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ESSAY

CAN ATTEMPTED SEIZURES BE UNREASONABLE?: APPLYING THE LAW OF ATTEMPT TO THE FOURTH AMENDMENT

INTRODUCTION

On April 18, 1988, Hodari and some of his friends were standing by a small red car, that was parked along the curb.¹ A couple of police officers patrolling the area in a squad car saw the four young black males. When the boys noticed the officers approaching, they ran away.² While one of the officers got out of the car to give chase, the other drove around the block after them.³ While running away, Hodari, with one of the officers almost upon him, pitched aside a bag of crack cocaine to the street.⁴ Just then, the officer tackled and handcuffed him.⁵

At the time of *California v. Hodari D.*, flight alone was not sufficient reasonable suspicion to justify the stopping of the young men by the officers.⁶ Therefore, apprehending Hodari merely for running away from the officers would have constituted an unreasonable seizure within the meaning of the Fourth Amendment. Stopping Hodari in this case, however, was not an unreasonable seizure within the meaning of the Fourth Amendment, because once Hodari tossed the drugs—which were recognized as such by the pursuing officer—the officer then had the requisite reasonable suspicion to stop him.⁷

1. See Brief for Respondent at 2, *California v. Hodari D.*, 111 S. Ct. 1547 (1990).

2. See *California v. Hodari D.*, 499 U.S. 621, 622-623 (1991).

3. *Id.* at 623.

4. *Id.*

5. *Id.*

6. *Id.* at 624 n.1 (stating that the lower court conceded that the officer did not have the required reasonable suspicion to justify stopping Hodari). See also *Illinois v. Wardlow*, 120 S. Ct. 673, 676 (2000) (holding that presence in an area of heavy narcotics trafficking coupled with unprovoked flight upon noticing the police is enough to support a reasonable suspicion that the person is committing a crime). *Wardlow*, however, does not make it clear whether unprovoked flight alone will justify stopping a person as the majority concluded that “determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” *Id.* Thus, there are still situations where an officer could unjustifiably chase a person, as with Hodari.

7. See *Hodari*, 499 U.S. at 624 (stating there would be reasonable suspicion for the unquestioned seizure that occurred when the officer tackled Hodari, only if the officer recognized the crack cocaine as such).

Hodari illustrates how an officer's attempt to unreasonably seize a person can ultimately be viewed as reasonable. In other words, what began as unlawful police conduct became reasonable, and therefore lawful, as soon as *Hodari* tossed the drugs.⁸ It is precisely this type of contradiction that is the focus of this Essay. Specifically, this Essay closely analyzes the problem posed by, and potential legal response to, attempted unlawful seizures. Part I of this Essay will discuss the *Hodari* case and its implications for the relation between the law of remedies and police attempts to violate the Fourth Amendment. Part II then takes up the substantive criminal law's notion of attempted criminality, its elements, purpose, and punishment. Part II also demonstrates why the law of attempt should (though it currently does not) apply to attempted seizures. Part III addresses two concerns: why suppression of evidence obtained via an attempted unjustified seizure is the appropriate remedy; and why civil remedies can do little if anything to remedy attempted unjustified seizures.

I. *HODARI*: HOW POLICE SUCCEED BY TRYING AND FAILING

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure . . . against unreasonable searches and seizures."⁹ Because the Fourth Amendment only applies when there is a search or seizure, it is important to determine when a search or seizure occurs.¹⁰ Once it is determined that a search or seizure has occurred, the next question is whether the search or seizure is reasonable.¹¹ Whether a search or seizure is reasonable depends on whether there is sufficient justification for the police officer's actions.¹²

In *Hodari*, the majority held that because *Hodari* did not submit to the officer's show of authority, he "was not seized until he was tackled."¹³ The Court also held that since *Hodari* abandoned the cocaine while he was running, that is, before being seized, it was not a fruit of the seizure.¹⁴ If, however, the Fourth Amendment intends to prevent police from abusing their power, then relying on whether a suspect *submits* to an official show of authority, e.g. a police chase, should not determine whether the police officer's conduct was justified. An officer's abuse of power should not be legitimized by circumstances out of the officer's control, such as whether a suspect decides to turn himself in.

8. See *California v. Hodari D.*, 499 U.S. 621, 628 (1991) (Stevens, J., dissenting).

9. U.S. CONST. amend. IV.

10. See Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 800 (1991) (explaining why the definition of seizure is of crucial importance to deciding cases in court and in guiding police officers in determining how they may permissibly interact with citizens).

