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THE DUE PROCESS EXCLUSIONARY RULE

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As the Supreme Court continues to cut back on and perhaps eliminate Fourth Amendment suppression, the exclusionary rule has entered a new period of crisis. The rule's greatest vulnerability today stems from the consensus that it can be justified only based on policy arguments from deterrence or atextual values like judicial integrity. Instead of pursuing those prevailing theories, the exclusionary rule's defenders should draw on arguments centered on constitutional text and historical change. Under that approach, the exclusionary rule would spring not from the Fourth Amendment itself, but rather from the historically evolving interrelationship between the Fourth Amendment and the Due Process Clauses. By the mid–twentieth century, changes in law and practice had recast the Fourth Amendment as a source of pre-trial "process" analogous to in-trial procedural guarantees such as the Confrontation Clause. And when a criminal conviction is predicated on a violation of the Constitution's criminal procedure requirements, including the Fourth Amendment, the conviction works an ongoing deprivation of liberty without due process. This approach has a number of advantages and implications. It provides a constitutional foundation for the harmless error doctrine, explains why the same exclusionary principles apply to different constitutional rights, clarifies the contested bounds of many exclusionary exceptions, and supplies a manageable framework for analyzing the remedial implications of newly emerging Fourth Amendment rules for digital surveillance technologies.

The exclusionary rule has entered a new period of crisis.[1] In a pair of 5–4 decisions, the Roberts Court has established the doctrinal basis for radically curtailing the circumstances in which the Fourth Amendment exclusionary rule might apply. The first decision, *Hudson v. Michigan*,[2] argued at length that the exclusionary rule was a product of a bygone era, when police were unprofessional and egregious Fourth Amendment violations were routine.[3] Because times have changed, the Court reasoned, the exclusionary rule often "forc[es] the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."[4] The second decision, *Herring v.*

[*] J.D. 2008; M.Phil. 2005. The author is indebted to a long list of generous commentators, including Akhil Amar, Jack Balkin, Will Baude, Kristen Eichensehr, Dan Epps, Dan Hemel, Robert Goldstein, Orin Kerr, Wayne Logan, Dina Mishra, Hashim Mooppan, Alex Potapov, Dave Pozen, Chris Re, Joe Sanders, Kate Stith, David Sklansky, Vivek Suri, Eugene Volokh, and the editors of the *Harvard Law Review*. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

[1] The exclusionary rule's last moment of comparable peril was over thirty years ago, when the Court ordered reargument in *Illinois v. Gates*, 462 U.S. 213 (1983), and directed the parties to address whether to suppress evidence where police reasonably but erroneously believed that their search comported with the Fourth Amendment.

[2] 547 U.S. 586 (2006) (holding that knock-and-announce violations should not trigger suppression of evidence).

[3] *See id.* at 589–99.

[4] *Id.* at 597. *But see* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567 (2008).

United States,[5] went even further by suggesting the specific form that a twenty-first-century exclusionary rule might take. "To trigger the exclusionary rule," the Court said, "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[6] In other words, the exclusionary rule should apply in Fourth Amendment cases, if at all, only when the police have exhibited "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[7]

Read for all they are worth, the sweeping dicta set out in *Hudson* and *Herring* would work a revolution.[8] In 1961, *Mapp v. Ohio*[9] declared "that *all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[10] Today, while there are of course many exceptions to the exclusionary rule, the basic default established in *Mapp* — that unconstitutionally obtained evidence is presumptively inadmissible at trial — remains a cornerstone of American criminal procedure. Yet *Herring* repeatedly cited and endorsed views that Judge Henry J. Friendly wrote *to criticize* cases like *Mapp* and their broad endorsement of exclusionary remedies.[11] Many commentators have noted the Court's "ominous" signals.[12] As if to confirm that suspicion, the Justices have

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[5] 129 S. Ct. 695 (2009) (declining to suppress evidence where police conducted a search because their records erroneously indicated that the defendant was the subject of an outstanding arrest warrant).

[6] *Id.* at 702.

[7] *Id.*; *cf.* Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 213 (2010) (proposing suppression only when an illegal search results from "negligen[ce]" by police).

[8] In the wake of *Herring*, one leading commentator published an article straightforwardly entitled: "Is the Exclusionary Rule Dead?" Craig M. Bradley, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012). Another prominent title states: "No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule." Tracey Maclin & Jennifer Rader, 81 MISS. L.J. 1183 (2012). Meanwhile, the leading Fourth Amendment treatise writer called *Herring* "a complete disaster" and "scary." Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 770, 787 (2009) (internal quotation marks omitted); *see also* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 325–47 (2012) (arguing that *Hudson* and *Herring* contributed to the "[a]brogation of the exclusionary rule" during the Roberts Court, *id.* at 346); Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 511 (2009) (agreeing that *Herring* is "scary" (internal quotation marks omitted)).

[9] 367 U.S. 643 (1961).

[10] *Id.* at 655 (emphasis added).

[11] *E.g.*, *Herring*, 129 S. Ct. at 702 (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965)); *see also* Note, *Toward a General Good Faith Exception*, 127 HARV. L. REV. 773, 775–76 (2013) (endorsing and updating Friendly's views).

[12] LaFave, *supra* note 8, at 770; *see also* sources cited *supra* note 8.

already begun to stake out positions in this divisive and apparently inevitable contest.[13]

Despite the sense of change in the air, debate over the exclusionary rule has become hackneyed,[14] as evidenced by *Herring*'s invocation of Judge Friendly's 1965 article.[15] Indeed, the battle lines seem to have been drawn long ago. On one side are those who believe that a broad exclusionary rule both deters the police from infringing the Fourth Amendment and honors moral values, such as equitable restoration.[16] On the other side are critics who argue that the rule is both inconsistent with historical practice and unnecessary in light of other actual or potential constraints on police behavior.[17] This fundamental schism has remained as though frozen in time. In other areas of constitutional law and criminal procedure, the Court now routinely engages in textual interpretation informed by history,[18] yet debate over the exclusionary rule still seems to lack any foothold in conventional constitutional interpretation. Instead, Fourth Amendment suppression explicitly rests on essentially atextual notions of policy or morality. In a still-cited 1939 case, for instance, the Court candidly explained that the exclusionary rule is "the translation into practicality of broad considerations of morality and public well-being."[19] Remarkably, both propo-

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[13] *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting) ("[I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was 'deliberate, reckless, or grossly negligent,' then the 'good faith' exception will swallow the exclusionary rule."); *id.* at 2435 (Sotomayor, J., concurring in the judgment) ("We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable.").

[14] *See* Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence*," 37 FORDHAM URB. L.J. 743, 745 (2010) ("The ideas in this 'new' debate, however, are about as fresh as the musty air of an antique shop.").

[15] *Herring*, 129 S. Ct. at 702 (quoting Friendly, *supra* note 11, at 953).

[16] *See* Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 134 (2003); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 44–45 (1987); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600 (1983) [hereinafter Kamisar, *Does (Did)*]; Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1394–96 (1983).

[17] *E.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994); *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365–66; *infra* note 75 (collecting sources).

[18] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 626 (2008); Crawford v. Washington, 541 U.S. 36, 42–56 (2004); *infra* pp. 1927–28.

[19] Nardone v. United States, 308 U.S. 338, 340 (1939). Though *Nardone* involved suppression for a statutory violation, it both cited and has been cited by leading Fourth Amendment exclusion cases. *E.g.*, Hudson v. Michigan, 547 U.S. 586, 593 (2006) (citing *Nardone*, 308 U.S. at 341).

nents and critics of the exclusionary rule continue to agree with that basic assessment today.

This Article argues that a modified exclusionary rule can and should be defended as a product of conventional constitutional interpretation. The key is to shift focus away from the Fourth Amendment and toward the Due Process Clauses.[20] When a criminal defendant is convicted based on unconstitutionally obtained evidence, that defendant's "liberty" has been "deprived" without "due process of law."[21] To avert that unconstitutional deprivation, the unlawfully obtained evidence should not be admitted in the first place. To be clear, this vision of Fourth Amendment suppression does *not* rest on an assertion of "substantive" due process.[22] Instead, the argument stems from the core, procedural meaning of the Due Process Clauses: deprivations of life, liberty, and property must accord with lawful process, including the search and seizure procedures set out by the Fourth Amendment.[23] On this view, suppression does not result from the Fourth Amendment itself, as many commentators and judges have suggested.[24] Instead, the exclusionary rule is a product of the Fourth Amendment and the Due Process Clauses working together.[25]

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[20] U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV, § 1.

[21] *Id.* amend. V; *id.* amend XIV, § 1; *see also* Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 343, 362–64 (1974) (arguing in part that the Due Process Clause establishes a right "to a fair prosecution, or to constitutional conduct by the government in its entire criminal proceeding," *id.* at 343, including collection of evidence).

[22] *See* Rochin v. California, 342 U.S. 165, 174 (1952) (suppressing evidence obtained from stomach pumping under the Due Process Clause); *see also* William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1203 (noting "the possibility that a new *due process* wrong can be brought about if a court allows the government to use evidence obtained through an *unconscionable* fourth amendment wrong," even if "[s]uch wrongs are perhaps rare"). For a balanced criticism of a substantive due process approach, see Slobogin, *supra* note 17, at 437–41 (arguing that the "shocks the conscience" standard poses administrability problems).

[23] *See* Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1776 (2012); sources cited *infra* notes 99–100.

[24] *E.g.*, United States v. Leon, 468 U.S. 897, 932–33 (1984) (Brennan, J., dissenting); United States v. Calandra, 414 U.S. 338, 360 (1974) (Brennan, J., dissenting) ("[T]he exclusionary rule is 'part and parcel of the Fourth Amendment's limitation upon [governmental] encroachment of individual privacy.'" (alteration in original) (quoting Mapp v. Ohio, 367 U.S. 643, 651 (1961))); *Mapp*, 367 U.S. at 655 (holding that "the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions").

[25] For other scholarship in this vein, see Nadia B. Soree's *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753, 791 (2013) (drawing on due process to criticize Fourth Amendment "standing" doctrine). *See also* Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 154 (1978) (arguing that due process bars "substantial" violations of constitutional procedures); James Boyd White, Comment, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1280 (1983) (positing that "due process — if it is to mean anything at all — means that the state must comply with its own law when it seeks to pros-

When viewed as a function of due process, the exclusionary rule finds new sources of normative appeal. First, due process suppression is rooted in constitutional text and history and so proceeds from widely accepted first principles of constitutional interpretation. Of particular note, due process supplies a response to originalists who contend that suppression was unheard of at the Founding: only gradually, during the nineteenth century, did the Fourth Amendment come to function as pre-trial criminal "process." Second, due process offers an organizing principle capable of making sense of exclusionary doctrine. Without quite saying so, the Court has effectively come to treat the Fourth Amendment as just another procedural rule for the use of evidence. That tacit assimilation of the Fourth Amendment into other procedural rules explains much of the Court's otherwise incoherent case law, even as it highlights areas that are in tension or even incompatible with due process.

Besides planting Fourth Amendment suppression on firmer footing, focusing on due process also suggests avenues for the rule's refinement. Today, the voluminous literature on Fourth Amendment remedies tends to view the exclusionary rule as an all-or-nothing proposition. Almost without exception, the rule's proponents advocate a rather categorical norm of suppression, while exclusionary critics hope for the rule's demise, either at once or gradually by a thousand exceptions.[26] The unfortunate result is that the literature has often treated exclusionary issues at a high level of abstraction. By contrast, an exclusionary rule grounded in due process — like our actual exclusionary rule — is naturally qualified and nuanced. Focusing on due process thus sets the stage for exclusionary compromise.

More broadly, viewing suppression as a product of due process enhances our understanding of suppression under other criminal procedure provisions, such as the Confrontation and Self-Incrimination Clauses. These provisions are frequently said to contain their own exclusionary rules,[27] but that is an oversimplification. For instance, the Confrontation Clause does not specify whether to afford a remedy when a violation has *already* taken place. Does this lacuna mean that, so far as the Constitution is concerned, confrontation violations lack any remedy? No. When the introduction of unconfronted testimony runs afoul of the Confrontation Clause, the appropriate remedy is dictated by the Due Process Clauses. If the Confrontation Clause violation led to a due process violation (by leaving the defendant unlawfully deprived of liberty), then the case must be retried in a proceeding

ecute the citizen"); *cf. infra* p. 1911 and note 241 (critically discussing Soree's and Sunderland's papers).

[26] *See, e.g.*, sources cited *supra* notes 8, 16.

[27] *See* sources cited *infra* note 142 (explaining that these clauses expressly exclude evidence).

where the unlawful evidence is excluded. But if the Confrontation Clause violation did *not* yield a due process violation, then reversal of the conviction would be unnecessary. In this way, due process supplies a constitutional basis for the harmless error doctrine — a critical remedial principle that prevents trial rights from being drained of practical value.

The argument proceeds in four parts. Part I sets out and then criticizes the prevailing rationales for Fourth Amendment suppression. These familiar justifications focus on deterrence, equitable restoration, judicial integrity, and judicial review. These approaches are all normatively problematic because they rest on an appeal to essentially legislative policy preferences without any basis in conventional legal interpretation. What is more, these approaches are descriptively problematic because they are incompatible with basic features of existing Fourth Amendment exclusionary doctrine.

Part II makes the first-principles case for suppression based on due process. The first step is to acknowledge the core meaning of the Due Process Clauses: individuals may not be deprived of life, liberty, or property except through compliance with lawful procedures. That simple idea explains why convictions predicated on illegally obtained evidence typically cannot survive appellate review. With the concept of due process exclusion now in view, this Part considers historical changes in criminal procedure, particularly the rise of investigative police, to explain why due process exclusion in Fourth Amendment cases makes more sense today than at the Founding. This discussion supplies an example of the rising trend toward "new originalism" in constitutional scholarship. While attentive to constitutional text and original practice, due process exclusion also draws essential support from historical change.

Part III advances an "interpretive"[28] argument for due process suppression. This mode of analysis is partly normative and partly descriptive, in that it argues that due process provides the most persuasive basis for current exclusionary jurisprudence. The exclusionary rule's most fundamental traits flow naturally from a due process approach, even though those traits are incompatible with prevailing theories. True, some important features of exclusionary doctrine do not follow from viewing the exclusionary rule as due process. But even those areas of doctrine are readily intelligible in due process terms, given prevailing views of exogenous issues. For example, the exclusionary rule's applicability in habeas proceedings turns on the prevail-

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[28] *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192 & n.11 (1987) (citing RONALD DWORKIN, LAW'S EMPIRE 4–14, 45–86 (1986)) (describing an "interpretive" approach).

ing exogenous view that habeas proceedings are not necessarily vehicles for vindicating due process rights.

Part IV pushes beyond the status quo to suggest revisions to current doctrine, as well as solutions to emerging exclusionary questions. For example, due process supplies a framework for addressing the Seventh Circuit's remarkable curtailment of the warrant requirement under the guise of inevitable discovery.[29] In addition, current doctrine delineates "exceptions" for inevitable discovery, independent source, and attenuation — each of which is supposedly rooted in causality or deterrence. But all these doctrines can be recast as applications of a single due process principle. Finally, due process sheds much-needed light on what promises to be the next major challenge in Fourth Amendment case law: digital surveillance and mosaic theories of evidence acquisition.

The Conclusion proposes a change in terminology. Courts, litigants, and scholars routinely speak of "the Fourth Amendment exclusionary rule," yet no such rule exists. Exclusionary principles are instead a product of the Fourth Amendment and other procedural rights acting in tandem with the Due Process Clauses. What we have, in other words, is a "due process exclusionary rule."

I. PREVAILING THEORIES OF THE EXCLUSIONARY RULE

Today, constitutional argument is increasingly marked by attention to text and history,[30] yet that trend has not made its way to the exclusionary rule.[31] For many decades, by far the leading justification for the exclusionary rule has been the need to deter police misconduct, and the nearest runners-up were the equally atextual values of equitable restoration and judicial integrity.[32] What is more, these familiar theories all fall short of justifying modern exclusionary doctrine. Below, sections A through D criticize the prevailing justifications for the exclusionary rule — namely, justifications based on deterrence, equitable restoration, judicial integrity, and judicial review.

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[29] *See infra* pp. 1949–50.

[30] *See supra* p. 1889; *infra* pp. 1927–28.

[31] Early exclusionary cases rested in part on the Self-Incrimination Clause, *see, e.g.*, Boyd v. United States, 116 U.S. 616 (1886), but that approach "has not withstood critical analysis or the test of time." United States v. Leon, 468 U.S. 897, 906 (1984). For example, the fruits of reasonable searches are admissible "against" the accused, and most excludable evidence involves no "witness." U.S. CONST. amend. V.

[32] *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 707–08 (2009) (Ginsburg, J., dissenting) (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)) (internal quotation mark omitted).

A. Deterrence

Deterrence is often said to offer the "sole" principle capable of explaining the Court's complex set of exceptions to the exclusionary rule.[33] The Court's recent decision in *Davis v. United States*[34] arguably represents the culmination of deterrence reasoning, as all three filed opinions — Justice Alito's majority, Justice Sotomayor's concurrence in the judgment, and Justice Breyer's dissent — focused exclusively on deterrence and like policy considerations.[35] The law reviews agree. As Professor Donald Dripps has observed, theories of the exclusionary rule *not* based on deterrence "have fared poorly in the literature."[36]

This section argues that deterrence arguments cannot justify central features of current exclusionary doctrine. As a descriptive matter, deterrence arguments simultaneously counsel much more and much less suppression than current doctrine allows. And, from a normative standpoint, deterrence reasoning is in tension with important principles of precedent and judicial legitimacy.

