from the governmental agent's, so that the agency can assert any defense the agent had.

54. *Hearings*, *supra* note 18 (statement of Stephen H. Sachs), *reprinted in* YALE L. REP., Winter 1981–82, at 73. This was recognized in *Mapp v. Ohio*, 367 U.S. 643, 652 (1961): “The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*. See *Irvine v. California*, 347 U.S. 128, 137 . . .” *Id.* at 652–53.

55. Posner, *supra* note 41, at 638. This simply will not do as an economic explanation of current legal reality because it does not explain existing legal institutions and it creates a new one. No system of “fines” currently exists to levy against the offending police, and, admittedly, existing tort remedies are highly inadequate. Thus, it appears that one of Posner's necessary bases for his economic comparison (“fines”) is simply not actually available, and his “economic explanation,” therefore, does not follow. Moreover, as developed above, Posner's attempt to provide for an “opti-

Posner makes odd use of the Paretian criteria when he claims that the exclusionary rule imposes an economic "deadweight" loss. Paretian superiority, as I understand it, involves a version of welfare economics and refers exclusively to the situation of individuals. It states that one specific allocation of society's goods and services is superior to another if at least one person is better off under the first allocation than under a second and if no one is made worse off.⁵⁶ The second allocation is Paretian inferior, and the first is Paretian superior. The change to a Paretian superior allocation must result in a net increase in aggregate utility in a society, since no one is made worse off by the new distribution of goods and services and at least one person is made better off by the change. Paretian superior allocations produce winners but no losers. When society's resources are allocated in a way that any further redistribution of them can only benefit one person at the expense of another, we have reached Paretian optimality. No further Paretian superiority allocation exists. Paretian optimal distributions are also Paretian efficient.

There are crucially important distinctions between individual-preference theories, total-utility theories and social-welfare theories.⁵⁷ Judgments flowing from Pareto's superiority criterion are expressed solely in terms of individual human preference orderings; that is, each person is assumed to have his or her own specific order of preferences for all goods and services. Thus, to declare that one allocation of society's goods and services is Paretian superior to some other allocation is only to say that, under the preferred allocation, one person would be placed higher along his or her preference ranking with no one else made worse off on his or her preference ranking. The existence of individual preference rankings is critical to the concept of Paretian superiority. They give us a standard of

mal fine" scheme is sorely lacking. This is not to say that a system of fines could not be instituted, although it may be an insuperable problem to assure they will be levied and to identify their amounts so as necessarily to achieve actual police deterrence equal to that of the exclusionary rule. If Posner is recommending that a system of fines be legislated sometime in the future, then he must be more realistic than merely to recommend an "optimal fine" equal to the cleanup costs after an illegal search. He must present an operational, real-world basis for the amounts of the fines that are empirically linked to deterring police behavior. More important, he must identify and defend openly the social policies that lie behind his recommendation. Posner's economic reasoning leading to a policy recommendation that future legislation create a system of fines as exclusive sanctions for illegal searches and seizures divorces him from current reality and catapults him into the realm of amorphous hypothetical conjecture, and consequently, cannot be accepted either as an economic explanation of existing legal reality or as an acceptable policy recommendation in its present form.

56. A good discussion of Paretian ethics can be found in Coleman, *Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF L. REV 221 (1980). See also C. PRICE, *WELFARE ECONOMICS IN THEORY AND PRACTICE* (1977); V. TARASCIO, *PARETO'S METHODOLOGICAL APPROACH TO ECONOMICS* (1968).

57. See generally A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970) (discussing these theories).

comparison enabling us to bring the discrete judgments about the relative standing of individuals to their preference orderings into a single judgment about aggregate utility existing in a given society at a given moment in time. Pareto's concepts require human beings with preference schedules.

Earlier in his paper Posner explains his notion of an economic "deadweight loss." Here he gives a somewhat different reason why the exclusionary rule can be economically excessive—"it can violate the Pareto criterion of efficiency"⁵⁸ and produce a deadweight loss. Posner illustrates what he means by an economic "deadweight loss" by assuming a situation where a fine levied against a criminal would produce as much deterrence as a prison sentence, but the prison term would also impose a deadweight economic loss "in the form of the criminal's forgone legitimate earnings and the costs of guarding him."⁵⁹ Therefore, on Posner's assumptions, the fine is economically preferable under his view of Pareto's efficiency concept because an equal amount of deterrence is achieved more cheaply, and society need not incur the "deadweight losses" of forgoing the criminal's "legitimate" productivity during the time he would have been in prison, or incur the costs of guarding him. Assuming an exclusive system of fines is adopted and the criminal's "legitimate" production of goods and services (represented by the criminal's legitimate earnings) are now available for social distribution, the actual distribution of the criminal's production will necessarily serve to advance one or more persons along his or her preference schedules because the total amount of society's goods and services available for distribution would have been increased by the amount "legitimately" produced by the criminal who had not been imprisoned.