11. *Id.*

12. *Id.*

13. *Hodari*, 499 U.S. at 629.

14. *Id.*

The Fourth Amendment exists to protect against invasions of autonomy. More specifically, it prohibits unreasonable searches or seizures by government actors, regardless of whether the person who is searched or seized turns out to be guilty.¹⁵ The lawfulness of the government's actions is measured by the sufficiency of the government actor's suspicions or knowledge about the suspect *before* the search or seizure, not by what is *produced* by the search or seizure. The courts enforce the Fourth Amendment primarily though not wholly with the exclusionary remedy, which provides that when a search or seizure is deemed unreasonable, the government is penalized by the exclusion of all evidence obtained from the unreasonable action.¹⁶ This judicially created remedy is designed to safeguard a citizen's Fourth Amendment rights¹⁷ by prohibiting use of the evidence against the defendant at trial, where police expect to obtain a conviction based on the illegally-obtained evidence produced by the search or seizure. In this way, the exclusionary remedy is meant to deter police from performing unreasonable seizures by depriving them of their anticipated gain. The remedy therefore is meant to improve official investigatory techniques by ensuring a high cost to police and prosecutors for reckless and careless policing.¹⁸

The exclusionary remedy, however, does not apply to attempted seizures. *Hodari* held that a seizure does not take place unless the subject submits to a police show of authority.¹⁹ In other words, the arbitrary actions of police officers—like chasing *Hodari*—do not require justification because there was no seizure under the Fourth Amendment until after police tackled *Hodari* upon observing him discard the drugs while fleeing.²⁰

Requiring that a person submit to a show of authority in order for a seizure to take place creates situations where police can violate procedure without facing any consequences. For example, if a racist police officer chases an individual solely because he is black, successful capture of the suspect is an illegal seizure that implicates the Fourth Amendment. But if the suspect somehow eludes capture, then no seizure occurs and the very same behavior remains to an extent invisible because it will require no justification by the officer as to *why* he was chasing the suspect.²¹ By requiring submission to

15. See John B. Owens, *Judge Baer and the Politics of the Fourth Amendment: An Alternative to Bad Man Jurisprudence*, 8 STAN. L. & POL'Y REV. 189, 192 (1997) (stating that Judge Brennan, as well as Justice Harlan, viewed the purpose of the Fourth Amendment similarly, describing it as not designed to be a shelter for criminals, but a basic protection for everyone).

16. See *Mapp v. Ohio*, 367 U.S. 643, 654 (1961).

17. Richard Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition*, 35 VAND. L. REV. 501, 506 (1982).

18. *Id.* at 504-06.

19. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

20. See Richard W. Zahn, *California v. Hodari D.: An Evolving Definitions of Seizure Under the Fourth Amendment*, 27 NEW ENG. L. REV. 447, 465 (1992).

21. See Ronald J. Bacigal, *The Right of the People to Be Secure*, 82 KY. L.J. 145, 187 (1993) (illustrating with examples why the fourth amendment's coverage should not turn upon an individual's success or failure in eluding the police).

authority for a completed seizure, police officers may now shoot at an innocent citizen and the officers' behavior would be beyond the coverage of the Fourth Amendment as long as they miss their target.²² Or even worse, officers could hit their target and not implicate the Fourth Amendment as long as the target was hearty enough to continue to flee. Furthermore, government agents may now enter an airport, draw their guns, announce a "baggage search" (a search they have no authority to compel), and if the passengers refuse to submit to police authority and walk away, then police have done nothing objectionable, at least not in the eyes of the law.²³

In each of these examples, officers attempt an unlawful seizure but fail. Because submission to authority is required, the officers' conduct is beyond the coverage of the Fourth Amendment, no matter how outrageous or corruptly motivated that conduct may be.²⁴ Such a state of affairs hardly comports with the exclusionary remedy's purpose, which is to encourage police to conform to the Fourth Amendment's commands. If a happy outcome (getting evidence to use against a fleeing suspect) can cure an otherwise unjustified action (*trying* to seize someone when you have no right to do so), then the law is giving police a mixed message about the consequences that flow from putting themselves to searching or seizing without sufficient justification. Indeed, if the purpose of the exclusionary remedy is to deter improper behavior by law enforcement officers,²⁵ then it should dictate how police must operate independent of a citizen's reaction to such misbehavior.²⁶ Accordingly, if deterrence is the goal, a penalty should exist for attempted seizures just as a penalty exists under the criminal law for would-be criminals who put themselves to crime but, for one reason or another, fail.