1. Deterring Too Little. — Start with how current doctrine suppresses less than a deterrence-based approach would recommend. A true supporter of deterrence would be willing to impose punitive sanctions on misbehaving police.[37] In principle, achieving optimal deterrence might require, for example, that *all* evidence in cases involving certain egregious Fourth Amendment violations be suppressed, such that courts would have to dismiss with prejudice all pending charges. A comparison might be drawn with the tort system, wherein would-be perpetrators of great wrongs are deterred through punitive damages.

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[33] *E.g.*, Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."); Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388–89 (1964) ("The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers.'" (first alteration in original) (footnote omitted) (quoting Elkins v. United States, 364 U.S. 206, 235 (1960) (Frankfurter, J., dissenting))); Friendly, *supra* note 11, at 951 ("The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.").

[34] 131 S. Ct. 2419.

[35] *See id.* at 2426–27; *id.* at 2434 (Sotomayor, J., concurring in the judgment); *id.* at 2438–39 (Breyer, J., dissenting).

[36] Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 23 (2001); *see also id.* at 8 ("Theories based on due process, judicial review, and judicial integrity have trouble explaining why an adequate deterrent remedy, whatever its form, would not provide an adequate forum for judicial review, uphold the law of the land, and preserve judicial integrity unstained.").

[37] *See* Dripps, *supra* note 14, at 789 (collecting sources that acknowledge "deterrence is not incompatible with suppressing evidence that was obtained without violating the rights of the instant defendant").

Supercompensatory sanctions are particularly important where potential wrongdoers face low odds of detection, since the threat of draconian punishment counterbalances the high likelihood of escaping punishment altogether.[38] That reasoning powerfully applies in the Fourth Amendment context, as vast numbers of Fourth Amendment violations never result in suppression.[39] Most obviously, the fruits of unconstitutional searches can be admitted by virtue of exclusionary exceptions, such as for inevitable discovery.[40] These doctrines greatly undermine the immediacy and predictability of the exclusionary sanction, thereby diluting its deterrent value. What is more, a very large number of unconstitutional searches are never identified at all.[41] Unlawful searches might fail to uncover useful evidence, for example, or the government might not introduce the fruits of illegal conduct.[42] Other possible causes of underdetection include oversights by (overworked) public defenders, deceit by testifying police, and judicial error. The burden of establishing a Fourth Amendment violation, after all, rests on the defendant.

Yet the Court has *never* — not once, not even for the most egregious instances of police misconduct — followed the reasoning of deterrence to its logical conclusion by authorizing a punitive suppression order. Instead, the Court has excluded only illegally obtained evidence, and even then only when an array of exceptions (for example, independent source, inevitable discovery, good faith) do not apply. Illegally obtained evidence is thus the upper limit beyond which the exclusionary rule dare not venture. This pattern is no accident. When it applies, the exclusionary rule disgorges the government of an evidentiary advantage obtained through a Fourth Amendment violation, without deliberately imposing punitive sanctions beyond specific ill-gotten gains.[43] One might say that the exclusionary rule is "Newtoni-

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[38] *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 890–91 (1998) ("[P]unitive damages should equal the harm multiplied by . . . the ratio of the injurer's chance of escaping liability to his chance of being found liable." *Id.* at 890.); *see also* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 438–39 (2001) (citing Polinsky & Shavell, *supra*, at 890–91).

[39] Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

[40] *See infra* section IV.B.2, pp. 1956–59.

[41] *See* Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 56 (1994) (citing Amar, *supra* note 17, at 814); *cf.* Kamisar, *Does (Did)*, *supra* note 16, at 659 ("As a device for directly deterring burglaries a rule that burglars only had to give up their ill-gotten gains on those occasions when they were caught would be a failure, too." (emphasis omitted)).

[42] *See* Terry v. Ohio, 392 U.S. 1, 14 (1968) (explaining that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal").

[43] *See, e.g.*, Murray v. United States, 487 U.S. 533, 537 (1988) (declining to exclude where suppression "would put the police in a worse position than they would have been in absent any error

an" in that each Fourth Amendment violation calls for an equal and opposite suppression order. This explicitly restorative strain in the doctrine must seem hopelessly misguided to any serious student of deterrence, since (as just explained) it guarantees that the doctrine will not account for the fact that many Fourth Amendment violations go undetected or otherwise unpunished. Put more bluntly, the rule against punitive exclusion all but guarantees that the legal system will substantially underdeter police misconduct.

Even worse, some of the Court's exceptions to the exclusionary rule permit strategic Fourth Amendment violations and so gravely undermine deterrence. Perhaps the most salient example is that current law permits the government to use evidence obtained in violation of one person's constitutional rights in a prosecution against a different individual.[44] This so-called "standing" requirement supplies a tremendous inducement to unconstitutionality, including in cases that the Court itself has heard.[45] Yet the Court has nonetheless enforced the requirement of Fourth Amendment standing, apparently because it believes that the exclusionary remedy is tied to personal Fourth Amendment rights.[46] This absolute restriction is nonsensical from a deterrence standpoint, since the threat of springing Person A from prison could very well deter police from violating Person B's constitutional rights.

In sum, the exclusionary rule does not come close to achieving optimal deterrence, and current doctrine has squarely rejected obvious ways to do so. As a result, deterrence — the purported first principle of Fourth Amendment remedies — cannot even begin to explain contemporary exclusionary-rule jurisprudence.

2. Deterring Too Much. — Longstanding doctrine also suppresses much more than a proponent of deterrence should support. Courts regularly apply the exclusionary rule both presumptively and

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or violation" (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)) (internal quotation mark omitted)); *Nix*, 467 U.S. at 443 (explaining that suppression ensures that the prosecution is not "put in a better position than it would have been in if no illegality had transpired"); *infra* text accompanying notes 76–77.

44 *See* Rakas v. Illinois, 439 U.S. 128, 133–34 (1978); *see also* Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1694–96 (2007) (critiquing this practice as incompatible with the exclusionary rule's deterrence rationale); Kamisar, *Does (Did)*, *supra* note 16, at 635 (collecting sources that support the abolition of the standing requirement).

45 *See* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 911–12 (1989) (discussing United States v. Payner, 447 U.S. 727 (1980), in which the Court did not suppress evidence attained after the police stole a briefcase to prosecute a third party).

46 *See, e.g.*, Brown v. United States, 411 U.S. 223, 230 (1973) ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (citations omitted) (quoting Alderman v. United States, 394 U.S. 165, 174 (1969)) (internal quotation marks omitted)).

transsubstantively — that is, without regard to either the flagrancy of the government's violation or the gravity of the defendant's crime. But that traditional approach is in tension with the reasoning of the Court's recent case law. When the Court discusses deterrence, it does so within a larger utilitarian framework in which the exclusionary rule's benefits are assessed in light of its costs. Under this analytical scheme, most of the work is done, not by deterrence assessments as such, but rather by *the comparison* of deterrence interests against incommensurable nondeterrence values.[47] The exclusionary rule must "pay its way" in the sense that it must yield a marginal deterrence benefit at least commensurate with the substantial social costs of suppressing reliable evidence.[48] This approach moves beyond the overbroad goal of maximizing aggregate deterrence and so provides a nuanced framework for resolving specific exclusionary questions. But that sophistication comes at a price. Instead of presumptively requiring the suppression of illegally obtained evidence, courts that apply "pay its way" reasoning have to ask whether each separate application of the exclusionary rule would yield sufficient benefits to outweigh the resulting costs. Courts attentive to the way the wind is blowing at One First Street have already begun to do just that.[49]

To create a more efficient deterrent, the Court might give up on insisting that the exclusionary rule operate both presumptively and transsubstantively. Instead, the Court might adopt a spectrum of remedies that calibrates the severity of the exclusionary deterrent to the magnitude of its anticipated rewards.[50] Under this revised approach, egregious or deliberate police misconduct might trigger punitive exclusion, such as dismissal of all charges. Serious violations where the de-

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[47] *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("We have rejected 'indiscriminate application' of the rule, and have held it to be applicable only . . . 'where its deterrence benefits outweigh its substantial social costs.'" (citations and alteration omitted) (internal quotation marks omitted)); *id.* (distinguishing this approach from *Mapp*'s). *But see* Kamisar, *Does (Did)*, *supra* note 16, at 646 ("Inasmuch as 'privacy' . . . and 'efficiency' . . . are different kinds of interests, how can they be compared . . . ?" (emphasis omitted)).

[48] Herring v. United States, 129 S. Ct. 695, 704 (2009) (quoting United States v. Leon, 468 U.S. 897, 907 n.6 (1984)) (internal quotation marks omitted).

[49] *See, e.g.*, United States v. Davis, 690 F.3d 226, 256 (4th Cir. 2012) (declining to suppress where "the obtaining and testing of Davis' DNA from his bloody clothing, and the subsequent inclusion of his DNA profile in the database were, at best, 'isolated negligence attenuated from the arrest'" (citing *Herring*, 129 S. Ct. at 698)); United States v. Master, No. 11-5753, 2012 U.S. App. LEXIS 16649, at *11 (6th Cir. Aug. 6, 2012) (rejecting suppression of evidence unlawfully collected pursuant to a warrant that was void ab initio because "[u]nder the *Herring* balancing test the benefits of deterrence, if any, do not outweigh the costs"); *infra* p. 1959.

[50] Instead of creating a spectral rule of exclusion like the one described in the main text, the Court has instead used cost-benefit analysis only to disqualify the exclusionary rule in certain defined contexts. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) ("As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.").

fendant poses a risk to society might result in compensatory exclusion, such as exclusion of the tainted evidence and its fruits. And good-faith violations, or violations involving routine crimes, might not warrant exclusion of any evidence at all. The context-specific reasoning of marginal deterrence might likewise prompt the Court to qualify its incorporation doctrine, which currently holds that the exclusionary rule must apply symmetrically in all fifty states. Under a deterrence paradigm, by contrast, the exclusionary rule could vary by state and even county, depending on the rates of police misconduct and violent crime in any given jurisdiction. In sum, the Court's "pay its way" reasoning suggests that the exclusionary rule should apply only in certain limited categories of Fourth Amendment cases, such as when the police engage in outrageous conduct, pursue relatively unimportant criminals, or systematically violate the law.

Yet for over fifty years, the exclusionary rule has routinely and automatically applied across the country in cases where the alleged crime was serious or the police error mundane. To eliminate suppression in such cases would mean giving up on exclusion for the most pervasive types of Fourth Amendment violations, as well as for most violations conducted during investigations into major crimes. The Court's "pay its way" reasoning would thus transform the exclusionary rule into the exclusionary exception.

3. Precedent. — A defender of deterrence-based reasoning has at least one point in her favor: the Court's precedents have been increasingly explicit in saying that deterrence is the only justification for the exclusionary rule. But the Court's older, foundational exclusionary-rule cases talk about much more than deterrence.[51] Further, proponents of deterrence-based approaches are not well placed to insist on steadfast fidelity to the reasoning of past decisions, since increased precedential support for what we might call "deterrence exclusivity" was itself the result of a doctrinal shift. Decades ago, the exclusionary rule was not about deterrence.[52] Then it became partially about deterrence.[53] And now it is (allegedly) only about deterrence.[54] Does that chronology foreclose the possibility that the rule might become about more than deterrence once again? Or, instead, does the Court's dynamic reimagining of exclusionary precedent over time suggest that this area remains unsettled and, indeed, open to new changes of emphasis?

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[51] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12–13 (1968) (discussing judicial integrity); Mapp v. Ohio, 367 U.S. 643, 659 (1961) (same); Elkins v. United States, 364 U.S. 206, 222–23 (1960) (same).

[52] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, 393–94 (1914).

[53] *See Mapp*, 367 U.S. at 658.

[54] *See Calandra*, 414 U.S. at 348.

Before answering that question, consider the second point: while the Court has relied on deterrence arguments to forge *exceptions* to the exclusionary rule, we have already seen that some of these exceptions, such as the Fourth Amendment standing principle, are incompatible with a serious concern to achieve optimal deterrence.[55] And other exceptions must be based on considerations besides deterrence.[56] This context shows that arguments about exclusionary-rule exceptions cut both ways. While it is true that the Court has increasingly relied on deterrence-based reasoning to nibble away at the edges of the robust exclusionary rule established in the 1960s, the core of that rule remains intact and in force today: unconstitutionally collected evidence is presumptively inadmissible at trial. As we have seen, that core rule has never been, and likely could never be, justified based on deterrence alone. That is why the Court's increasing focus on deterrence and "pay its way" reasoning might spell the end of the exclusionary rule as we know it. So, the Court's recent statements notwithstanding, it is actually quite unclear whether deterrence now serves as the exclusive foundation for modern exclusionary-rule jurisprudence. Even if deterrence reasoning could explain some of the rule's exceptions, it cannot explain the rule itself.

4. Legitimacy. — The exclusionary rule has long rested on overt policy judgments.[57] In fact, the modern Court has made clear that the exclusionary rule is *not* an aspect of the Fourth Amendment, but rather "a 'prudential' doctrine" aimed at deterring police misconduct.[58] This view is especially remarkable because the relatively conservative Justices who have consolidated precedential support for a deterrence-based understanding of the exclusionary rule are, in most contexts, the Court's most outspoken advocates of formalism and judicial restraint. How did this misalignment of judicial philosophy and exclusionary jurisprudence arise? Most likely, the Justices in question found the exclusionary rule to be unsupported by conventional legal argument and so demoted it to a subconstitutional status, thereby opening the door to further "pragmatic" revisions.[59]

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[55] *See supra* section I.A.1, pp. 1894–96.

[56] *See, e.g.*, sources cited *supra* note 43 (collecting cases).

[57] Indeed, "how does one go about deciding whether the exclusionary rule can 'pay its way' in a particular setting without giving free play to one's own views of policy?" Kamisar, *Does (Did)*, *supra* note 16, at 621.

[58] Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

[59] *Cf.* Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 6 (1975) ("[I]t is not just one form of the fourth amendment exclusionary rule that is threatened by the shift to the deterrence rationale, but the very legitimacy of the rule itself . . . .").

This is not to say that all or even most contemporary supporters of suppression see any great problem with justifying the exclusionary rule based on its deterrent effect. At least since Justice Stewart's famous article on the subject,[60] the conventional pro-exclusion view has been that the rule is constitutionally required, not in any direct sense, but indirectly, because it is the only practical means of deterring Fourth Amendment violations.[61] That approach begins with the premise that the Constitution's text does not dictate the exclusionary remedy. Despite that concession, proponents of the conventional view don't recommend deference to the elected branches when it comes to the admissibility of evidence.[62] Instead, the conventional view holds that the Supreme Court has a constitutional duty to ensure that the Fourth Amendment remains something more than a "form of words."[63] Proponents of this view typically consider current jurisprudence to be imperfect in many particulars, perhaps including for some of the reasons outlined above, but they nonetheless find basic features of exclusionary doctrine to be satisfactory. So long as the government is frequently barred from using unconstitutionally obtained evidence in its case in chief, the exclusionary rule generates worthwhile deterrence.[64]

But the exclusionary rule is not the only thing that saves the Fourth Amendment from becoming a dead letter. For example, the law of constitutional torts views the Fourth Amendment as an authorization for both damages and injunctions.[65] What is more, the amendment's principal purpose at the Founding was to preempt assertions of governmental immunity, thereby permitting state trespass actions to proceed against officials.[66] The Fourth Amendment is entirely capable of fulfilling that preemptive function today, even without the exclusionary rule. Modern state and federal immunity doctrines often insulate individual officers from liability even when their conduct violates the

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[60] Stewart, *supra* note 16.

[61] *See* Weeks v. United States, 232 U.S. 383, 393 (1914) (stating that without exclusion, the "right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution").

[62] *Cf. supra* note 83 and accompanying text (noting that relevant evidence is generally admissible under the rules of evidence).

[63] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)) (internal quotation mark omitted). It is likely no coincidence that the Court stated this view during an era when official immunity was growing and thereby preventing the Fourth Amendment from fulfilling its main original purpose in tort actions. *See also infra* note 169 and accompanying text.

[64] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 609–14 (2006) (Breyer, J., dissenting) (outlining the conventional pro-exclusion view at some length).

[65] *E.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (injunction); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (damages).

[66] *See infra* p. 1920.

Fourth Amendment.[67] And, as Professor Akhil Amar has written, "[t]he Framers would have found the current remedial regime, in which a victim of constitutional tort can in many cases recover from neither the officer nor the government, a shocking violation of first principles."[68] Thus, one historically well-founded way to give the Fourth Amendment self-executing effect would be to view it as preempting official immunity defenses in search-and-seizure cases. For these reasons, the Fourth Amendment does not need the exclusionary rule to avoid becoming a mere form of words.

Most importantly, a deterrence-oriented framework encounters legitimacy problems stemming from its dependence on a host of predictive empirical judgments.[69] Every time the Court applies the exclusionary rule, it has to evaluate the marginal deterrent effect of its decision. More than that, it has to weigh the deterrent benefit against the potential costs of increased crime. This analysis presumes that courts should resolve what look like paradigmatically legislative questions, yet courts have access to virtually no relevant data when making these judgments.[70] The most famous survey of the exclusionary rule's deterrent effect is now over forty years old, and even that rigorous study concluded that the rule's overall deterrent effects were indeterminate.[71] This empirical void becomes all the more obvious in connection with specific doctrinal exemptions to the exclusionary rule. In *Herring*, for example, neither the majority nor the dissent had access to any reliable data on whether a good-faith exception would significantly affect police behavior or the crime rate. Each side offered plausible arguments why deterrence either was or was not important in the particular situation at hand, but there was no empirical basis for adjudicating that dispute. As a result, *Herring* and other exclusionary-rule decisions seem to resist falsification, and the Court's deterrence "arguments" often read like half-hearted rationalizations.[72]

Perhaps some exclusionary-rule supporters will continue to find deterrence arguments persuasive, despite all the criticisms outlined

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[67] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 643 (1987).

[68] Amar, *supra* note 17, at 812.