On this analysis, the "deadweight loss" concept necessarily is tied to notions of productive, allocative economic efficiency, which, under certain circumstances, can be the same as Paretian efficiency.⁶⁰ Posner asks

58. Posner, *supra* note 41, at 636.

59. *Id.*

60. The concept of economic efficiency is quite complex and widely misunderstood. Economic efficiency can refer to at least four notions of efficiency—production-allocative efficiency; Paretian optimality; Paretian superiority; and Kaldor-Hicks efficiency. This list is incomplete because there possibly may be added a Posnerian standard of wealth optimizing. See sources cited in note 61 *infra*. Moreover, production-allocative efficiency on which Coase's theorem of externalities is based, see, Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960), (and which asserts that allocative efficiency, or the maximum productive use of society's resources, does not ultimately depend on the initial assignment of legal entitlements, assuming perfect market competition and zero transaction costs) can be consistent and perhaps interchangeable, under certain circumstances, with Paretian optimality. See particularly the discussion of "Pareto Optimality and Allocative Efficiency" in Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221, 226-37 (1980).

us to compare two ways of achieving the same level of deterrence—a system of fines and prison sentences—and to choose the more efficient method, which turns out, on Posner's assumptions, to be a system of fines. By adopting a system of fines instead of prison terms, we avoid the economic "deadweight loss" which consists of the prisoner's lost production and the economic costs incurred by guarding him. The "deadweight losses" would have been incurred if we had chosen imprisonment.

Is this analysis applicable to the exclusionary rule? Posner seems to indulge in similar assumptions and reasoning about it. For example, if one makes the assumption that the exclusionary rule and fines are equal, or sufficiently equal, deterrents of illegal searches, then one might claim that the exclusionary rule imposes an economic "deadweight loss" because the illegally seized evidence cannot be used at trial, as it could have been under an exclusive scheme of fines. But this is to speak metaphorically, and the economic claim is false. It is no longer the economic analysis of law because the term "deadweight loss" now no longer carries economic meaning. It no longer is directly connected to forgone, i.e., lost, "legitimate" economic productivity of goods and services which qualified as the economic loss in Posner's example about fines and prison terms. What is "lost" now is only the police officer's *illegitimate* production of illegally seized evidence. I know of no way in which this *illegitimate* "production" by the police officer could be distributed so as to advance anyone along his or her preference schedule. The police officer has not produced "legitimate" economic goods and services which can be distributed, as did the criminal who was gainfully employed after avoiding imprisonment in Posner's fine/imprisonment example. Thus, the analogy between imprisonment and the exclusionary rule fails, and the exclusionary rule does not impose a "deadweight loss" in the same economic sense as does imprisonment. Furthermore, Posner's basic assumption has no basis in current legal fact. No system of fines currently exists that is equal, or sufficiently equal, in deterrent effect to the exclusionary rule. Also, as indicated above, it is unlikely that such an equally deterring system of fines will ever exist, although a legislature may enact a system of fines. Finally, Posner offers us nothing about the judicial-fidelity-to-the-Constitution basis for the exclusionary rule, which simply cannot be dismissed. The constitutional dimension must be faced and accounted for if one is to account fully in economic terms for the exclusionary rule.

VII. CONCLUSION

In summary, Posner does not use economic analysis to explain the ori-

gins of the exclusionary rule. Nor does he analyze its empirical reality. A strong policy recommendation is loud and clear—abandon the exclusionary rule—but his recommendation rests on inadequate theoretical and practical grounds. Posner makes no attempt to justify his policy recommendation on grounds of social policy beyond his claims of theoretical “economic efficiency.” Finally, he never attempts to answer the crucial question: Why should our constitutional policy on illegal searches and seizures be based *exclusively* on economic efficiency grounds?⁶¹ Until these serious deficiencies are remedied, we might believe that the claim of excessive sanctions for governmental misconduct in criminal cases is unproved, and justifiably remain quite skeptical about normative claims derived from the economic analysis of law.

61. Although he formerly embraced it, Posner has recently disavowed classical utilitarianism as the ultimate ground of justification for economic efficiency. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 111–19 (1979). Instead, he embraced a system of wealth maximization which requires people to act so as to increase social wealth—defined as the dollar value equivalents of everything in society. His definition of wealth in its relationship to a system of wealth maximization is:

The value in . . . dollar equivalents . . . of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up. [Everything, for Posner, has its price.] The only kind of preference that counts in a system of wealth maximization is thus one that is backed up by money—in other words, that is registered in a market.

Id. at 119. But, if there were no prices, Posner's scheme of wealth maximization collapses. If I trade you an apple for your orange, there is no wealth maximization under Posner's new wealth maximization criterion. But, if I pay you a dollar for your orange, and you pay me a dollar for my apple, then we have prices, and wealth maximization under Posner's new criterion. Unfortunately for Posner, it has been convincingly shown that wealth maximization fails as a normatively defensible first principle, which is what Posner must supply to justify his economic efficiency criterion. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 520–40 (1980); *see also*, Dworkin, *Is Wealth A Value?*, 9 J. LEGAL STUD. 191, 194–97 (1980).