II. THE LAW OF ATTEMPT

Since the law of criminal attempt holds a person responsible for attempting to commit a crime, then it follows that a police officer should be responsible for *attempting* to violate a person's Fourth Amendment rights.²⁷ By deterring only actual seizures, police can still attempt unreasonable seizures.²⁸ Attempted unreasonable seizures are undesirable not only because police could pursue suspects aggressively (with the "intent" to fail in the

22. *Hodari*, 499 U.S. at 630 (Stevens, J., dissenting).

23. *Id.* at 645 (Stevens, J., dissenting).

24. *Id.* at 646.

25. *Id.*; Zahn, *supra* note 20, at 466.

26. *Hodari*, 499 U.S. at 646 (Stevens, J., dissenting).

27. Bacigal, *supra* note 21, at 203 (drawing upon established concepts used in defining attempted crimes, an area of the law requiring "a judicial determination as to whether the actor's conduct imposes upon society certain undesirable consequences that our legal system seeks to prohibit").

28. See Randolph Peidrahita, *A Conservative Court Says "Goodbye to All That" and Forges New Order in the Law of Seizure-California v. Hodari D.*, 52 LA. L. REV. 1321, 1334 (1992).

hope of recovering incriminating evidence without implicating the Fourth Amendment²⁹), but also because it is undesirable to set themselves *at all* to pursue a course of unconstitutional action.

Most American jurisdictions have enacted statutes to protect citizens against attempted criminal offenses.³⁰ An attempt, as described in the Model Penal Code, requires an act constituting a substantial step toward committing a crime that is “strongly corroborative of the actor’s criminal purpose.”³¹ The dual purpose behind attempt laws is both to deter people from committing crimes and also to reform a person who was either unsuccessful in committing or attempting to commit a criminal act.³² Law enforcement must intervene whenever possible to prevent a person from committing the intended crime.³³ Moreover, a failure to complete a crime on a particular occasion may present a continuing danger that the person will succeed in the next attempt.³⁴ Punishment, therefore, is appropriate to deter the criminal defendant from engaging in dangerous conduct, as well as to enable the police to protect society by incarcerating the defendant.³⁵

People are held criminally responsible for their criminal actions and do not escape punishment merely because the intended result did not occur.³⁶ Although criminal liability should not rely on matters out of the agent’s control, most sentencing codes and guidelines treat attempts more leniently than their corresponding completed crimes.³⁷ The fact that attempts are typically, though not always,³⁸ treated more leniently than completed crimes implies that failure provides a partial excuse. In other words, when a person tries to commit a crime but fails to do so for whatever reason, that person has a plea for a partial excuse.³⁹ Such failure, however, does not let the person completely evade responsibility.⁴⁰

Whether failure should provide a partial excuse is debatable.⁴¹ The vast majority of jurisdictions hold that, at least when it comes to the most serious

29. *Id.*

30. See WAYNE R. LAFAVE, CRIMINAL LAW § 6.2 at 537 (3d ed. 2000).

31. MODEL PENAL CODE § 5.01(2) (West 1974 & Supp. 2000).

32. See LAFAVE, *supra* note 30, at 538.

33. *Id.* at 539.

34. *Id.*

35. *Id.*

36. See Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 125 (1995); MODEL PENAL CODE § 5.01 (West 1974 & Supp. 2000).

37. See Feinberg, *supra* note 36, at 121.

38. See MODEL PENAL CODE § 5.05 (West 1974 & Supp. 2000).

39. See Daniel B. Yeager, *Inchoate Criminality* 4 (Dec. 1998) (unpublished manuscript on file with author) (arguing to re-characterize inchoate criminality as a plea for a partial excuse subject to less stringent punishment than completed crimes).