[69] *See* White, *supra* note 25, at 1282 (arguing that the deterrence paradigm "destroys" the "ethical," "intellectual," and "political" bases "upon which judicial authority rests").

[70] *See* Elkins v. United States, 364 U.S. 206, 218 (1960) ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained."); Slobogin, *supra* note 17, at 368–69 ("No one is going to win the empirical debate . . . . In short, we do not know how much the rule deters . . . . We probably never will.").

[71] Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970).

[72] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) ("Imprecise as the exercise may be, . . . there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.").

above.[73] Yet even thoroughgoing deterrence enthusiasts should think twice about defending the rule on that ground alone. Doing so casts the exclusionary rule in the most unflattering light possible: as a discretionary judicial invasion of the democratic process. And at what cost! Serious criminals (including, in cases that have reached the Supreme Court, murderers and rapists) ask to go free — unpunished and uninhibited — not because constitutional principle requires that particular remedy, but rather because a judge has determined it to be instrumentally useful. But if the suppression remedy is nothing more than a necessary evil,[74] then courts and scholars should make that evil unnecessary — not a cornerstone of law. Focusing on deterrence thus invites proposals for how deterrence might be achieved without the exclusionary rule, and commentators have eagerly obliged.[75] The Roberts Court has encouraged that trend by threatening to severely constrict the exclusionary remedy, and the rule's defenders should consider whether, in the face of that impending challenge, it might be worth having more than just policy arguments at hand.

B. Equitable Restoration

Some scholars argue that equitable restoration supplies the exclusionary rule's touchstone,[76] and that view finds considerable support in the case law.[77] When the government obtains incriminating evidence through a legal wrong, the argument goes, the result is an improperly obtained benefit. The appropriate remedy, on this view, is disgorgement of the government's ill-gotten gain. This argument lacks any textual basis, and so is subject to serious criticism on legitimacy grounds. Still, the restorative approach does tap into background remedial principles familiar to the Founders, as well as an intuitive sense of fairness that utilitarian arguments from deterrence cannot capture.

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[73] *Cf.* Dripps, *supra* note 14, at 790 ("We have the exclusionary rule not because it is a necessary remedy for Fourth Amendment violations, but because it is the possible remedy with the least combined risk of underdeterrence and overdeterrence.").

[74] *See, e.g.*, Carol S. Steiker, Response, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 848 (1994) ("Despite its many flaws, the exclusionary rule is, I am convinced, the best we can realistically do.").

[75] For suggestions as to how deterrence (indeed, superior deterrence) might be achieved without the conventional exclusionary rule, see *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 422–23 (1971) (Burger, C.J., dissenting); Amar, *supra* note 17, at 811–16; Dripps, *supra* note 36; and Slobogin, *supra* note 17, at 386 (arguing that government-funded lawyers should represent search victims and seek liquidated damages at bench trials).

[76] *See* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 284–87 (1998); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 652 (1983); *cf.* Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938 n.4 (1983).

[77] *See* Schroeder, *supra* note 76, at 652–53.

And it also makes sense of why courts presumptively exclude neither more nor less than all evidence obtained in violation of a defendant's Fourth Amendment rights.[78]

But the exclusionary rule is ultimately a poor fit with equitable restoration. On the one hand, suppression often has the over-restorative effect of rendering a defendant *better off* than he was before the illegal search, since a suppression order can effectively render him immune from prosecution for a particular crime.[79] On the other hand, suppression cannot possibly provide full restoration in many circumstances. As to the latter point, consider cases in which the defendant is never brought to trial, where property is destroyed, or where the defendant is killed, thereby mooting the case. The exclusionary rule likewise does not require restoration of seized contraband or freed hostages.[80] Lawless searches can also uncover once-private information that slips into the public domain, including by way of a public trial or suppression hearing. Additional dissemination of that information can then become protected by the First Amendment. And, in any event, no suppression order will restore the public trust that a criminal defendant once enjoyed. Because the exclusionary rule is exclusively evidentiary in nature, it cannot put any of these genies back in their respective bottles, and there are often very good reasons not to try.

Ultimately, the restorative approach's normative and descriptive problems amplify one another. If courts are truly empowered to order restoration even without a basis in constitutional text, then it is hard to see why current doctrine would include nothing more restorative than a rule *of evidence* limited to the relatively narrow context of criminal adjudication.

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[78] *See* Norton, *supra* note 76, at 296 (defending standing requirements because suppression's "purpose is only to restore the person wronged to his rightful position"); *supra* note 43 (collecting cases asserting that deterrence is best achieved by restoring the status quo ante).

[79] *See* People v. Defore, 150 N.E. 585, 588 (N.Y. 1926) (Cardozo, J.) ("The pettiest peace officer would have it in his power, through overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious."); Craig M. Bradley, Murray v. United States*: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907, 913 (1989) (explaining that "exclusion puts the police in a *worse* position than they would have been in had they followed the rules because they can never go back and re-search"); Slobogin, *supra* note 17, at 432 ("[T]he exclusionary rule rearranges rather than restores, in a way that favors defendants."); *cf.* sources cited *infra* note 391. The inevitable discovery doctrine — which admits evidence *likely* to have been found through other means — does not avoid this result. *See infra* note 390. For example, illegally searching someone with a 25% chance of being lawfully caught can generate a 0% chance of conviction, thereby rendering the defendant effectively immune.

[80] *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 27 (1997) (noting that "the government need not return . . . contraband").

C. Judicial Integrity

Some Justices and commentators assert that the exclusionary rule is best defended with reference to a freestanding principle of judicial integrity.[81] The basic idea is that the admission of illegally obtained evidence amounts to the judiciary's tacit endorsement of Fourth Amendment violations. This approach resembles the due process exclusionary rule insofar as both maintain that reliance on unconstitutionally obtained evidence is objectionable in itself. But an infringement on judicial integrity is not the same as a violation of the Constitution. And the norm of "integrity" — if viewed as distinct from the duty to adhere to law — has no basis in constitutional text, history, or structure. As Justice Stewart wrote: "Describing the judiciary as a 'party' to the constitutional violation begs the question: what provision of the Constitution forbids the judiciary to admit illegally obtained evidence?"[82] Moreover, invocations of integrity cannot answer why courts should have legal authority to suppress evidence that, under the law of evidence, should be admitted.[83]

In any event, appeals to judicial integrity cut in divergent directions. Perhaps judicial integrity is somewhat compromised when judges hold their nose while admitting unlawfully obtained evidence. But judicial integrity is also at stake when courts keep relevant evidence away from juries and thereby oversee demonstrably false verdicts.[84] A court's integrity — actual and perceived — must grievously suffer when known criminals stride proudly out of court, unpunished. Given the deep tension between any exclusionary rule and the court's role as a finder of fact and dispenser of justice, courts confronted with Fourth Amendment violations must inevitably allow *some* wrongdoer — either public or private — to benefit from past misdeeds. The only question is, which one? Because judicial integrity weighs on both

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[81] *See* Fletcher N. Baldwin, Jr., *Due Process and the Exclusionary Rule: Integrity and Justification*, 39 U. FLA. L. REV. 505, 537–39 (1987); Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 71–78 (2010); Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 459–60 (2013) (arguing that judicial integrity requires courts to supply an effective Fourth Amendment remedy); Harvey Wingo, *Rewriting* Mapp *and* Miranda*: A Preference for Due Process*, 31 U. KAN. L. REV. 219, 240 (1983) ("[I]f the Court is to adopt a [substantive] due process basis for the exclusionary rule, it must resurrect the judicial integrity notion.").

[82] Stewart, *supra* note 16, at 1383.

[83] *See* FED. R. EVID. 402 (providing for admission of all relevant evidence not otherwise barred by the Constitution, federal statutes, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court).

[84] *See* AMAR, *supra* note 80, at 25–26 ("[I]ntegrity and fairness are also threatened by excluding evidence that will help the justice system to reach a true verdict. . . . Our society . . . also cherishes the notion that cheaters — or murderers, or rapists, for that matter — should not prosper.").

sides of this debate, that abstract value cannot justify the choice of suppression as the appropriate Fourth Amendment remedy. A more specific principle is required.

D. Judicial Review

Finally, some commentators have sought to justify the exclusionary rule as a manifestation of judicial review.[85] The leading exposition of this approach is contained in a 1974 article by Professors Thomas S. Schrock and Robert C. Welsh.[86] By "judicial review," the authors mean the principle established in *Marbury v. Madison*[87] that unconstitutional actions, such as statutes, are null and void in the eyes of courts.[88] Given that precept, Schrock and Welsh reason, courts should also view unconstitutional searches as legal nullities — with the upshot that illegally obtained evidence must be suppressed. Much like the judicial integrity rationale described above, a "judicial review interpretation" holds that "the vital function of the exclusionary rule is to ensure that the judiciary avoids validating unconstitutional conduct."[89] Schrock and Welsh go so far as to say that their argument from "judicial review" gives rise to a "due process right to exclusion."[90] On this view, due process requires that Fourth Amendment violations be treated as "invalid and void."[91]

But the argument from judicial review encounters both descriptive and normative difficulties. The principal descriptive problem is that the exclusionary rule doesn't actually accomplish what Schrock and Welsh think it must. Far from being always "invalid and void," illegal searches often engender legal consequences. For example, they can accomplish permanent transfers of ownership, such as when police illegally discover and then confiscate contraband.[92] And the exclusionary rule never nullifies Fourth Amendment violations divorced from pros-

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[85] Schrock & Welsh, *supra* note 21, at 335, 366–72; *see also* Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 357 (2013) ("[T]here can be no right without a remedy."); Maclin, *supra* note 41, at 49 ("Professors Thomas Schrock and Robert Welsh were correct when they wrote that the exclusionary rule 'is simply another name for judicial review.'" (quoting Schrock & Welsh, *supra* note 21, at 325)); Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 181 (2012).

[86] Schrock & Welsh, *supra* note 21, at 335, 366–72.

[87] 5 U.S. (1 Cranch) 137 (1803).

[88] *See* Schrock & Welsh, *supra* note 21, at 346–47, 359 ("[T]he Constitution as 'given force and effect' by the Marshall of *Marbury v. Madison* in his role as judge requires only that unconstitutional behavior of a governmental actor be declared invalid and void if brought before a court." *Id.* at 359.).

[89] *Id.* at 335 (internal quotation marks omitted).

[90] *Id.* at 372.

[91] *Id.* at 359.

[92] *See infra* p. 1932.

ecutions. These limitations are not the product of stingy judicial interpretations; rather, they are inherent in the idea of an evidentiary rule of exclusion. Finally, the need for judicial review provides no guidance as to the many exceptions in current doctrine, such as when evidence obtained by means of an unconstitutional search turns out to be admissible after all.[93]

Even more fundamentally, Schrock and Welsh are wrong to think that judicial review necessitates the particular remedy of exclusion. In fact, judicial review often calls for remedies other than the simple nullification of illegal acts. Consider the Takings Clause.[94] A finding that the government committed an unlawful taking is entirely compatible with the government's acquisition of title, ownership, and possession. Instead of nullifying those events, the constitutionally prescribed remedy is normally an order directing compensation.[95] Judicial review of Fourth Amendment violations can be viewed in a similar light. We have already seen that most critics of the exclusionary rule advocate alternative remedial options such as civil suits for injunctions or damages.[96] Those nonexclusionary proposals are entirely consistent with courts' duty to "review" unconstitutional searches and seizures. Moreover, Schrock and Welsh do not explain, historically or otherwise, why the Fourth Amendment should be viewed as a source of process for criminal convictions.

So there is an important gap between Schrock and Welsh's arguments and their conclusions. The authors correctly insist that courts have an obligation to afford judicial review and to demand adherence to law, as dictated by due process.[97] But, as other commentators have noted,[98] Schrock and Welsh do not persuasively explain why the exclu-

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[93] *See infra* section III.B, pp. 1936–45; section IV.A, pp. 1945–52.

[94] U.S. CONST. amend. V (prohibiting takings "without just compensation").

[95] *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985) (explaining that the Takings Clause "does not proscribe the taking of property; it proscribes taking without just compensation"); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

[96] *See* sources cited *supra* notes 68, 75.

[97] *E.g.*, Schrock & Welsh, *supra* note 21, at 363–64 ("[E]xclusion is simply the appropriate form for unfavorable review to take under this [Fourth Amendment] rule of recognition . . . ."). Schrock and Welsh begin with an overbroad premise that the government must follow all laws during a prosecution, as opposed to the defendant's personal procedural entitlements. *See id.* at 371 ("[T]he defendant has a due process personal right to have the government observe its own laws, at any rate its own constitution, in its prosecution of him — and therefore to have the court exclude unconstitutionally seized evidence from his trial."). Their overbroad major premise leads Schrock and Welsh to endorse over-suppression. *See, e.g.*, *infra* notes 239, 359 and accompanying text.

[98] *See* Heffernan, *supra* note 22, at 1227 n.87 (noting that Schrock and Welsh's argument "begs the question"); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 269–70 (1988) (criticizing Schrock and Welsh's argument as "circular" and "question begging"); Slobogin,

sionary rule provides the correct means of discharging that obligation. The general duty to provide *some* judicial review of Fourth Amendment violations does not justify, much less necessitate, the specific remedy of suppression. The exclusionary rule's best justification lies elsewhere.

II. THE EXCLUSIONARY RULE AS DUE PROCESS

The Fifth and Fourteenth Amendment Due Process Clauses together ensure that governmental deprivations of individual liberty are authorized in accordance with separately codified procedures. This core historical meaning of the Due Process Clauses provides the best foundation for the Fourth Amendment exclusionary rule. Section A outlines the case for understanding due process to mean adherence to law. Section B then demonstrates that exclusion of evidence can sometimes be a constitutionally compelled remedy. This discussion explains the harmless error doctrine as a product of due process. Next, section C shows that, in light of historical changes, the Fourth Amendment has become a source of pre-trial investigative procedure encompassed by due process. Finally, section D argues that the due process exclusionary rule should have broad appeal in light of its methodological premises and historical basis.

A. Due Process as Adherence to Law

While there is endless debate about all that the Due Process Clauses might mean, there is no serious question that the minimum content of the Due Process Clauses requires courts to observe separately codified constitutional procedures for deprivations of life, liberty, or property. As Professor John Harrison has put it: "In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law."[99] "This requirement that deprivation follow the rule of law is so funda-

supra note 17, at 437 ("Unfortunately, Schrock and Welsh's due process theory ends up begging the central question.").

[99] John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997); *see also* Chapman & McConnell, *supra* note 23, at 1679 ("By the time the Fifth Amendment was enacted, everyone agreed that due process applied to executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law . . . ."); Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987) (providing detailed evidence of due process as adherence to law); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 420–21, 434, 456 (2010) ("[A]t the time of the Fifth Amendment's ratification the phrase 'law of the land' was widely understood to refer to duly enacted positive law . . . ." *Id.* at 456.).

mental that it is often forgotten," including by courts.[100] Still, the intuition that due process demands adherence to law has abiding force, even as due process case law has evolved.

The case for viewing "due process" as a commitment to positive law begins in the thirteenth century, with the Magna Carta's guarantee that no man would be imprisoned, disseised, or exiled "except by the lawful judgment of his peers or by the law of the land."[101] This "law of the land" rule has long been viewed as synonymous with the requirement of due process as adherence to positive law. The most influential statement to that effect appears in Sir Edward Coke's *Institutes of the Lawes of England*.[102] For Coke, the "law of the land" provision meant that "no man be taken or imprisoned, but per legem terrae, that is, by the Common Law, Statute Law, or Custome of England."[103] And, Coke maintained, the law of the land rule found its "true sense and exposition" in a fourteenth-century British statute prohibiting imprisonment, execution, and other deprivations "Without being brought in to answere but by due Process of the Common law."[104] Citing the same statute that Coke did, the Queen's Bench stated that "the words [law of the land], which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority."[105] There is substantial evidence — and scholarly agreement — that the Founders followed Coke and the Queen's Bench in viewing "due process" as a guarantee that deprivations would accord with positive law.[106]

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[100] Harrison, *supra* note 99, at 497; *see also In re* Winship, 397 U.S. 358, 378–85 (1970) (Black, J., dissenting); Hopt v. Utah, 110 U.S. 574, 579 (1884) ("If [the defendant] be deprived of his life or liberty without being so present [as required by statute], such deprivation would be without that due process of law required by the Constitution."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856) (discussing the Constitution as due process); Regina v. Paty, (1704) 92 Eng. Rep. 232 (Q.B.) 234 (explaining that *lex terrae* "takes in all the other laws, which are in force in this realm").

[101] MAGNA CARTA, ch. 39 (1215), *reprinted in* CHRISTOPHER PETER LATIMER, CIVIL LIBERTIES AND THE STATE 3 (2011) ("No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."). The original Latin allows the final phrase to be read "*and* the law of the land." Williams, *supra* note 99, at 428 n.77.

[102] 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND (1642). For examples of Coke's influence, see 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 10 (1st ed. 1827), and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833). Some scholars believe that Coke may have misunderstood the Magna Carta, but even they agree it is "necessary to pay attention to Coke" because his views were so widely known in the colonies. *See, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96.

[103] COKE, *supra* note 102, at 46.

[104] *Id.* at 50 (citing 1354, 28 Edw. 3, c. 3 (Eng.)).

[105] *Paty*, 92 Eng. Rep. at 234.

[106] *See* sources cited *supra* notes 99–100; *see also* Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1 (1979); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).

These historical understandings also found expression in the most important antebellum due process case in the United States, *Murray's Lessee v. Hoboken Land & Improvement Co.*[107] The relevant question was whether a type of a "distress" or debtor's warrant accorded with due process.[108] The Court began with the premise that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*" and that "Lord Coke, in his commentary on those words, says they mean due process of law."[109] The Court then explained that it "must examine the constitution itself, to see whether this process" — that is, the distress warrant — "be in conflict with any of its provisions."[110] Later in its opinion, the Court specifically considered whether the Fourth Amendment prohibited the distress warrant at issue, which had been issued without oath or affirmation.[111] Answering no, the Court held that the amendment did not apply to civil debt proceedings.[112] This view of due process as adherence to positive law persisted well after ratification of the Fourteenth Amendment,[113] as evidenced by leading late-nineteenth-century treatises.[114]

In the twentieth century, however, normative aspects of due process increasingly came to play a leading role. Due process was said to embody all the principles "implicit in the concept of ordered liberty"[115] or "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[116] These standards fostered the development of a new species of due process, which we now call "substantive" due process.[117] But the normative turn in due process case law also cut back on the original notion of due process as positive law, since it allowed the Court to pick and choose which sources of were so "funda-

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107 59 U.S. (18 How.) 272 (1856).

108 *Id.* at 275.

109 *Id.* at 276 (citation omitted).

110 *Id.* at 277.

111 *Id.* at 285–86.

112 *Id.*

113 *E.g.*, Walker v. Sauvinet, 92 U.S. 90, 93 (1876) ("Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State."); *see also* Davidson v. New Orleans, 96 U.S. 97, 102 (1878).

114 *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 356 (1868) ("Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1945 (5th ed. 1891) (same).

115 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

116 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

117 *See In re* Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting).

mental" as to form part of due process.[118] This approach fostered the selective incorporation doctrine, whereby the Court has admitted constitutional rights into the ambit of Fourteenth Amendment due process one by one — though, in a tacit bow to the original meaning of due process, virtually all constitutional rights have now been found up to snuff.[119] The normative turn also led to the banishment of state law from due process,[120] as well as a similar if more equivocal demotion for nonconstitutional federal law, such as agency regulations.[121] Some or all of these twentieth-century curtailments can be criticized as inconsistent with the original historical meaning of due process as positive law.[122]

Under another modern line of cases, the Court has come to review positive-law processes under the *Mathews v. Eldridge*[123] test for procedural adequacy. *Mathews* calls for a balancing of private and governmental interests, the improved reliability of added procedures, and the administrative costs of imposing additional process.[124] This balancing test now seems to apply even in cases of quasi-criminal procedure.[125] Still, the Court has not used *Mathews* to subvert procedural rights prescribed in the Constitution. For example, the Confrontation Clause was adopted to promote reliability and so could be viewed as a proper subject of *Mathews* balancing. Yet the Court's recent cases have not asked whether the enforcement of confrontation rights would efficiently promote reliability. Instead, the Court has recognized that the Framers struck the constitutional balance between reliability and efficiency by mandating confrontation.[126] Much the same can be said of other constitutional rights. As the Court recently put it: "If a 'particular guarantee'" of the Constitution "is violated, no substitute procedure can cure the violation."[127] In that important respect, the original meaning of due process remains in force.

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118 *See, e.g.*, Hurtado v. California, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting).

119 *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010).

120 Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009).

121 *See* United States v. Caceres, 440 U.S. 741, 749–50 (1979).

122 *See infra* section III.B.5, pp. 1939–42.

123 424 U.S. 319 (1976).

124 *Id.* at 335.

125 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion).

126 *See* Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence . . . . [However, it] commands, not that evidence be reliable, but that reliability be assessed in a particular manner . . . .").

127 Bullcoming v. New Mexico, 131 S. Ct. 2705, 2716 (2011) (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006)); *see id.* (explaining that it is not "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values" (alteration in original) (quoting Giles v. California, 554 U.S. 353, 375 (2008)) (internal quotation marks omitted)).

In guaranteeing adherence to positive law, the right to due process, too, has meaning and content apart from the reasons for its adoption. This point often goes unappreciated. For example, Professor Lane V. Sunderland's essay on the exclusionary rule correctly concluded that the Fifth Amendment's Due Process Clause "might be paraphrased to say that any deprivation of life, liberty or property must be in accordance with the law of the land, or, at the very least, according to the commands of the authoritative legal declaration of the American law of the land, the Constitution."[128] However, Sunderland quickly pivoted. Instead of adhering to the rule he had just stated, Sunderland proposed "limiting exclusion to instances of *substantial* violations of the law of the land or due process of law."[129] In this way, Sunderland ended up endorsing something like the good-faith exception floated in *Herring*. But that amended view conflated the meaning of the due process right at issue with a particular conception of the right's "purpose."[130] For example, Sunderland relied on Professor Rodney Mott's statement that the Magna Carta was adopted in part as a "protest . . . against the use of brute force in a flagrant and unusual manner."[131] Perhaps, but that one purpose plainly did not exhaust either the goals or the meaning of the "law of the land" provision. Confirming as much, Mott also stated that "the desire to prevent forfeitures and exactions *except by a recognized legal procedure* was one of the elements of Magna Charta chapter thirty-nine as it was sealed at Runnymede."[132]

The distinction between meaning and purpose also sheds light on why the prevailing exclusionary theories have such staying power, even though, as discussed in Part I, they cannot explain many of the exclusionary rule's core features. In short, the prevailing theories supply nonhistorical reasons to accept a positive-law conception of due process. So, for example, one reason to insist on adherence to law is that doing so reduces the government's incentive to commit violations.[133] Another reason is to correct the unjust effects of illegal government actions.[134] And yet another is to preserve the ethical norm of judicial integrity, or to strengthen judicial review of executive ac-

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128 Sunderland, *supra* note 25, at 150.

129 *Id.* at 154 (emphasis added); *see id.* at 155 ("[I]nsubstantal violations do not threaten the very values of political life toward which this great protection of liberty — due process of law (or law of the land) — is directed.").

130 *Id.* at 154 ("[T]he purpose of requiring adherence to the law of the land was to avoid 'governmental tyranny' . . . .").

131 *Id.* at 151 (quoting RODNEY L. MOTT, DUE PROCESS OF LAW 72–73 (1926)).

132 *Id.* (emphasis added) (quoting MOTT, *supra* note 131, at 71).

133 *Cf. supra* section I.A, pp. 1894–902.

134 *Cf. supra* section I.B, pp. 1902–03.

tion.[135] Though exclusionary doctrine follows none of those potentially conflicting values to its logical conclusion, each value helps explain and justify a narrower and more historically grounded rule — namely, that deprivations of life, liberty, and property must adhere to positive-law procedures. Adapting language and reasoning that the Court has used to describe many other constitutional rights, one might say that, through the Due Process Clauses, the choice of *how much* deterrence, equitable restoration, judicial integrity, and judicial review has already been made for us.[136] The original meaning of the Due Process Clauses thus affords much more than a textually and historically defensible home for the abstract values that motivate the exclusionary rule. It also provides a lens that focuses our intuitions, yielding legally defensible conclusions.

B. Exclusion as a Due Process Remedy

The idea that individuals are "due" the protections "of law" infuses many aspects of contemporary criminal procedure. Consider our settled practice and strongest intuitions regarding appellate remedies. Criminal defendants are entitled to a variety of constitutional trial rights, such as the Sixth Amendment right to trial by jury. When a defendant is nonetheless tried without a jury, his Sixth Amendment right is thereby violated. And if that individual were then convicted and incarcerated, he would suffer a second constitutional violation — namely, a deprivation of liberty without due process. The appropriate remedy for that second violation is clear: invalidation of the judgment of conviction and an order of release from prison. Alternative forms of relief for unlawful imprisonment, such as damages, would be inadequate, because they could not substitute for the due procedures constitutionally required to maintain an ongoing deprivation of liberty. This due process reasoning is transsubstantive in the sense that it applies to a range of constitutional guarantees, including the Fourth Amendment. When the police unconstitutionally search a suspect, his Fourth Amendment rights are infringed. And if a court later relies on the fruits of the illegal search to impose a conviction, then the defendant would thereby suffer a deprivation of liberty without due process. This simple idea is the basis of the due process exclusionary rule.

Viewing exclusion as a manifestation of due process is consistent with an emerging consensus that the Fourth Amendment itself does

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[135] *Cf. supra* section I.C, pp. 1904–05.

[136] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.").

not require evidentiary suppression or any other remedy.[137] On its face, the Fourth Amendment provides a right to be "secure," not from evidence submitted in courtrooms, but rather from "searches" and "seizures" in everyday life.[138] The Supreme Court has accordingly recognized that the Fourth Amendment does not apply at trial and so, by its terms, cannot justify suppression.[139] Commentators agree.[140] These textual arguments find ample support in historical practice, as the Fourth Amendment was originally thought to be judicially enforceable only insofar as it trumped official immunity defenses to private tort actions, such as for trespass.[141] In sharp contrast, the Confrontation and Self-Incrimination Clauses expressly address evidentiary issues at trial and have always been viewed as judicially enforceable through in-trial exclusion.[142] Thus, the Constitution appears to envision suppression only for violations of trial rights, like the right to confrontation, and not for pre-trial violations of the Fourth Amendment. As Professor Arnold Loewy put it, the Fourth Amendment, "in language and origin, is clearly substantive in that it is concerned with obtaining rather than using evidence."[143]

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137 *See* Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 918–22 (1986); Loewy, *supra* note 45, at 909–11; Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 525–27 (2013) (explaining that there is "widespread support" for the notion that the exclusionary rule "is not constitutionally required," *id.* at 525).

138 U.S. CONST. amend. IV.

139 *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2426 (2011) ("The [Fourth] Amendment says nothing about suppressing evidence obtained in violation of this command."); Arizona v. Evans, 514 U.S. 1, 10 (1995) ("[T]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands.").

140 *See, e.g.*, Rosenthal, *supra* note 137, at 531 (discussing the emerging consensus that "the Fourth Amendment's text is silent on the evidentiary use of unconstitutionally obtained evidence").

141 *See* Amar, *supra* note 17, at 786 ("Tort law remedies were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions. Supporters of the exclusionary rule cannot point to a single major statement from the Founding — or even the antebellum or Reconstruction eras — supporting Fourth Amendment exclusion of evidence in a criminal trial."). One scholar recently argued that exclusion finds historical support in the Founding period, *see* Rogers Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2010), but that claim seems overstated, *see* Srinivas, *supra* note 85, at 205.

142 U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); *see also* Davis v. Washington, 547 U.S. 813, 826 (2006) (referring to the Confrontation Clause as an "exclusionary rule"); United States v. Patane, 542 U.S. 630, 640 (2004) (plurality opinion) ("[T]he Self-Incrimination Clause contains its own exclusionary rule. . . . Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing."); Coolidge v. New Hampshire, 403 U.S. 443, 497–98 (1971) (Black, J., concurring and dissenting) ("In striking contrast to the Fourth Amendment, . . . [t]he Fifth Amendment in and of itself directly and explicitly commands its own exclusionary rule — a defendant cannot be compelled to give evidence against himself.").

143 Loewy, *supra* note 45, at 910.

Yet even "clearly substantive" constitutional guarantees can have indirect consequences for trial when they are read in conjunction with the Due Process Clauses. Consider the First Amendment. Congress's passage of the Sedition Act admittedly violated the guarantee that "Congress shall make no law" abridging the freedom of speech.[144] By contrast, convictions under the Act were accomplished by coordinated actions of the executive and judiciary and so did not violate the terms of the First Amendment.[145] Those convictions instead transgressed the procedural requirement that every deprivation of liberty must be authorized by a valid substantive law.[146] Thus, the Fifth Amendment's Due Process Clause *in conjunction with* the First Amendment, not the First Amendment alone, explains why convictions under the Sedition Act should have been reversed.

The same reasoning applies to procedural guarantees. True, the Self-Incrimination and Confrontation Clauses are expressly concerned with trial and, indeed, with the admission of evidence. But those clauses do not dictate the appropriate remedy once a trial violation has already taken place. This silence on the subject of appellate remedies could be resolved through a rule of automatic reversal, such as the one followed during early American judicial practice. Under that approach, any violation of constitutional trial rights necessarily triggers reversal.[147] Today, however, courts apply a harmless error inquiry and

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144 U.S. CONST. amend. I; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (discussing the Sedition Act of 1798, ch. 74, 1 Stat. 596).

145 *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1253 (2010) (highlighting that the restrictions imposed by the First Amendment apply textually only to Congress).

146 *See* Shrum v. City of Coweta, 449 F.3d 1132, 1143 (10th Cir. 2006) (McConnell, J.) ("[I]f the First Amendment forbids the making of 'law' that infringes the free exercise of religion, and the Due Process Clause forbids the executive from taking away liberties except pursuant to 'law,' it follows that the First Amendment protects against executive as well as legislative abridgement."); Easterbrook, *supra* note 102, at 95–99 (discussing the history of the Anglo-American principle of legality); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1453 (1992) (suggesting that "the Due Process Clause also refers to the principle of legality itself: the requirement that the government act only pursuant to law — the 'due process of law' — and not according to the whim of some official"); Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601, 609 (2013) (discussing Professor Gary Lawson's statement that, "[a]t a minimum, the Fifth Amendment's Due Process Clause embodies the principle of legality from Magna Carta, which declares that executive and judicial deprivations of life, liberty, or property must be authorized by valid sources of law" (alteration in original) (internal quotation marks omitted)).

147 *See* Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting) ("[Prior to the early twentieth century,] most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts . . . and held that any error of [constitutional] substance required a reversal of conviction." (citing LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 190 (1939))); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483, 484 (defending automatic reversal in the context of constitutional violations).

so ask whether illegally submitted evidence played a sufficiently integral role in producing convictions.[148] If the answer to that question is yes, then the reviewing court orders a new trial in compliance with law. But if the answer is no, then no retrial is warranted.

Harmlessness analysis is typically viewed as a product of federal common law, the Federal Rules of Criminal Procedure, or statute.[149] Those accounts threaten to dilute the value of constitutional trial rights, since they create the possibility that Congress might decree that some violations must go without any remedy. Alternatively, Congress could provide that trial rights should be remedied exclusively through damages, not reversal. Moreover, it is far from clear why the federal courts should have authority to impose harmlessness standards on the states in the absence of a constitutional need for doing so. In response to these problems, one might argue that harmless error analysis is somehow derivable from the text of the Self-Incrimination or Confrontation Clauses themselves — but how? As noted, those Clauses by their terms require exclusion of certain evidence in the first instance,[150] but they do not speak to the appropriate remedy in the case of a violation. Those Clauses, like the Fourth Amendment, are silent when it comes to the appropriate remedy in the event that a violation has *already* transpired.

The Due Process Clauses offer the solution to the foregoing problems. First, due process principles can explain why trial violations of the Self-Incrimination and Confrontation Clauses *presumptively* trigger reversal on appeal.[151] The key here is the separate due process re-

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[148] *See* Delaware v. Van Arsdall, 475 U.S. 673, 681–82 (1986); Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963) (asking if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction"); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 28 (1970) ("[I]n a review of error, the crucial question is not whether there is substantial evidence to support the judgment, but whether error affected the judgment.").

[149] *See* 28 U.S.C. § 2111 (2012); FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 5 (1994) (arguing that harmless error review is a product of constitutional common law meant to prevent states from diluting federal rights); Monaghan, *supra* note 59, at 21 (arguing that harmlessness analysis is federal common law); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 157 (2006) (Alito, J., dissenting) ("The Constitution, by its terms, does not mandate any particular remedy for violations of its own provisions. Instead, we are bound in this case by Federal Rule of Criminal Procedure 52(a), which instructs federal courts to 'disregar[d]' '[a]ny error . . . which does not affect substantial rights.'" (alterations and omission in original)); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1772 (1991) ("The modern view that constitutional errors can be harmless . . . emerges instead from a balancing calculus familiar to the law of remedies: if the risk of prejudice, though not nonexistent, is small, the burdens of retrial are not warranted.").

[150] *See supra* note 142 and accompanying text.

[151] The presumption of reversal is reflected in the rule that the beneficiary of a violation has the burden of showing harmlessness. *See Chapman*, 386 U.S. at 24 (adapting the "original common-law harmless-error rule," which "put the burden on the beneficiary of the error"); *cf. in-*

quirement that convictions must be authorized by constitutionally sufficient evidence — namely, proof beyond a reasonable doubt.[152] An individual charged with murder and convicted based on no evidence whatsoever has been denied due process.[153] The same conclusion holds for a defendant convicted based on illegally admitted evidence. Imagine for example that the government moves to admit a sworn affidavit accusing the defendant of the crime, and the defendant moves to exclude based on the Confrontation Clause. If it succeeds in getting the affidavit admitted, the government will next rely on that evidence to request the jury's authorization to convict. And, after that, the government will rely on the conviction to authorize continued detention during appeal. This chain of authorizations is only as strong as its weakest link.[154] If the affidavit were admitted in error, then there would be insufficient lawful evidence to authorize conviction. And that, in turn, would deprive the government of authority to defend the defendant's continued detention on appeal. Thus, the in-court violation in itself supplies a reason to reverse, thereby justifying the adoption of a presumption of harmful error.

Second, focusing on the Due Process Clauses makes sense of why violations of constitutional trial rights do not *necessarily* trigger reversal on appeal.[155] To modify the foregoing example, imagine that an

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fra note 155 (cataloging the varying standards applied to different trial violations and the concerns underlying those differences).

[152] Jackson v. Virginia, 443 U.S. 307, 318–19 (1979) ("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319).

[153] Thompson v. City of Louisville, 362 U.S. 199, 206 (1960).

[154] The harmlessness inquiry goes to whether the government has legal *authority* to impose a criminal punishment, regardless of factual causation. So a conviction stands if illegal evidence would not have affected any reasonable jury, even if the jury was actually unreasonable and would in fact have acquitted.