40. See *id.*

41. See Bacigal, *supra* note 21, at 208-11. Bacigal explains the difference between the subjectivist and objectivist view on how to treat attempts. Subjectivists maintain that “classifying attempts as crimes” provides the state with an opportunity to isolate and punish danger-

offenses, there should be a difference in degrees of punishment between attempted and completed crimes. These jurisdictions argue that the harmful result is an indication of bad intentions, but absent a harmful result, there is not enough evidence to justify criminal liability to its fullest.⁴² Attempts may fail for a number of reasons and the causal explanation for failure could be more than external intervention; instead, failure could be due to a partial withholding of will or an ambivalence of motive.⁴³ For example, a would-be thief may be insufficiently committed to the actual crime for his theft to succeed, perhaps because of his internal conflict about *being* a thief (which in turn perhaps contributes to his being apprehended). Punishing attempts more leniently than completed crimes, therefore, can be justified by the uncertainty of the precise explanation of why an attempt failed.⁴⁴

Others, though far fewer in number, believe there should not be a difference in punishment between attempted and completed crimes, and instead argue the intended result may have little to do with the blameworthiness of the intended action.⁴⁵ The difference in liability between attempts and completed crimes should be eliminated, they argue, because criminal liability involves dangerous persons and such persons are dangerous whether or not the harm they intend ultimately occurs.⁴⁶ A popular example that expresses this position is known as "equivalency." Equivalency is where two people intend to commit the same crime but, all other factors being equal, one fails due to external circumstances, such as where the would-be murderer's gunshot is deflected by a bird or the victim's cigarette case.⁴⁷ The argument runs, therefore, that this chance failure should not justify a difference in liability between the two equally determined and dangerous persons because the fact that the same action led to different consequences means that sentencing is relying on luck rather than actual culpability.⁴⁸ "Indeed, exculpation of those

ous persons who subjectively intend to cause social harm." *Id.* at 208. Objectivists, on the other hand, would "withhold censure until the conduct has brought about some harmful consequence." *Id.* at 210. The subjectivist, therefore, views the Fourth Amendment as a device for regulating conduct intended to bring about a constitutionally prohibited harm and concludes there would be no need to wait for the actual infringement upon liberty to occur because legal sanctions for attempts seek to prevent future harm; the objectivists would invoke legal sanctions against conduct which damages some interest deemed socially valuable. *Id.*

42. See Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143, 145-46 (1995).

43. *Id.* at 145.

44. *Id.* at 146.

45. Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2194 (1994).

46. See Daniel M. Mandil, *Chance, Freedom, and Criminal Liability*, 87 COLUM. L. REV. 125, 129 (1987).

47. Feinberg, *supra* note 36, at 118.

48. *Id.* at 119; Mandil, *supra* note 46, at 129. *But see* Herman, *supra* note 42, at 147-49 (arguing that success of our actions being contingent on factors outside our control is insufficient as a basis for explanations of those actions, and distinguishing failed attempts from successful actions may not involve anything morally arbitrary).

who fail due to a fortuity would involve inequality of treatment that would shock the common sense of justice.⁴⁹

While there is some support for punishing attempts equivalently to completed offenses, such support is rare, and no legislature adheres to this ideology without at least some exceptions. Although the purpose of criminalizing attempts is deterrence and a harmful consequence is not required for guilt, the fact that attempts tend to be treated more leniently than completed crimes strongly suggests that failure does provide a partial excuse.

III. ATTEMPTED SEIZURES AND THE QUESTION OF REMEDY

If the law of criminal attempt holds a person responsible for attempting to commit a crime, then the law of criminal procedure should hold law enforcers responsible for attempting to violate someone's Fourth Amendment rights. When an officer attempts to violate someone's Fourth Amendment rights, the same penalty should apply to failed violations as well as to completed ones.⁵⁰ The bad intention may misfire or fall short, but, just as with criminal attempts, a remedy is nonetheless appropriate in order to deter future wrongdoing—even *attempted* wrongdoing.

The two settings—criminal law and criminal procedure—are not, however, identical. While failure to commit the crime provides a partial excuse for criminal defendants, police should not have a partial excuse available to them because the only available remedy for attempted unconstitutional seizures is exclusion of the evidence. That is, *the idea of partial excuse makes no sense in the context of attempted unconstitutional seizures*. Sentences under criminal law are incremental or gradual, while under criminal procedure they cannot be. A sentence can be reduced, but evidentiary exclusion is binary: exclusion operates or it does not. There is no middle ground. Therefore, because the officer in *Hodari* attempted to violate the Fourth Amendment by attempting an unlawful seizure, the cocaine should have been suppressed in order to deter that very kind of police misconduct.