[155] Harmless error doctrine demands varying standards of proof with regard to nonconstitutional trial errors and constitutional trial errors, while also requiring *per se* reversal of so-called "structural" errors whose consequences for verdicts cannot be ascertained. *See* Arizona v. Fulminante, 499 U.S. 279, 310 (1991); Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale*, 125 U. PA. L. REV. 15 (1976) (discussing three distinct versions of the harmless error test). This trichotomy is open to criticism. *See* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 695–97 (2013) (criticizing the distinction between nonconstitutional and constitutional errors); Steven M. Shepard, Note, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180, 1182–83 (2008). Further complicating this picture, there may be a fourth category: procedural violations whose very definition includes at least some affirmative showing of prejudice. *See* Strickland v. Washington, 466 U.S. 668 (1984) (requiring showing of prejudice to prove ineffective assistance of counsel); Brady v. Maryland, 373 U.S. 83 (1963) (requiring showing of prejudice to prove that withholding evidence violated constitutional due process). While a serious evaluation of these important details lies beyond the scope of this Article, it is worth noting that the Court's variegated approach may reflect the perceived likelihood that different types of procedural error contribute to the authorization of criminal convictions.

unconfronted and therefore illegally admitted affidavit formed part of the government's case in chief, but that the government also introduced compelling in-trial testimony incriminating the defendant. In that event, the illegally submitted affidavit might be superfluous to the conviction's legality. For example, any reasonable jury might have reached the very same result — conviction — *even without* the illegally submitted affidavit.[156] Thus, the erroneous introduction of the affidavit would not have deprived the jury of authority to enter a conviction, nor would it have deprived the government of authority to defend the conviction on appeal. A defendant deprived of liberty on the basis of both an unconfronted affidavit and compelling in-trial testimony would have enjoyed the full benefit of the "process" he was "due," even though he suffered a violation of right at trial. So while the presence of a constitutional violation at trial may signal the possibility of a defective conviction, the trial error alone would not in itself require reversal of the ultimate conviction. In this way, harmless error analysis — like the presumption in favor of reversal — can be viewed as a product of the Due Process Clauses.

The same reasoning also explains why pre-trial violations of the Fourth Amendment can require reversal of ensuing convictions. Imagine that police want to search for evidence in a home. Under the Fourth Amendment's procedures for evidence acquisition, the police would lack authority to conduct their search unless they had first obtained a warrant.[157] The decision to request the warrant could be likened to the decision to move for admission of evidence at trial. In both scenarios, the government seeks authorization to perform a procedural step along the way toward depriving the defendant of liberty. If the government conducted its search without authorization, then its subsequent reliance on that evidence at trial would amount to a request for a deprivation of liberty without due process. So while it is true that a Fourth Amendment violation is "complete" before the commencement of trial,[158] it is also true that the introduction of illegally obtained evidence threatens a second violation — namely, the violation of a defendant's right not to be deprived of liberty without due process. This in-trial due process violation answers the decades-old question of how there can be a "justification for requiring the fourth amendment exclusionary rule if there is no violation of the fourth

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[156] *Cf. Chapman*, 386 U.S. at 24 (applying a beyond-a-reasonable-doubt standard for harmlessness).

[157] *E.g.*, Payton v. New York, 445 U.S. 573 (1980).

[158] United States v. Janis, 428 U.S. 433, 458 n.35 (1976); *see also* United States v. Calandra, 414 U.S. 338, 354 (1974) (explaining that derivative uses of illegally obtained evidence "work no new Fourth Amendment wrong").

amendment in the criminal trial."[159] The link "between the wrong of the search and a subsequent official proceeding" is not "mystical,"[160] but straightforward. While the Fourth Amendment "is concerned with obtaining rather than using evidence,"[161] the Due Process Clauses are explicitly concerned with trial.

Viewing the exclusionary rule as a function of due process takes the sting out of then-Judge Cardozo's famous lament that "[t]he criminal is to go free because the constable has blundered."[162] Our system takes it for granted that criminals must sometimes go free because legislatures, prosecutors, or judges have blundered, and that same due process principle applies to official investigators. In different ways and circumstances, all these government actors are constrained by constitutional procedure.

By establishing that the Due Process Clauses can demand exclusionary remedies, the foregoing analysis goes halfway toward justifying the exclusionary rule. But much of the journey remains. For the due process exclusionary rule to function, the Fourth Amendment must constitute a procedural constraint on the government's authority to acquire evidence for use in subsequent prosecutions. In other words, the Fourth Amendment must be a "process" that criminal defendants are "due" before they suffer a deprivation of "liberty." That critical assumption is defended below.

C. The Fourth Amendment as Pre-Trial Procedure

Today, there is a very strong case for viewing the Fourth Amendment as a source of pre-trial "process" governing evidence acquisition. Law schools themselves supply ample evidence of this fact, as the subject of Fourth Amendment law is typically taught as part of a course overtly denominated as "criminal procedure."[163] But it was not always so. Early in American history — many decades before the modern category of constitutional criminal procedure was invented[164] — unreasonable searches and seizures were generally viewed as a species of

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159 Monaghan, *supra* note 59, at 8 n.42.

160 Dripps, *supra* note 137, at 919 ("So long as the gravamen of the Fourth Amendment is privacy, any essential connection between the wrong of the search and a subsequent official proceeding will remain somewhat mystical.").

161 Loewy, *supra* note 45, at 910.

162 People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

163 *E.g.*, RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE (2d ed. 2005); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (12th ed. 2008); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE (9th ed. 2010).

164 *See* Anthony M. Kennedy, Tribute, *William Rehnquist and Sandra Day O'Connor: An Expression of Appreciation*, 58 STAN. L. REV. 1663, 1666 (2006) ("Before the late 1960s or early 1970s, criminal procedure was not generally taught as a separate course, nor was it generally thought of as a discrete subject.").

tort in the same legal category as trespasses perpetrated by private parties. These unreasonable searches and seizures triggered civil remedies, but formed no part of the recognized process for obtaining evidence for later use at trial. Only with the passage of time did the Fourth Amendment take on a procedural aspect akin to a trial right. In particular, unreasonable searches and seizures came to be viewed as procedural missteps in the investigative stage of a criminal prosecution.

At the Founding, courts admitted unconstitutionally obtained evidence.[165] But that original practice must be understood in its historical and legal context. There were no professional police in the eighteenth century, and government officials rarely conducted investigations in advance of criminal prosecutions.[166] Rather, criminal investigations were generally conducted by private parties who presented cases to the government for charging.[167] Customs officials, for example, were among the very few officials who conducted investigative searches with any regularity, but even they did so primarily in order to pursue in rem forfeiture actions in exchange for a fraction of the confiscated goods.[168] And, in the unusual cases where state actors carried out in-

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[165] *See supra* note 141 and accompanying text. The most often cited evidence comes from Justice Story's circuit opinion in *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822). *See, e.g.*, AMAR, *supra* note 80, at 21. In a forfeiture case involving a private party's seizure of a ship, Justice Story stated that "the right of using evidence does not depend, nor, as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained." *La Jeune Eugenie*, 26 F. Cas. at 843. Consistent with his era's view of search and seizure law as a species of private tort law, Justice Story had in mind evidence "obtained by a trespass upon the person, or by any other forcible and illegal means." *Id.* at 844.

[166] *See* Wesley MacNeil Oliver, *The Neglected History of Criminal Procedure, 1850–1940*, 62 RUTGERS L. REV. 447, 447–48 (2010) ("Professional police departments did not exist in the eighteenth century, and Framing Era constables did not investigate crimes."); *see also* ROGER LANE, POLICING THE CITY: BOSTON 1822–1885, at 7 (1967); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620 (1999) ("[E]ven post-crime investigation by officers was minimal."); Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L.J. 685, 687–89 (2001) ("Initiation and investigation of criminal cases was the nearly exclusive province of private persons. . . . The courts of that period were venues for private litigation — whether civil or criminal — and the state was rarely a party." *Id.* at 687.); Srinivas, *supra* note 85, at 204 n.159 (collecting sources); Steiker, *supra* note 74, at 830–38 (contrasting Founding-era constables with modern police); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 401 n.36 (1995) (arguing that seminal warrant cases like Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.), had almost no effect on routine criminal investigations at the Founding because, "[i]n short, criminal investigation was mostly privatized, and even the portion that was not privatized was, by contemporary standards, the work of amateurs").

[167] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 28–29 (1993); Oliver, *supra* note 166, at 449–57; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1202–08 (1999).

[168] *See* United States v. Bajakajian, 524 U.S. 321, 331, 340 (1998) (explaining that while "early customs statutes required the forfeiture of goods imported in violation of the customs laws," those remedies "were civil *in rem* forfeitures," *id.* at 340); MAURICE HENRY SMITH, THE WRITS OF ASSISTANCE CASE 13, 96 (1978) (explaining that Founding-era customs searches were effectively

vestigative searches, the officers were principally constrained by tort law, particularly the private law of trespass. Unconstitutional searches were adjudicated according to a three-step process: (i) the aggrieved party brought a trespass action; (ii) the federal officer claimed immunity, usually based on a warrant; and (iii) to overcome the asserted immunity defense, the aggrieved party alleged a violation of the Fourth Amendment.[169] This original mode of presenting Fourth Amendment claims seems roundabout in our world, where official-liability actions frequently rest directly on the Fourth Amendment, not the common law of trespass. But the original trespass-oriented remedial scheme was intuitive given the eighteenth-century premise that officers should be treated as private parties.[170] Originally, the Fourth Amendment did not impose special constraints on government agents as such. Rather, it ensured that "unreasonable" federal officials would be treated just like private common law trespassers.

By the twentieth century, the typical pre-trial investigation looked very different. Over the course of the nineteenth century, professional police forces had become the norm in the United States, and evidence collection had accordingly come to be viewed as the initial phase of the government's criminal proceedings against a defendant.[171] In this new context, the principal perpetrators of Fourth Amendment violations were not imperious soldiers or customs agents (as at the Founding), but increasingly professional police investigating routine crimes for later trial. These modern officers were far more threatening to persons and privacy than any private trespassers.[172] And they were overseen not

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qui tam actions that were often undefended and in which the claimant won a fraction of the condemned property).

169 *See* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

170 *See* Davies, *supra* note 166, at 554 ("[T]he Framers . . . did not anticipate that a wrongful act by an officer might constitute a form of government illegality — rather, they viewed such misconduct as only a *personal* trespass by the person who held the office."); *id.* at 663 ("The exclusionary rule is premised on the notion that an unconstitutional *government* act is void — but exclusion has never been seriously proposed as a consequence of private wrongdoing."). Today, the dual nature of unlawful conduct by officers — unauthorized yet authoritative — is exemplified by the so-called "*Ex parte Young* fiction." *See Ex parte* Young, 209 U.S. 123 (1908).

171 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 16 (2012) (noting that "in the late nineteenth century, police work became more professional and specialized" and "public prosecution spread and displaced private prosecution"); FRIEDMAN, *supra* note 167, at 67–69, 358–61.

172 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392 (1971) ("An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."); *see also Ex parte* Virginia, 100 U.S. 339, 347 (1880) (explaining that when an individual is "clothed with the State's power, his act is that of the State"). An individual encountering a police officer experiences much the same coercive authority as an individual in the dock at a crimi-

by an occupying army or a foreign empire, but by local prosecutors steeped in legal training and attentive to judicial interpretations of constitutional rights. Meanwhile, the Fourth Amendment itself had evolved. Due to the lack of police, the Fourth Amendment received relatively little judicial attention for most of the nineteenth century.[173] By the early twentieth century, however, the Fourth Amendment had come to signify a growing number of judicially identified principles binding on professional police engaged in pre-trial investigation.[174] At the same time, newfangled official-immunity doctrines diminished the Fourth Amendment's salience in civil suits.[175] These historical changes make it unsurprising that the Supreme Court mandated Fourth Amendment suppression in federal cases in the early twentieth century.[176] The typical investigatory search had become the initial phase of criminal adjudication.

We can see the effects of this historical change by comparing watershed Founding-era and twentieth-century searches. In the 1765 English case *Entick v. Carrington*,[177] a royal official issued a warrant for a number of the King's messengers to ransack the home, papers, and effects of a dissident pamphleteer suspected of libel. The pamphleteer sued at tort; and, in a famous decision that would help inspire the Fourth Amendment,[178] Lord Camden held that the intrusive and unsupported executive warrant was void.[179] Several aspects of this sensational incident stand out to twenty-first-century readers. First, there were no police in the case. Instead, the search was conducted by royal "messengers."[180] Second, the search was ordered not by a judge

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nal trial. The advent of police thus extended the machinery of criminal justice beyond the courtroom.

173 *See* Orin Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 71 n.12 (2013) ("Because the modern notion of a police force restrained by the legal limitations on the scope of searches was largely unknown, the need to interpret the term did not arise with the frequency that it does today.").

174 For example, the famous Aaron Burr treason prosecutions helped create the rule that judges must independently review the government's assertions of probable cause. *See* James Etienne Viator, *The Fourth Amendment in the Nineteenth Century*, *in* THE BILL OF RIGHTS 172, 176–77 & nn.19–21 (Eugene W. Hickok, Jr., ed., 1991). Federal law enforcement subject to the (unincorporated) Fourth Amendment expanded particularly quickly in the late nineteenth and early twentieth centuries. *See* FRIEDMAN, *supra* note 167, at 266 (noting that "many important constitutional cases, on such issues as illegal searches and seizures, came out of a Prohibition background"); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 100 (2011) (discussing salience of federal enforcement of Reconstruction and Prohibition laws). *See generally* JEFFREY B. BUMGARNER, FEDERAL AGENTS (2006).

175 *See* sources cited *supra* note 169.

176 *See, e.g.*, Weeks v. United States, 232 U.S. 383, 391–92 (1914).

177 (1765) 95 Eng. Rep. 807 (K.B.).

178 *See* Boyd v. United States, 116 U.S. 616, 626–27 (1886); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 26 (1969); Amar, *supra* note 17, at 775 & n.67.

179 *Entick*, 95 Eng. Rep. at 818.

180 *Id.* at 807–09.

or prosecutor, but by a royal official engaged in a political vendetta.[181] Third, Lord Camden could rely on almost no preexisting positive law of official searches and so had to break new doctrinal ground to void the warrant.[182] Fourth, the controversy reached the courts, not in a criminal prosecution, but in the context of a whopping £2,000 trespass action alleging extensive damage to and interference with property. Today, we can look at *Entick* through the lens of modern historical experience and discern proto-police engaged in a crude pre-trial investigation. But that view is anachronistic. Having no tradition of regulating official investigative searches,[183] denizens of the eighteenth century could understand the facts in *Entick* only as an outrageous deviation from the norm against private trespass. The governmental conduct and its historical context were inextricably linked.

Fast forward to 1914 and *Weeks v. United States*,[184] the first Supreme Court exclusionary-rule decision to rest squarely on the Fourth Amendment.[185] Police in Kansas City arrested Weeks and then entered his home without a warrant, discovering gambling paraphernalia and letters regarding an unlawful lottery operation.[186] The government prosecuted, and Weeks requested the return of his property.[187] After the trial court declined to return the most incriminating materials,[188] the Court reversed the resulting conviction.[189] To some extent, the search in *Weeks* resembled the one in *Entick*: both involved officers entering a home and seizing property. But the context had utterly transformed. *Weeks* involved a concerted investigation by professional police, including a U.S. Marshal, all overseen by prosecutors.[190] The Court relied on centuries-old warrant precedents, including *Entick* itself.[191] And because the case arose in a criminal prosecution, the defendant's grievances focused not on the destruction or occupation of his property, but rather on the invasion of his privacy.[192] These differ-

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[181] *Id.* at 808.

[182] The most relevant precedent was an even more famous and egregious search case decided just two years earlier and affirmed on appeal on narrow grounds. *See* Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.).

[183] This characterization applied with equal force in America at the Founding. *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT 761 (2009) ("American case law offered only the possibility, not the established custom, of controlling governmental searches and seizures in the public interest.").

[184] 232 U.S. 383 (1914).

[185] *See id.* at 389.

[186] *Id.* at 386–88.

[187] *Id.*

[188] *Id.* at 389.

[189] *Id.* at 398–99.

[190] *Id.* at 386–87.

[191] *Id.* at 391.

[192] *See id.* at 389.

ences bespeak major changes in criminal procedure. The idea of government officials performing pre-trial investigation, though extraordinary at the time of *Entick*, had become routine. *Weeks* itself emphasized this fact by noting that the search at issue occurred "without authority of process."[193] This point was essential to the Court's disposition, which was to order, not damages for the trial court's retention of Weeks's property, but rather reversal of an otherwise valid conviction.[194] While *Weeks* distinguished older cases by invoking views of the Fourth Amendment as a guardian of property at tort,[195] those precedential relics soon fell away.[196] Experience and changed circumstances had created a conceptual category for Fourth Amendment investigative process where none had previously existed.

As the twentieth century progressed, the Court increasingly viewed pre-trial investigation as a constitutionally constrained form of criminal procedure. Consider, for example, the still-famous midcentury case *Rochin v. California*,[197] which suppressed evidence discovered through a coerced stomach pump.[198] "Regard for the requirements of the Due Process Clause," the Court explained, "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings resulting in a conviction."[199] That reference to "proceedings" encompassed the pre-trial stomach pump.[200] By the time of *Rochin*, the Court's incorporation cases had already come to view the Fourth Amendment as included within the "process" that state-court defendants are "due."[201] More recent decisions are to much the same effect. For example, *Gerstein v. Pugh*[202] explained that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of per-

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[193] *Id.* Elsewhere, *Weeks* said that "not even an order of court would have justified such procedure, much less was it within the authority of the United States Marshal." *Id.* at 393–94. *Weeks* referred to the police's "authority" over a dozen times.

[194] Despite suggestions that *Weeks* established, in essence, a right to return of property, *see* sources cited *infra* note 245, the Court argued that the conviction itself was defective and had to be reversed due to its reliance on unconstitutionally obtained evidence. *See Weeks*, 232 U.S. at 398–99.

[195] *See Weeks*, 232 U.S. at 396 (discussing Weeks's request for his property).

[196] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (calling the Fourth Amendment "a provision forbidding the acquisition of evidence in a certain way").

[197] 342 U.S. 165 (1952).

[198] *Id.* at 172–74.

[199] *Id.* at 169 (alteration omitted) (quoting Malinski v. New York, 324 U.S. 401, 416 (1945)) (internal quotation mark omitted).

[200] *Rochin* would today be decided under the Fourth Amendment. *See* County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998).

[201] Wolf v. Colorado, 338 U.S. 25, 27–28 (1949), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961). For discussion of *Wolf* and due process exclusion, see *infra* pp. 1934–35.

[202] 420 U.S. 103 (1975).

son or property in criminal cases."[203] To be sure, these decisions took up relatively ambitious due process topics like substantive due process, incorporation, and procedural sufficiency and so exceeded the core meaning of "due process" as adherence to law.[204] Yet all of these twentieth-century decisions shared a basic assumption: that the guarantee of due process encompasses the constitutional rules governing pre-trial investigation.

A similar doctrinal shift affected other constitutional rights, as the modern Supreme Court increasingly extended trial guarantees to encompass police investigations. Take the Sixth Amendment right to counsel, which protects the "accused" in "criminal prosecutions."[205] As Judge Friendly explained, the text of the Sixth Amendment makes it hard to see why the Counsel Clause should "come into play long before any prosecution was launched and thus . . . preclude interrogation whose very purpose is to determine whether to prosecute."[206] Yet the Court has held precisely that, reasoning that certain critical stages of pre-trial investigation are, in effect, phases of prosecution as well.[207] The Court has likewise extended the Self-Incrimination Clause backward in time, so that it applies not just "in any criminal case" where a defendant may be called as a "witness,"[208] but also during pre-trial police investigations.[209] For example, the Fifth Amendment today allows invocation of the right to remain silent long before the initiation of a criminal prosecution.[210] So while the Counsel and Self-Incrimination Clauses are textually and historically linked to trial procedures, the Supreme Court has recognized that they can nonetheless apply to modern pre-trial investigations. Running similar reasoning in reverse, the exclusionary rule effectively recognizes that Fourth Amendment rights, which are textually and historically linked to pre-trial investigations, are often relevant at trial.[211]

To be sure, the Fourth Amendment has retained its original, tort-like aspect in that it continues to facilitate remedies for unreasonable searches and seizures that do not contribute to the authorization of criminal prosecutions. For example, the Fourth Amendment today prohibits excessive uses of force, and instances of excessive force can

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[203] *Id.* at 125 n.27.

[204] *See* sources cited *supra* notes 99–100.

[205] U.S. CONST. amend. VI.

[206] Friendly, *supra* note 11, at 946.

[207] *See, e.g.*, United States v. Wade, 388 U.S. 218, 224–25 (1967).

[208] U.S. CONST. amend. V.

[209] *See* Salinas v. Texas, 133 S. Ct. 2174, 2180 (2013).

[210] *See, e.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967).

[211] *See* Soree, *supra* note 25, at 787–92 (arguing similarly that the Court has blurred the boundary between substantive rights and trial rights).

yield constitutional tort actions.[212] The Founding vision of the Fourth Amendment thus has lineal descendants in contemporary law. What is more, the exclusionary rule's critics have offered proposals for updating Fourth Amendment tort suits for the modern era.[213] But the persistence of Founding-era concerns is consistent with the Fourth Amendment's increasingly procedural character over time. In light of its central role in regulating pre-trial investigations, the Fourth Amendment came to resemble procedural rules like the Confrontation and Self-Incrimination Clauses, which expressly dictate how evidence may be obtained for use at trial. Thus, the Fourth Amendment gradually took on an additional role as part of a larger set of legal rules fairly termed "criminal procedure." And adherence to that set of established procedures is precisely what the Due Process Clauses require.

In sum, the rise of the exclusionary rule is best viewed as a function of the evolving nature of criminal investigation since the Founding. The paradigmatic eighteenth-century criminal investigation consisted of private conduct regulated by state tort law, and the Fourth Amendment ensured that those same state tort principles would also regulate the comparatively unusual investigations conducted by federal officials. By the twentieth century, however, changes in governmental practice and in Fourth Amendment law had established that pre-trial criminal investigations were an integral part of the constitutional "process" for obtaining convictions. The Fourth Amendment had come to be viewed — correctly — as a source of the procedural rules governing deprivations of liberty in criminal cases. And when a failure to adhere to Fourth Amendment procedures yielded a deprivation of liberty, the Due Process Clauses prescribed the appropriate remedy. This approach takes the form of a conventional legal argument: certain legal texts establish a personal right to due process, and judges must do their level best to apply that principle in light of the facts before them.

D. Historical Change and Interpretive Method

As we have seen, the case for due process exclusion finds support in a variety of legal sources, including constitutional texts, the original meanings of those texts, and an evaluation of how constitutional principles should apply to changing historical facts. Arguments based on this collection of legal sources generally appeal to a broad range of constitutional interpreters, including, for example, proponents of living constitutionalism. Yet the case for due process exclusion should have

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[212] *E.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). These rules are discussed below in section IV.A, pp. 1945–52.

[213] *See* Amar, *supra* note 17, at 811–16.

special force for those interpreters who have traditionally been most skeptical of the exclusionary rule: originalists.

In recent years, originalist scholarship has converged on an interpretive method often termed "new originalism."[214] This approach critically depends on a distinction between "interpretation" and "construction."[215] *Interpretation* ascertains the original semantic meanings of legal texts, while recognizing the possibility that texts can codify relatively open-ended principles. The Due Process Clauses are perfect examples of broad, textually codified principles.[216] As noted above, the original semantic meaning of the Due Process Clauses obligates the government to follow lawful "methods" before depriving people of life, liberty, or property.[217] New originalists view that original semantic meaning as binding. Plainly, however, this broad principle established by the Due Process Clauses' original meaning leaves unanswered many critical questions of application and implementation. *Construction* addresses those unanswered questions by "giv[ing] legal effect to the semantic content of a legal text."[218] While new originalists often disagree about how to choose constructions, they generally agree that present-day courts should not be constrained by original views of how constitutional provisions should be applied. New originalists thus distinguish between the *original meanings* of constitutional provisions, which are binding until amended, and *original expectations* of how to apply those provisions, which may be useful guides but are not binding on judges today.[219]

The key claim underlying the due process exclusionary rule is that courts should adopt a construction of the word "process" that encompasses pre-trial police investigation, such that convictions predicated on violations of the Fourth Amendment run afoul of "due process." This construction is inconsistent with the Founders' original expected applications, as exclusionary opponents have emphasized,[220] but those

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[214] *See, e.g.*, Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin's* Living Originalism, 7 JERUSALEM REV. LEGAL STUD. 42 (2013).

[215] *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010).

[216] *See id.* at 108 (noting that the phrase "due process of law" is "framed in abstract, general, and vague language").

[217] *See supra* pp. 1907–08. Noah Webster's 1806 dictionary defined "process" as a "method" or "course." NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 237 (1806). Webster's 1828 dictionary defined "process" in part as: "In law, the whole course of proceedings, in a cause, real or personal, civil or criminal, from the original writ to the end of the suit," adding that "[o]riginal process is the means taken to compel the defendant to appear in court." NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

[218] Solum, *supra* note 215, at 103.

[219] For scholars who share this insight in various forms, see *supra* note 214 and *infra* notes 221–24, 229 (citing Professors Barnett, Balkin, Lessig, Rubenfeld, Solum, and Whittington).

[220] *See supra* note 141 and accompanying text.

original expectations are not binding on new originalists. Though the Framers did not view pre-trial investigation as part of the "process" for authorizing criminal convictions, that application of due process never worked its way into the Constitution's text and so remains open to reconsideration by subsequent generations. Courts constructing due process are therefore free to apply original meanings in light of changed factual circumstances. As discussed in the preceding section, the construction that underlies the due process exclusionary rule is justified by several independent and mutually reinforcing historical developments. Over time, pre-trial Fourth Amendment rights came to function as a critical source of pre-trial procedure for the lawful deprivation of liberty and became functionally analogous to in-trial confrontation and self-incrimination rights. So while constitutional text, Founding history, and early judicial practice are of course critically important, the due process exclusionary rule does not rest on those sources, but instead goes on to assess how the Constitution's original meanings and purposes can be adapted to the new circumstances of modern American criminal justice. The due process exclusionary rule is thus consonant with a number of dynamic interpretive theories that are rooted in history, including Professor Jack Balkin's living originalism,[221] Professor Lawrence Lessig's theory of legal translation,[222] Professor Jed Rubenfeld's account of constitutional promise-keeping,[223] and Professor Lawrence Solum's semantic originalism.[224] All these approaches recognize that background facts change and that the Constitution should keep pace. At a minimum, this line of argument should persuade originalists that Founding-era expectations do not close the door to due process exclusion today.

Offering a more nuanced critique, some might contend that the due process exclusionary rule rests on an unwarranted construction. Construction might seem like such a dangerously unbounded enterprise that courts should simply defer to legislative constructions when-

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[221] JACK M. BALKIN, LIVING ORIGINALISM (2011).

[222] Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that shifts in background legal principles may alter the context and, as a result, the current practical meaning of constitutional provisions). Lessig specifically argues that the exclusionary rule is a plausible modern "translation" of common law trespass actions, which originally afforded effective remediation for Fourth Amendment violations but no longer do so. *See id.* at 1228–33. However, Lessig acknowledges that the Court may have chosen "the wrong translation" for common law trespass actions and cites Judge Posner's damages-based proposal as one potential alternative. *Id.* at 1232 n.248 (citing Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 53–58).

[223] JED RUBENFELD, REVOLUTION BY JUDICIARY (2005).

[224] Lawrence B. Solum, *Semantic Originalism* 19 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, 2008), *archived at* http://perma.cc/7TFU-7H5T.

ever possible.[225] Alternatively, viewing the Fourth Amendment as a source of "process" might be condemned on the ground that it does not necessarily serve core criminal justice values, such as the discovery of guilt.[226] The basic response to these sorts of points is to reemphasize the independent legal force of the Due Process Clauses. Far from being capable of justifying anything under the sun, the core meaning of due process enforces nothing more than separately established legal procedures. Thus, Fourth Amendment exclusion is possible only to the extent that there is a separately established set of Fourth Amendment rules. In addition, the due process exclusionary rule respects the interpretive commandment that constructions must be as limited as possible while achieving fidelity to the original meanings enshrined in constitutional text.[227] While this parsimony principle is often difficult to apply, it is fairly easily applied here, since there are only two interpretive options: either Fourth Amendment rights against unreasonable searches are among the procedures due to criminal defendants, or they are not. Answering that question requires reflection on whether the Fourth Amendment today serves as a source of process for the acquisition of criminal verdicts. If the answer is yes, then an originalist should not care whether exclusion fosters freestanding values, such as deterrence, equitable restoration, judicial integrity, or even ascertainment of guilt.[228]

In light of the foregoing, the best construction of the Due Process Clauses — the one most attentive to the Clauses' core purpose and to historical change — is that the phrase "due process" encompasses the Fourth Amendment as a source of pre-trial procedure, such that convictions predicated on Fourth Amendment violations are unlawful. Yet that construction is hardly indisputable, and the political branches might reasonably propose alternative ways of reconciling the Constitution's text, purposes, and history. This possibility raises an important and as-yet unresolved question in new-originalist scholarship: To what extent can the political branches assert *their own* constitutional con-

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[225] *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

[226] *Cf.* Amar, *supra* note 17, at 758–59.

[227] *See* Lessig, *supra* note 222, at 1213–14 (arguing for a principle of conservatism, such that an interpreter must "find the accommodation that makes the *smallest* possible change in the legal material and still achieves fidelity," *id.* at 1213).

[228] *Cf.* Michigan v. Bryant, 131 S. Ct. 1143, 1176 (2011) (Scalia, J., dissenting) (arguing in a Confrontation Clause case that while the defendant convicted of murder may have "received his just deserts," "he surely has not received them pursuant to the procedures that our Constitution requires").

structions, thereby displacing competing judicial views?[229] Imagine, for example, a federal statute that sought to "enforce" the Fourth Amendment by establishing a damages regime to deter police and compensate defendants for unreasonable searches and seizures.[230] In the wake of such a measure, the Fourth Amendment might no longer function primarily as a source of pre-trial procedure for the acquisition of evidence, but instead as a vehicle for tort remedies — much as it did at the Founding. The Fourth Amendment might then be recast as a source of "process" only for searches and seizures, not convictions. On this view, the exclusionary rule would resemble *Miranda*, which can likewise be viewed as a reasonable construction subject to legislative modification.[231] But resolution of these hypothetical issues will have to await another day. For the time being, courts both can and should adopt the due process exclusionary rule as the best construction of the Due Process Clauses.

III. MAKING SENSE OF EXCLUSIONARY DOCTRINE

The due process exclusionary rule draws added normative support from its ability to explain and justify many core features of existing doctrine. Because the law is an interpretive practice, legal theories are on balance more compelling when they maximally fit and justify the law as it is.[232] That interpretive principle cuts in favor of the due process exclusionary rule, since many basic features of current jurisprudence suddenly make sense when deterrence-based arguments are set aside in favor of a focus on due process. Further, many apparently ad

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[229] *Cf.* Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 122 (2010) ("If a construction no longer . . . expresses the values of important political actors, then it can and often will be revisited.").

[230] *See* U.S. CONST. amend. XIV, § 5 (Enforcement Clause). For other examples of legislation that could alter judicial constructions, see AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 216–18 (2012) (proposing that the actual malice standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), might be displaced by legislative caps on punitive damages in defamation actions); Richard M. Re, *Can Congress Overturn* Graham v. Florida*?*, 34 HARV. J.L. & PUB. POL'Y 367, 375 (2011).

[231] *See* Dickerson v. United States, 530 U.S. 428, 440 n.6 (2000); Miranda v. Arizona, 384 U.S. 436, 467 (1966) (indicating room for legislative modification); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 200–01 (1988) (discussing *Miranda* as a legislatively modifiable effort to implement the Fifth Amendment Self-Incrimination Clause).

[232] *See* DWORKIN, *supra* note 28, at 90 (arguing that legal theories both do and should "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice"); *id.* at 225; Fallon, *supra* note 28, at 1233–37 ("The goal is to portray the practice in the best light that is reasonably compatible with the self-understanding of practitioners." *Id.* at 1234.); *see also* Neil MacCormick, *Coherence in Legal Justification*, *in* THEORY OF LEGAL SCIENCE 235 (Aleksander Peczenik et al. eds., 1984); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 310 (1992) (defending the value of "local coherence," that is, "coherence of doctrine in specific fields" where "law should reflect one overriding moral or evaluative concern").

hoc limits on the exclusionary rule likewise appear intelligible when understood as efforts to mark the boundaries of due process. Below, section A explores the explanatory power of due process by discussing six basic features of the right to exclusion of evidence. Section B then discusses six limits on due process and their implications for the exclusionary rule.

A. Basic Explanatory Power

The Court has tended to enforce the Fourth Amendment on the often explicit assumption that it constitutes a source of "process" for the acquisition of evidence.[233] That approach has allowed the Court to treat the Fourth Amendment just like any number of other procedural rules for the acquisition of evidence, such as the Self-Incrimination and Confrontation Clauses.[234] Because the Court has generally followed that intuitive approach, the due process exclusionary rule provides a compelling explanation for basic features of current doctrine. For over fifty years the Fourth Amendment exclusionary rule has consistently exhibited the six traits discussed below — each of which is a natural reflection of due process.

1. Personal. — Current doctrine holds that only people who have personally suffered a Fourth Amendment violation can obtain suppression based on that violation.[235] This rule has come in for criticism, and understandably so.[236] If the exclusionary rule were truly meant to deter, then it should apply (at a minimum) whenever evidence directly results from an egregiously unconstitutional search.[237] Imagine for instance that police searched the cell phones of everyone exiting a concert in the hope of finding photos of third parties using illegal drugs.[238] Isn't it obvious that suppression in that situation would deter similar dragnets? The same conclusion follows from principles of restoration, integrity, or judicial review.[239] Under any of those approaches, the government should not gain from, and the courts should not bless, unconstitutional conduct. Yet they do.[240]

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[233] *See supra* p. 1924.

[234] *See* U.S. CONST. amend. V; *id.* amend. VI.

[235] Rakas v. Illinois, 439 U.S. 128, 139–40 (1978).

[236] *See supra* notes 44–46 and accompanying text.

[237] *See* Kamisar, *Does (Did)*, *supra* note 16, at 634 (pointing out that Fourth Amendment standing "seemed to be one occasion when the 'deterrence' rationale *favored* the defendant," as compared with older notions of suppression predicated on self-incrimination); *id.* (quoting Roger J. Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319, 335).

[238] *Cf.* United States v. Payner, 447 U.S. 727, 731–33 (1980) (admitting evidence obtained when officers seized a third party's briefcase and copied its contents).

[239] *See, e.g.*, Schrock & Welsh, *supra* note 21, at 257–60.

[240] *See Rakas*, 439 U.S. at 140–42.

The exclusionary rule's personal character suddenly becomes intuitive once it is freed from the supposed obligation to serve abstract values and public policy goals. The Due Process Clauses provide something narrower and more pointed than a generalized guarantee that the government will follow the law — namely, a guarantee that all persons will receive the predeprivation process to which they are entitled. Imagine for example that a witness implicates two defendants in a joint criminal trial, and only one of the defendants is permitted to be in the courtroom. In that situation, only one defendant has suffered a Confrontation Clause violation. As a result, only that defendant could claim a due process violation upon conviction. Fourth Amendment rights work the same way. We might imagine, for example, that the government illegally searched A's house and, in the process, discovered evidence incriminating both A and B. If convicted, the defendant whose house was illegally searched would suffer a deprivation of liberty without due process. The second defendant, by contrast, would have experienced no Fourth Amendment wrong and so would have received all the process to which *he* was entitled.