Although exclusion of evidence is the appropriate remedy in cases involving police misconduct, when there is no evidence to exclude, the exclusionary remedy provides no relief to those individuals subjected to police misconduct.⁵¹ When there is no evidence, the only other option for a person subjected to police misconduct is to seek a civil remedy that compensates victims of such misconduct and deters future abuse.⁵² Unfortunately, there is not much incentive for such a person, innocent or not, to bring a civil lawsuit.⁵³ Section 1983 of the United States Code is the primary remedy for the

49. LAFAYE, *supra* note 30, at 539.

50. See Peidrahita, *supra* note 28, at 1334.

51. Owens, *supra* note 15, at 192.

52. Matthew V. Hess, *Good Cop—Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, UTAH L. REV. 149, 152 (1993).

53. See CHRISTOPHER S. COGGIN, *CRIMINAL PROCEDURE: REGULATION OF POLICE*

vindication of civil rights.⁵⁴ Section 1983 allows citizens to sue in federal court to enforce their civil rights against state and local police officers (among others) who deprive them of their constitutional and other federally guaranteed rights.⁵⁵ A *Bivens* action is a comparable suit that allows private citizens to initiate a federal action against federal officers who deprive them of certain constitutional rights, including the right to be free from unreasonable searches and seizures.⁵⁶ Both section 1983 and *Bivens* suits allow citizens to seek redress in federal court when their constitutional rights have been violated by law enforcement officials.⁵⁷

Police officers can raise qualified immunity as a defense if the law is not clearly established or, even if it is, if the officer reasonably *believed* that he or she was acting lawfully.⁵⁸ When an officer properly raises qualified immunity as a defense, the officer is not subject to the jurisdiction of the court.⁵⁹ Moreover, one cannot bring an action against the State because the Supreme Court has held that a State is not a "person" within the meaning of section 1983 and states have not consented to such suits.⁶⁰ Additionally, an action against a municipality or county, which *are* treated as persons for purposes of section 1983, will succeed only if the constitutional deprivation resulted from the official policy or custom of the defendant entity.⁶¹ Municipalities and counties cannot assert qualified immunity as a defense,⁶² but neither are they subject to punitive damages.⁶³

Certainly, a qualified-immunity defense impedes the plaintiff,⁶⁴ since officials who perform their public duties reasonably (though unlawfully) are not subject to personal liability for money damages.⁶⁵ If the court accepts the officer's claim of qualified immunity, then the only claim the plaintiff may have is against the municipality or county. The fact that local government entities can be sued only if they authorized the individual officer's action through a government policy or custom, however, can make a section 1983 lawsuit difficult for plaintiffs. It is of little surprise that less than half of one

INVESTIGATION 555-565 (1998). Criminal action and administrative remedies exist but are useless because criminal actions against police officers and administrative remedies are rarely instituted. *See id.*

54. Hess, *supra* note 52, at 152-53.

55. William Hawkins, *Section 1983: A Basic Understanding*, 12 AM. J. TRIAL ADVOC. 355, 356-57 (1988); H. Mitchell Caldwell et. al., *If It's Broken, Fix it: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 740 (1998).

56. Owens, *supra* note 15, at 193.

57. Daniel J. McDonald, *A Primer on 42 U.S.C. '1983*, UTAH B.J. 29 (May 12, 1999).

58. *See* Hawkins, *supra* note 55, at 365.

59. *See* McDonald, *supra* note 57, at 32.

60. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

61. *Monell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658, 694 (1978).

62. *Id.* at 701.

63. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

64. *See* Hess, *supra* note 52, at 158.

65. *See* Creighton v. Anderson, 922 F.2d 443, 448 (1990).

percent of all section 1983 suits, at least those filed by prisoners, elicit any damage awards at all.⁶⁶

Plaintiffs also are hindered in a section 1983 or *Bivens* lawsuit because they often result in small actual damages.⁶⁷ Often suspects suffer no physical injury or emotional trauma when police detain them too long, or rummage through their belongings and find nothing, or otherwise subject plaintiffs to their authority in a relatively minor way (minor at least when compared to the sort of tort suits that yield substantial damages). Put slightly differently, a real hindrance to the success of civil-rights lawsuits is that they are viewed largely as just another form of tort action, where damages, if only due to the legal system's lack of remedial imagination, get expressed merely in terms of bumps, bruises, and emotional trauma.

While section 1983 compensates injuries caused by a constitutional deprivation,⁶⁸ the Supreme Court is more than a little reluctant to "presume" damages from the "abstract" value of a constitutional right.⁶⁹ Perhaps due to a lack of imagination, or an inability to view the right at stake as more valuable than the physical or emotional injury suffered by its violation, it is not unusual for a court or jury to find a constitutional violation, yet decline to order compensation as a remedy. Did the plaintiff lose sleep? Income? Why, exactly? Because someone performed a religious prayer at a graduation program in a public school? Indeed, plaintiffs have gotten all the way to the Supreme Court only to have the Court agree that their constitutional rights were violated or ignored by the government, and then order the government to pay the plaintiff as little as \$1 in damages for violations of the Fourteenth Amendment⁷⁰ and little more for violations of the First Amendment.⁷¹ Such instances where nominal damages are awarded to plaintiffs who substantiate constitutional violations but fail to establish the factual basis for an award of compensatory damages, although far from common, do indeed occur.⁷²

The availability of punitive damages does not make matters much better for plaintiffs. Punitive damages are available against individual officials who are sued under section 1983, but only in the most obvious and egregious cases, e.g. Rodney King's. Such damages are never available against local governments, who, ironically, are in a much better position than the tortfea-

66. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 17-22, 36 (Jan. 1995) (Discussion Paper).

67. McDonald, *supra* note 57, at 33.

68. Memphis Cnty. Sch. Dist. v. Stachura, 447 U.S. 299, 307 (1986).

69. *See id.* at 310.

70. *See* Farrar v. Hobby, 506 U.S. 103, 112 (1992). *See also* Carey v. Phipps, 435 U.S. 247, 266 (1978).

71. *See* Abramson v. Anderson, 50 U.S.L.W. 2462 (S.D. Iowa 1982). In *Abramson*, plaintiff was awarded \$300 for mental distress caused by authorized prayers at student assemblies. *Id.* *See also* DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 186 (1994).

72. *See* Stachura, 447 U.S. at 308 n.1; McDonald, *supra* note 57, at 33.

sor-officer to both pay punitive damages and minimize the re-occurrence of violations through improved recruitment, supervision, and officer training.⁷³

These civil-rights lawsuits are also costly to litigate.⁷⁴ Although prevailing plaintiffs are entitled to reasonable attorney fees,⁷⁵ the Supreme Court has held that if a “plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.”⁷⁶ Because section 1983 and *Bivens* lawsuits depend on private enforcement, the availability of at least attorney’s fees awards is necessary to supply greater incentive to bring such actions.⁷⁷

Individual officers, however, are not necessarily concerned with attorneys’ fees or with paying judgments. For instance, assume that the City of San Diego keeps lawyers on retainer to defend police officers, whether on or off duty at the time of the tort in question. The City then privately contracts with individual officers to provide the officers representation and indemnification as long as the action complained of occurs within the scope of employment. Only grossly negligent acts, such as rape, fall outside of the scope of employment and even then the City will represent the defendant through the administrative-hearing stage of litigation. The City will not, however, cover punitive damages.⁷⁸ Because the City has more money to spend on lawsuits than do plaintiffs and plaintiffs’ lawyers, plaintiffs’ lawyers will not expend sufficient time and money on the case due to their concern that their reasonable fee, to which they are entitled if they win, may be no fee at all in the typical small-damages case. This unequal playing field substantially hinders the plaintiff before and during trial.

In addition, when the plaintiff does get to court against an individual officer, the jury often sees the officers as merely “doing their job” and sympathizes with them on the question of the officer’s liability.⁷⁹ Moreover, jurors and judges alike can be biased against a former criminal defendant—now turned plaintiff—not only because of the base criminality, but also because they view them as unworthy victims. This is particularly so under rules that admit evidence that was discovered against the defendant, even though that evidence is inadmissible in the criminal case.⁸⁰

73. McDonald, *supra* note 57, at 33.

74. See Caldwell et. al., *supra* note 55, at 740.

75. 42 U.S.C. § 1988 (1999).

76. Farrar v. Hobby, 506 U.S. 103, 115 (1992) (citation omitted). The Tenth Circuit limited *Farrar’s* holding to cases where there is a significant difference between the amount recovered and the amount sought, the legal issue is of little significance, and no important public purpose is being served. *Id.* at 121-22 (O’Connor, J., concurring).