But if the due process exclusionary rule corroborates current doctrine, it also suggests a potential avenue for reform. When police search one person's house with the goal of acquiring evidence against the target of their investigation, the critical due process question is whether the target has suffered an invasion of privacy, such that his Fourth Amendment rights have been infringed.[241] If the results of that inquiry are unsatisfying, the solution is not to stretch the exclusionary remedy, but rather to expand the Fourth Amendment right. Consistent with that recommendation, scholars have long argued that current Fourth Amendment doctrine takes an unrealistically narrow view of personal privacy.[242]

In sum, nobody is "due" the observance of other people's procedural rights. And Fourth Amendment rights — unlike the abstract goals of deterrence, restoration, integrity, and judicial review — protect entitlements that are personal to individuals.[243]

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[241] Drawing on Sunderland's view that due process prohibits flagrant violations of law, *see supra* text accompanying note 25, Professor Nadia B. Soree has recently argued that, under a due process conception of the exclusionary rule, anyone "whom the police directly or indirectly target" should be able to request suppression of evidence, even if that person's Fourth Amendment rights were not infringed. Soree, *supra* note 25, at 793. But that rule does not follow from due process as positive law. While a suspect's pre-trial "process" may begin when she is targeted by police, the suspect is still "due" only her own rights.

[242] *E.g.*, Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1642–43 (1987).

[243] *See Rakas*, 439 U.S. at 140–41 (noting "this Court's long history of insistence that Fourth Amendment rights are personal in nature," *id.* at 140). The Court has muddied its exclusionary doctrine by at first embracing and then rejecting the notion that a defendant must have "standing" to raise Fourth Amendment rights. *Id.* at 138–39 (rejecting the standing inquiry of *Jones v.*

2. Evidentiary. — Exclusionary-rule detractors love to ask this question: If illegally obtained evidence should be suppressed at trial, then why shouldn't illegally obtained evidence — say, sawed-off shotguns, laundered money, and stores of cocaine — be returned to criminals?[244] Wouldn't doing so serve all the purported purposes of suppression, including the deterrence of police misconduct, the restoration of the status quo ante, and the preservation of judicial integrity? Some scholars have arrived at a similar result by grounding exclusionary practice in the common law right to return of one's personal property (as opposed to contraband).[245] On that narrow view, the exclusionary rule would be a rule of property, not evidence. Consequently, the government would not be barred from taking photographs of personal property during unconstitutional searches and then submitting *that* evidence at trial.[246] Or perhaps the government could pay damages in lieu of return.

By contrast, due process establishes the exclusionary rule's evidentiary character, as well as the presumptive need to vacate convictions based on unlawfully obtained evidence. The driving engine of due process suppression is a concern for the deprivation of life, liberty, or property that attends a criminal conviction. The due process exclusionary rule therefore has no effect outside of trial, and it plainly does not imply that police must return either unconstitutionally seized contraband or the fruits of unlawful activity. Because those items are not "property" that the defendant (or anyone else) is legally "due,"[247] the government may confiscate them without infringing due process. By contrast, legitimate personal property that the government has no au-

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United States, 362 U.S. 257 (1960)). This confusion evaporates under a due process approach: only defendants whose convictions are based on personal rights violations have an entitlement to relief.

[244] *See, e.g.*, AMAR, *supra* note 80, at 27 ("[I]f an illegal search turns up a ton of marijuana, the government need not return the contraband . . . .").

[245] *See* Steven R. Schlesinger & Bradford Wilson, *Property, Privacy, and Deterrence: The Exclusionary Rule in Search of a Rationale*, 18 DUQ. L. REV. 225, 235 (1980) (arguing based on early cases that the Supreme Court should view the exclusionary rule narrowly as "a right to have one's property returned when illegally seized"); *see also* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 171–72 (2012) (providing a similar account of early exclusionary practice). *But see infra* notes 247–48 and accompanying text (explaining that modern law affords courts the authority to retain personal property for use as evidence during trial).

[246] *But see* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (prohibiting derivative use of unconstitutionally collected evidence).

[247] *See* Savoy v. United States, 604 F.3d 929, 932 (6th Cir. 2010) ("The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated." (quoting United States v. Hess, 982 F.2d 181, 186 (6th Cir. 1992)) (internal quotation marks omitted)). *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992) (finding prohibitions on nuisances not to be takings); Andrus v. Allard, 444 U.S. 51, 67 (1979) (finding contraband prohibitions not to be takings).

thority to possess should indeed be returned after trial — as the law has long required.[248]

3. Newtonian. — The exclusionary rule is Newtonian in that each Fourth Amendment violation triggers an equal and opposite suppression order. When applying the exclusionary rule, courts don't just suppress *something*. Rather, they presumptively suppress whatever was found unlawfully — nothing more, and nothing less. As discussed above,[249] this underappreciated Newtonian theme is inconsistent with deterrence-based justifications for exclusion. A proponent of deterrence should be prepared to suppress much more or much less than what was discovered illegally, depending on the circumstances. To be sure, the exclusionary rule's Newtonian quality can seem restorative, as numerous commentators have argued.[250] But, again, that impression is illusory.[251] The exclusionary rule constitutes a principle of evidence and so cannot possibly restore the status quo ante in any comprehensive way. That limitation makes sense under the due process exclusionary rule. The violation triggering suppression is the deprivation of life, liberty, or property without adherence to "due" Fourth Amendment procedures. Therefore, illegally acquired evidence is presumptively ineligible to serve as the basis for conviction — nothing more, and nothing less.

4. Transsubstantive. — The exclusionary rule is "transsubstantive" in two senses. First, it applies no matter the nature of the underlying crime.[252] Thus, the same illegal pat-down will trigger suppression whether the defendant is discovered to have a bloody murder weapon or a baggie of unlawful narcotics. This is surprising. If the point of the exclusionary rule were really to promote either deterrence or intrinsic values such as judicial integrity, then there should be exceptions for cases where the cost to public safety or to the truth-finding process is just too great to abide. Yet the absence of any such exceptions makes perfect sense under a due process theory. Defendants are "due" adherence to applicable "process," no matter their crime. For that reason, it is uncontroversial that confrontation and self-incrimination violations presumptively trigger reversal, even in connection with serious

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[248] *See* FED. R. CRIM. P. 41(g) ("A person aggrieved by an unlawful search and seizure of property or by *the deprivation of property* may move for the property's return. . . . [But the court] may impose reasonable conditions to protect access to the property and its use in later proceedings." (emphasis added)). Thus, modern courts — even if not their common law predecessors — have legal authority to deny return of personal property until the conclusion of proceedings.

[249] *See supra* section I.A, pp. 1894–902.

[250] *See* sources cited *supra* note 76.

[251] *See supra* section I.B, pp. 1902–03.

[252] *Cf.* William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

offenses. All convictions resulting from deviations from lawful process transgress the Due Process Clauses.

Second, the exclusionary rule is transsubstantive in that the same exclusionary principles apply not just to Fourth Amendment violations, but also to a wide range of distinct procedural rights.[253] To choose just a few examples, a single basic toolbox of exclusionary doctrines applies to violations of: the Fourth Amendment, *Miranda*,[254] the Counsel Clause, the Self-Incrimination Clause, and the substantive aspect of the Due Process Clause. Many of the most important exclusionary-rule cases actually concerned constitutional provisions other than the Fourth Amendment. *Nix v. Williams*,[255] discussed below,[256] supplies a canonical example. The Court's cross-application of exclusionary principles sits uneasily with deterrence rationales, since incentive effects and government interests plainly vary across these contexts. Yet exclusionary transsubstantivity makes perfect sense if there is a common constitutional source for all the various exclusionary rules implementing different constitutional rights. That single, shared source is due process.

5. Incorporated. — The due process exclusionary rule makes incorporation easy — even moot. When the Fourth Amendment's investigative requirements were extended to the states, there was really no need to separately incorporate the exclusionary rule. The Fourteenth Amendment Due Process Clause, after all, by its terms applies to the states. This straightforward line of reasoning points out the error in *Wolf v. Colorado*,[257] which incorporated only the Fourth Amend-

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[253] *See* Nix v. Williams, 467 U.S. 431, 442 (1984) (noting that the same principles of exclusionary taint apply in Fourth, Fifth, and Sixth Amendment cases).

[254] *United States v. Patane*, 542 U.S. 630 (2004), may seem inconsistent with the due process exclusionary rule, but on inspection it is not. *Patane* held that the physical fruits of *Miranda* violations are admissible in criminal trials. *Id.* at 634 (plurality opinion). The two-Justice concurrence in the judgment reasoned that physical fruits should be admissible because they are so reliable, as compared with testimonial evidence. *See id.* at 645 (Kennedy, J., concurring in the judgment) (emphasizing "the important probative value of reliable physical evidence"). That prudential reasoning is incompatible with due process exclusion, since the collection of physical fruits, or any other kind of evidence, can violate the Constitution's procedural requirements. But the three-Justice plurality opinion turned on another line of reasoning, and that dominant analytical thread is perfectly compatible with, and even supportive of, the due process exclusionary rule. In short, the plurality concluded that no violation of law had actually taken place, despite the government's failure to supply adequate *Miranda* warnings. According to the plurality, the Self-Incrimination Clause and the *Miranda* rule can be violated only when testimonial evidence is introduced at trial. *See id.* at 641–42, 644 (plurality opinion). The discovery and admission of physical fruits, by contrast, could never violate the testimony-based rights at issue. *See id.* at 643. Thus, the defendant in *Patane* was mistaken to think that his procedural rights had been violated, and his conviction was lawful ab initio. *See id.* at 637.

[255] 467 U.S. 431.

[256] *See infra* p. 1956.

[257] 338 U.S. 25 (1949), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961).

ment — not the exclusionary rule.[258] Ironically, *Wolf* correctly considered the Due Process Clauses as a potential source of exclusionary rights, apart from the Fourth Amendment itself.[259] *Wolf* nonetheless went awry because it focused on the Due Process Clauses in isolation, instead of asking whether the Fourth Amendment itself constitutes a source of "due" procedures. As a result, *Wolf* asked only whether the exclusionary rule was essential to well-ordered liberty. Citing foreign legal systems without the rule, the Court said no.[260]

When *Mapp v. Ohio* overturned *Wolf*, the Court famously reasoned that the exclusionary rule was not just a remedy for Fourth Amendment violations, but a right specifically required by the Fourth Amendment itself.[261] As the Court put it, the exclusionary rule was "an essential part of the right to privacy" in the sense that it made the right effective.[262] On this view the Fourteenth Amendment was merely a conduit for the incorporation of Fourth Amendment rights.[263] The Fourth Amendment "right of privacy" applied to the states, the Court explained, and the Fourth Amendment carried with it the "sanction of exclusion."[264] As we have seen, the modern Court has undermined that view by emphasizing that the exclusionary rule is "a 'prudential' doctrine" aimed at deterring police misconduct.[265] This state of affairs raises an awkward question: Why should an avowedly atextual, prudential, judge-made doctrine be incorporated against the states as "fundamental to our scheme of ordered liberty"?[266] After *Mapp*, however, the Court never returned to the more straightforward question that Justice Frankfurter asked in *Wolf* — that is, whether a conviction based on illegally obtained evidence was in itself a violation of due process.

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[258] *Id.* at 27–28, 33.

[259] *Id.* at 25–26 (asking whether a state conviction might "deny the 'due process of law' required by the Fourteenth Amendment, solely because . . . there [was] deemed to be an infraction of the Fourth Amendment"). *Wolf*'s consideration of a due process exclusionary right is often overlooked. *E.g.*, Stewart, *supra* note 16, at 1378 (characterizing *Wolf* as concerned with a question of remedy, not constitutional right).

[260] *Wolf*, 338 U.S. at 28–29.

[261] *See* 367 U.S. at 656.

[262] *Id.* at 655–56.

[263] *See id.* at 655 ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion . . . .").

[264] *Id.*

[265] Davis v. United States, 131 S. Ct. 2419, 2426 (2011) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

[266] McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (emphasis omitted); *see also* United States v. Leon, 468 U.S. 897, 929–30 (1984) (Brennan, J., dissenting) (asking this question); Wingo, *supra* note 81, at 227 ("If the [exclusionary] rule is only one means of deterring violations and is not a part of any constitutional right, how can it be imposed on the states?").

6. Presumptive. — Finally, the exclusionary rule presumptively applies whenever the government accesses evidence by violating the Constitution. A search's unconstitutionality is in itself a reason to think that the evidence must be excluded from trial. That principle is in tension with deterrence-based theories, which should (and, in the wake of *Herring*, increasingly do[267]) favor a case-by-case analysis of costs and benefits. At the same time, the exclusionary rule is *only* presumptive in that evidence obtained through an unlawful act sometimes ends up being admissible after all. That principle is in tension with theories of exclusion predicated on intrinsic values like judicial integrity or judicial review, which appear to hold that no Fourth Amendment violation should go without a judicial response at trial.

The due process exclusionary rule makes better sense of the exclusionary rule's presumptiveness. The key question is whether admission of the evidence might cause the defendant to be deprived of life, liberty, or property without due process of law. On that approach, there is an automatic reason to consider exclusion whenever the police have obtained evidence by transgressing the Fourth Amendment. Still, the presumption in favor of suppression may be overcome, as there remains a possibility that a Fourth Amendment violation in the streets will not generate a due process violation at trial. As explained in more detail in Part IV below, the analytical space between Fourth Amendment violations and Due Process Clause violations is critical to understanding various "exceptions" to the exclusionary rule, such as the doctrines pertaining to taint, attenuation, inevitable discovery, independent source, and personal identity.

B. The Boundaries of Due Process

Due process principles are powerful, but they have only limited scope. This section discusses areas where the modern exclusionary rule does not apply. On reflection, these doctrinal exceptions are intelligible as attempts to mark the boundaries of criminal defendants' due process rights.

1. Grand Juries. — The Court allows use of unconstitutionally collected evidence in grand jury proceedings.[268] Because these proceedings are a necessary precursor to any subsequent trial, admission of unconstitutionally obtained evidence could reasonably be viewed as a violation of due process.[269] Still, the Court is on solid ground in em-

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[267] *See* cases cited *supra* note 49.

[268] United States v. Calandra, 414 U.S. 338 (1974).

[269] Similar reasoning can explain why racial discrimination in grand juror selection taints a later conviction. *See* Alexander v. Louisiana, 405 U.S. 625 (1972).

phasizing that grand juries don't authorize criminal convictions.[270] And, as a general rule, "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence."[271] Thus, not applying the exclusionary rule in grand jury proceedings is consistent with the type of "process" that is traditionally "due" targets of indictments. Whether convictions are tainted when grand juries hear unconstitutionally obtained evidence should accordingly turn on the nature of the protections afforded by the Grand Jury Clause.

2. Habeas Corpus. — Under *Stone v. Powell*,[272] the Court overlooks exclusionary-rule violations when raised in habeas corpus proceedings, provided adequate state-court review of the defendant's Fourth Amendment claim.[273] Whether this rule is correct depends on one's view of habeas corpus. If habeas ought to afford plenary review of due process claims, then it should also supply a vehicle for review of due process exclusionary claims.[274] But habeas hearings — like grand jury proceedings — do not actually authorize deprivations of life, liberty, or property. And habeas has never tested whether all lawful procedures were followed at a prior trial. At common law, for example, the principal inquiries of habeas corpus were whether the convicting court had jurisdiction to sentence and authority to impose the type of sentence issued.[275] More recently, federal law has limited the availability of habeas corpus in most cases to clearly established constitutional guarantees.[276] Consistent with those historical and legislative limits on habeas relief, the Court has frequently treated habeas as a proper object of common lawmaking.[277] *Stone* in particular has often been viewed as an indirect product of Judge Henry Friendly's influential suggestion that habeas should be conditioned on claims of actual inno-

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[270] *See Calandra*, 414 U.S. at 343–44; *id.* at 349 ("Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial.").

[271] *Id.* at 345; *see also* United States v. Dionisio, 410 U.S. 1, 17 (1973) (disapproving of rules that would "saddle a grand jury with minitrials and preliminary showings [that] would assuredly impede its investigation").

[272] 428 U.S. 465 (1976).

[273] *Id.* at 481–82.

[274] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 555–56 (2004) (Scalia, J., dissenting) ("The two ideas central to Blackstone's understanding — due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally imprisoned — found expression in the Constitution's Due Process and Suspension Clauses.").

[275] *See* RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1221 & n.2 (6th ed. 2009) (collecting sources).

[276] *See* Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. § 2254 (2012).

[277] *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (establishing a judicially fashioned nonretroactivity principle in habeas cases).

cence.[278] So *Stone* could be understood as a holding about the limited and malleable "purview" of habeas courts.[279]

3. Impeachment. — The Court allows illegally obtained evidence to be used for purposes of impeachment at trial, even though that evidence cannot be used to support the government's case in chief.[280] Illustrating the exclusionary rule's applicability across constitutional rights, the impeachment exception applies in the event of a Fourth Amendment violation,[281] a Fifth Amendment *Miranda* violation,[282] or a Sixth Amendment Counsel Clause violation.[283] Whether the impeachment exception comports with due process exclusion largely depends on how one views the nature and role of impeachment evidence. Because it isn't used as substantive evidence of guilt, impeachment evidence never formally authorizes a deprivation of life, liberty, or property — as the Court has pointed out.[284] That nice distinction may seem too divorced from the practical realities of trial, where impeachment evidence can sway juries to convict. Yet the impeachment exception has practical points in its favor as well, since it tends never to be used at all.[285] Because witnesses know that false testimony can be disproven, they are unlikely to give such testimony in the first place. The impeachment exception thus operates much like a rule against perjury — something which the defendant isn't "due."