77. Hess, *supra* note 52, at 164.

78. Telephone Interview with Tom Simones, Police Officer for the City of San Diego, Police Department in San Diego, Cal. (Apr. 4, 2000).

79. See Owens, *supra* note 15, at 194.

80. See *id.*; Caldwell, et. al., *supra* note 55, at 739-40.

Potential plaintiffs, therefore, have little incentive to sue for damages for violations of their Fourth Amendment rights because of the difficulty in obtaining effective legal representation and the absence of a prospect of a significant recovery. Consequently, there is no reason to believe civil lawsuits act as an effective deterrent.⁸¹ Due to the problems inherent in civil remedies, the exclusionary remedy should be applied whenever possible. Suppression of such evidence should be sought when evidence is obtained through an unlawful attempted seizure.

Although other attempted constitutional violations should require a penalty to serve as a deterrent, the exclusionary remedy would be inapplicable because there is no evidence to exclude. It is only in situations where there is no evidence to exclude, that civil remedies should be sought, or at least solely depended on.

For instance, when a police officer conducts a custodial interrogation and fails to properly warn the subject, the officer has violated *Miranda*. Any confessions obtained from the misconduct will be suppressed at trial.⁸² An attempted *Miranda* violation would involve the same police misconduct but either would not lead to a confession or would lead to a confession that the prosecution does not seek to introduce at trial (if there is one). Because in such a case there is no evidence to suppress, the exclusionary remedy cannot apply and the only option left is to bring a civil action against the offending officer.⁸³ In this situation, the small-damages problem becomes even worse given that suspects whose *Miranda* rights are violated are lawfully arrested; their only complaint is not that they were in custody, but that police *talked* to them. Because it is hard to see a question as a tort, only the tiniest minority of courts have identified section 1983 suits as the appropriate means for the vindication of the *Miranda* rights.

Similarly, when an officer conducts an unreasonable search by invading an individual's legitimate expectation of privacy, any evidence obtained will be suppressed at trial. An attempted search would involve the same unreasonable conduct, but would not lead to any evidence. Because no evidence results from an unlawful seizure, the exclusionary remedy could not apply.⁸⁴ It would be "damages or nothing" for the plaintiff-search victim.⁸⁵ And finally, while an impermissibly suggestive identification procedure results in exclusion of the out-of-court identification at trial, the exclusionary remedy will not apply to an attempted impermissibly suggestive identification that

81. See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE 36-37 (3d ed. 1996).

82. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

83. See *California Attorneys for Criminal Justice v. Butts*, 1999 WL 1005103, 11 (9th Cir. 1999) (holding that officers who intentionally violate *Miranda* are not entitled to qualified immunity and are subject to civil liability).

84. See *Goldman v. United States*, 316 U.S. 129, 133-35 (1942).

85. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

does not lead to an identification.⁸⁶ Clearly, the exclusionary remedy is not a plausible remedy in such a case. *Some* remedy, however, is still necessary in such a case for the same reasons it is necessary for attempted seizures. Although section 1983 and *Bivens* lawsuits act as a less effective deterrent than the exclusionary remedy, they are the only other penalties available when the exclusionary remedy is not. Because the exclusionary remedy is available when there is evidence to suppress, it is the appropriate remedy when an officer discovers evidence in an attempt to unlawfully seize someone.

CONCLUSION

The Supreme Court has decided not to treat attempted seizures as a form of seizure and, consequently, attempted seizures do not provide citizens with the adequate protection that the Fourth Amendment was intended to provide. If preventing an officer's unlawful conduct is the focus, then a citizen's *response* to that conduct should not be a factor in determining whether a penalty should exist for the already unlawful conduct. The logic here parallels the logic for holding people responsible for attempting to commit crimes. In seeking to prevent criminal behavior, most American jurisdictions provide a penalty for those who attempt such misconduct. Therefore, it follows that if officers are penalized for conducting unlawful seizures, attempts at such misconduct should be penalized as well.

The exclusionary remedy provides the best penalty and should be used in all cases where evidence is available to suppress and that has been obtained illegally. The fact that the exclusionary remedy is not a viable remedy for other attempted constitutional violations does not mean that it should be precluded in cases where it can apply. Therefore, in instances of attempted seizures where there is evidence to be excluded, suppression is the proper remedy.

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86. Daniel Yeager, "Oops!" *Inadvertence, Intentionality and the Police*, 24 SEARCH AND SEIZURE L. REP. 157, 160 (1997).

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