4. Civil Proceedings. — The Court has declined to exclude unconstitutionally obtained evidence in several civil contexts, including tax cases.[286] Predictably, these decisions rest on dubious and essentially ad hoc assertions regarding deterrence.[287]

The Court's distinction between civil and criminal cases is plainly in tension with the due process exclusionary rule, since civil proceedings can obviously result in deprivations of liberty or property. And, of course, the Fourth Amendment is not expressly limited to prosecu-

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[278] *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); *cf. Stone*, 428 U.S. at 480 (citing Judge Friendly's article); Schneckloth v. Bustamonte, 412 U.S. 218, 258 n.12 (1973) (Powell, J., concurring) (same); DAVID M. DORSEN, HENRY FRIENDLY 218 (2012).

[279] Wainwright v. Sykes, 433 U.S. 72, 79–80 (1977).

[280] *See* Walder v. United States, 347 U.S. 62 (1954).

[281] *See* United States v. Havens, 446 U.S. 620, 627 (1980).

[282] *See* Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[283] *See* Kansas v. Ventris, 129 S. Ct. 1841 (2009).

[284] *See, e.g.*, *Havens*, 446 U.S. at 627–28; *Harris*, 401 U.S. at 225.

[285] *See* Craig M. Bradley, Havens*,* Jenkins*, and* Salvucci*, and the Defendant's "Right" to Testify*, 18 AM. CRIM. L. REV. 419, 427–29 (1981) (arguing that a properly crafted impeachment exception can deter perjury, whereas actual case law on the impeachment exception has allowed circumvention of the exclusionary rule).

[286] *See* United States v. Janis, 428 U.S. 433 (1976) (civil tax proceeding).

[287] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1041 (1984) ("Imprecise as the exercise may be, . . . there is no choice but to weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs.").

tions and so can apply in civil cases. Yet it is axiomatic that criminal process needn't always be followed in civil proceedings,[288] and the Fourth Amendment has not played a central role in the evolution of civil procedure. (The Fourth Amendment is taught exclusively in "criminal" procedure classes for a reason.) A defender of current doctrine could therefore reasonably conclude that the Fourth Amendment does not generally constitute part of the "process" for the government's pursuit of civil remedies against private defendants.

Complicating this picture, the Court's civil/criminal distinction isn't as strict as it may appear. In particular, the Court has suggested that the exclusionary rule *does* apply in civil deportation cases involving "egregious" Fourth Amendment violations.[289] And federal courts have long excluded evidence in deportation cases on that basis.[290] While the existing "egregiousness" test is misguided,[291] these cases seem broadly responsive to the considerable convergence of deportation and criminal proceedings. Though immigration adjudications are civil in form, they often arise from investigations undertaken with an eye to possible criminal prosecution and conducted by police constrained by the Fourth Amendment. For these reasons, the Fourth Amendment could plausibly be viewed as part of the "process" for obtaining civil remedies in immigration cases.[292]

5. Nonconstitutional Process. — Courts tend not to demand suppression for violations of nonconstitutional rules.[293] This trend rough-

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[288] *See id.* at 1038 ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing."). For example, the Constitution provides distinct civil and criminal jury rights. *Compare* U.S. CONST. art. III, § 2 (criminal jury), *and id.* amend. VI (same), *with id.* amend. VII (civil jury). And evidence barred by expressly criminal procedures like the Confrontation Clause can be admitted in civil trials. *See* Austin v. United States, 509 U.S. 602, 608 n.4 (1993).

[289] *Lopez-Mendoza*, 468 U.S. at 1050–51 (plurality opinion).

[290] *See, e.g.*, Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006); Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994); *see also* Elizabeth A. Rossi, *Revisiting* INS v. Lopez-Mendoza*: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013) (discussing the "egregiousness" exception).

[291] The egregiousness test is a version of the "good-faith" rule floated in *Herring* as a general principle of exclusionary doctrine. *See supra* notes 5–7 and accompanying text; *infra* section III.B.6, pp. 1942–45 (discussing the good-faith exception).

[292] Adding further support to the notion that immigration proceedings are distinctive among civil cases, the Court has long recognized that special constitutional process can be due for deprivations of "liberty" as opposed to "property." *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 320 (2001) (noting nineteenth-century cases holding that "what process was due was different for cases where liberty was at stake as opposed to . . . only property").

[293] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 348 (2006) ("We have applied the exclusionary rule primarily to deter constitutional violations."); *see also, e.g.*, *id.* (treaty); California v. Greenwood, 486 U.S. 35, 44–45 (1988) (state law); United States v. Caceres, 440 U.S. 741, 749 (1979) (federal regulation); United States v. Donovan, 429 U.S. 413, 432 n.22 (1977) ("The availability of the suppression remedy for . . . statutory, as opposed to constitutional, violations . . . turns on the

ly tracks the evolution of due process doctrine, as the decline of suppression for nonconstitutional violations corresponds with the Court's growing reluctance to ascribe constitutional significance to violations of state and even nonconstitutional federal law.[294] Today, for example, "mere errors" of state law are not thought to yield due process violations.[295] That approach has pragmatic appeal, since it allows lawmakers to control the remedial consequences of the procedures they create. In *California v. Greenwood*,[296] for example, California both prohibited police searches of roadside trash and precluded exclusionary remedies.[297] And in *United States v. Donovan*,[298] a federal statute imposed certain requirements on wiretap applications while providing for suppression only in certain instances.[299] If the Court had demanded due process suppression in those cases, it might have discouraged lawmakers from imposing new constraints on police.[300] Instead, the Court has found only fundamental procedures, including constitutional ones, to qualify as due process.[301]

But if the exclusionary rule roughly tracks current doctrine's understanding of due process, it is fair to ask whether current doctrine is correct. There is some evidence suggesting that, at least by the time of the Fourteenth Amendment's ratification, "due process" referred largely to constitutional procedures, and not to federal statutes or state

provisions of [the statute]." (citing United States v. Giordano, 416 U.S. 505, 524 (1974))); United States v. Clenney, 631 F.3d 658, 667 (4th Cir. 2011); United States v. Ramsey, 165 F.3d 980, 991 (D.C. Cir. 1999).

294 *Cf.* Leslie v. Att'y Gen. of the U.S., 611 F.3d 171, 179 (3d Cir. 2010) ("The failure of an agency to follow its own regulations is not, however, a per se denial of due process unless the regulation is required by the constitution or a statute." (quoting Arzanipour v. INS, 866 F.2d 743, 746 (5th Cir. 1989)) (internal quotation marks omitted)). *Compare* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954) (insisting that an individual be "afforded that due process required by the [applicable] regulations"), *with* Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009) (state law), *and Caceres*, 440 U.S. at 749 (federal regulation).

295 *See* Engle v. Isaac, 456 U.S. 107, 121 n.21 (1982); Gryger v. Burke, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process . . . .").

296 486 U.S. 35.

297 *Id.* at 38–39.

298 429 U.S. 413.

299 *Id.* at 439–40.

300 *See, e.g.*, United States v. Caceres, 440 U.S. 741, 749 (1979). The reasoning of these decisions calls to mind the commonplace concern that the exclusionary rule encourages judges to shrink Fourth Amendment rights. *See, e.g.*, Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 112 (2003).

301 *E.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010) ("The Court [has] shed any reluctance to hold that rights guaranteed by the Bill of Rights [meet] the requirements for protection under the Due Process Clause."); Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876); *see also supra* section II.A, pp. 1907–12.

law.[302] As argued earlier, however, substantial historical evidence indicates that the Due Process Clauses were originally understood to command adherence to all positive-law procedures for depriving persons of life, liberty, or property.[303] Given that history, there is a powerful historical argument that suppression should be mandatory for all harmful violations of positive-law process, including state law and federal statutory law.[304] Supporting that possibility, older but still influential cases sometimes suppressed for nonconstitutional violations and even invoked due process when doing so.[305]

Still, one limiting principle bears emphasis. As we have seen, there can be room for disagreement as to whether a particular legal rule functions as part of the process for obtaining a conviction. The Fourth Amendment itself was originally viewed exclusively as part of tort process, and a federal statute might be able to return the Fourth Amendment to that original role.[306] A similar analysis applies to nonconstitutional sources of procedural law, which often prescribe nonexclusionary remedies.[307] The express remedial provisions at issue in *Donovan*, for example, made it hard to view the nonconstitutional rules in question as procedural steps toward the authorization of criminal convictions.[308] In accounting for the remedies expressly provided

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[302] *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277–78 (1856) (determining whether "process, enacted by congress, is due process" requires the Court to first "examine the constitution itself").

[303] *See supra* notes 99–100 and accompanying text.

[304] *See* Thomas W. Merrill, *The* Accardi *Principle*, 74 GEO. WASH. L. REV. 569, 611 (2006) ("I believe courts should read *Accardi* to mean what it says: an agency's violation of its own legislative procedural regulations is a violation of due process."); *see also* Raoul Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U. L. REV. 137, 149–51 (1967); Martha I. Morgan, *Playing by the Rules: Due Process and Errors of State Procedural Law*, 63 WASH. U. L.Q. 1, 31 (1985).

[305] *See, e.g.*, Bridges v. Wixon, 326 U.S. 135, 152 (1945) (invoking due process when a nonconstitutional rule was violated); Nardone v. United States, 308 U.S. 338 (1939) (suppressing evidence based on a statutory violation).

[306] *See supra* note 230 and accompanying text; *see also infra* section IV.A, pp. 1945–52 (on the distinction between scope and manner violations).

[307] *E.g.*, Electronic Communications and Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.) (creating criminal punishments and civil remedies for violation of the Act, which separately provides for suppression of certain illegally obtained information).

[308] *Donovan* found suppression inappropriate because, despite violations of statutory wiretap procedure, "the instant intercept is lawful." United States v. Donovan, 429 U.S. 413, 436 (1977); *see also id.* at 432 (explaining that the pertinent remedial provision provided exclusion if "the communication was unlawfully intercepted" (quoting 18 U.S.C. § 2518(10)(a)(i) (2012))). According to the Court, the violated statutory rules served interests other than constraining the government's investigative authority. *See id.* at 435 (declining to find that "the identification in an intercept application of all those likely to be overheard in incriminating conversations plays a 'substantive role' with respect to judicial authorization of intercept orders"); *id.* at 439 ("[W]e do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure."). Thus, the government's convictions based on the wiretap information

by the positive law at issue, the Court embraced the law's own conception of the procedures it established. Quite apart from its pragmatic appeal, that approach accords with the original meaning of the Due Process Clauses.

6. The Good-Faith "Exception." — The due process exclusionary rule also casts in a new, clarifying light one of the most important evolving areas of Fourth Amendment exclusionary jurisprudence. In a series of decisions, the Court has declined to suppress evidence where the police acted in objectively reasonable or "good-faith" reliance on an incorrect assumption. The police have thus relied — erroneously, it turned out — on warrants issued by impartial magistrates,[309] on statutes authorizing searches,[310] on databases that purported to store accurate warrant information,[311] and on binding appellate precedents.[312] In all these cases, the Court reasoned from the premise that the exclusionary rule is a "judicially created rule" designed to achieve the policy goal of deterring police misconduct.[313] And, in all these cases, the Court concluded that deterrence was unjustified where police searched suspects after reasonably relying on assumptions provided by third parties. Yet there is no "good-faith" exception to the Due Process Clauses. So evidence obtained through unconstitutional procedures should not justify deprivations of liberty, even when the unconstitutionality is a good-faith error. Thus, the good-faith cases seem inconsistent with the due process exclusionary rule.

This tension is more illusion than reality. True, the Court's stated reasoning — here as elsewhere — has nothing to do with the Due Process Clauses and, in fact, drifts far into the realm of judicial policymaking.[314] Yet the results obtained in the good-faith cases are best understood, not as the exclusionary-rule decisions they purport to be, but rather as displaced Fourth Amendment holdings. Instead of ruling that the exclusionary rule does not apply in one instance or another, the good-faith cases should simply have held that no unreasonable

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comported with due process. For another example, see *infra* note 334 (discussing United States v. Adams, 740 F.3d 40 (1st Cir. 2014)).

309 United States v. Leon, 468 U.S. 897, 900 (1984). Before *Leon*, courts assigned epistemic deference to the prior determinations of magistrates. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983) ("A magistrate's 'determination of probable cause should be paid great deference by reviewing courts.'" (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969))). This deference on the merits to ex ante probable cause assessments can be justified by recognition of various ex post biases. *See* sources cited *infra* note 357.

310 Illinois v. Krull, 480 U.S. 340 (1987).

311 Arizona v. Evans, 514 U.S. 1 (1995).

312 Davis v. United States, 131 S. Ct. 2419 (2011).

313 *E.g.*, *id.* at 2434.

314 *See, e.g.*, *id.* ("The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception.").

search took place at all. And when a conviction rests on evidence obtained through a reasonable search, the conviction works a constitutionally permissible deprivation of liberty.

To see this point, consider another context in which police engage in reasonable reliance: when they receive anonymous tips.[315] Tipster cases raise the Fourth Amendment question of whether a reasonable search has taken place. When a tip seems reliable, the police act reasonably in relying on it, even if the tip turns out to have been wrong.[316] That is exactly the structure of the good-faith decisions. In all those cases, a police officer had obtained a "tip" that there was a valid warrant, a constitutional statute, a correct judicial interpretation, or some other legal authorization to conduct a particular search. And, in every case, the officer reasonably believed that the tip was correct. Thus, the officer's reliance on the warrant, the statute, or the judicial decision was "reasonable" and so compliant with the Fourth Amendment — even if the tip ultimately turned out to be incorrect. The Court applied similar reasoning in its first "good-faith" decision, holding that evidence was collected in compliance with the Fourth Amendment where police had acted on a reasonable view of the law.[317]

This point has been obscured by nomenclature. The Court has long referred to a "good-faith" exception to the exclusionary rule.[318] But the doctrine does not actually call for good faith, which connotes good motives. Instead, the doctrine tests whether the police engaged in objectively reasonable reliance on the information — both factual and legal — that was available to them.[319] So this area of law should actually be referred to as a collection of exceptions for "reasonable reliance." That terminological correction raises an important question, however: why do we need a "reasonableness" exception to the exclusionary rule, when that rule comes into play only after a violation of the Fourth Amendment's "reasonableness" requirement? We don't. For example, the question presented in *Herring* was whether the exclusionary rule should apply where "an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong."[320] Wouldn't it have been more logical to say that the officer's reasonable belief in the search's lawfulness rendered the search itself,

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315 *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 217 (1983).

316 *See, e.g.*, Draper v. United States, 358 U.S. 307, 313 (1959) (holding that an officer reasonably relied on a tip under the circumstances).

317 Michigan v. DeFillippo, 443 U.S. 31, 37 (1979) (upholding a search incident to arrest as based on probable cause that the defendant had violated a law, even though courts later found the law to be unconstitutional).

318 United States v. Leon, 468 U.S. 897, 913 (1984).

319 *Id.* at 922–23.

320 Herring v. United States, 129 S. Ct. 695, 698 (2009).

well, reasonable? How, indeed, can a search be *unreasonable* if an officer *reasonably* believed it was appropriate?[321]

The Court's good-faith exclusionary rule cases have never answered that question. Again consider *Herring*, which appears to have framed its analysis in terms of good faith and the exclusionary rule because the parties had conceded the existence of a Fourth Amendment violation.[322] That concession muddied the issue. The better way to approach *Herring* would have begun by distinguishing the two police actions at issue.[323] First, the police computer system erroneously indicated that there was an outstanding arrest warrant for the defendant. Second, the police relied on that computer entry to perform an arrest. Only the second of these actions could possibly violate the Fourth Amendment or taint evidence submitted at trial. By its terms, the Fourth Amendment prohibits unreasonable "searches" and "seizures";[324] it does not prohibit faulty data-entry procedures. So the critical question in *Herring* should have been whether the second action — the officer's reliance on the computer system — was "reasonable" within the meaning of the Fourth Amendment. As though recognizing this point, *Herring* discussed testimony suggesting that no similar error had *ever* previously taken place.[325] By contrast, the Court suggested, searches in reliance on warrants are *un*reasonable when no valid warrant has actually issued and "systemic" data-entry errors have previously taken place.[326] On this revisionist reading, *Her-*

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[321] *See Leon*, 468 U.S. at 960 (Stevens, J., dissenting) ("In my opinion an official search and seizure cannot be both 'unreasonable' and 'reasonable' at the same time."); *cf.* Anderson v. Creighton, 483 U.S. 635, 659 (1987) (Stevens, J., dissenting) (objecting to a "double standard of reasonableness" in the Fourth Amendment qualified-immunity context).

[322] *See Herring*, 129 S. Ct. at 699.

[323] A similar distinction illuminates good-faith reliance on invalid warrants. In *Leon*, the police first obtained a defective warrant and then undertook a search. *Leon*, 468 U.S. at 900. The warrant was a nullity under the Warrant Clause. But it is a separate question whether the warrantless search was unreasonable. After all, the warrant requirement for searches is itself an application of the Reasonableness Clause. *See, e.g.*, Illinois v. McArthur, 531 U.S. 326, 330 (2001) (explaining that unwarranted seizures are generally "unreasonable"); Payton v. New York, 445 U.S. 573, 586 (1980) (explaining that warrantless home searches are "presumptively unreasonable"); *cf.* AMAR, *supra* note 80, at 11 ("The amendment's warrant clause does not require, presuppose, or even prefer warrants — it *limits* them."). Thus, the tautological question in *Leon* was whether the police acted reasonably when they reasonably relied on an invalid warrant. Unsurprisingly, the Court answered yes. 468 U.S. at 926. And because the conviction in *Leon* rested on constitutionally collected evidence, the invalid warrant did not taint the ultimate conviction. In other cases, however, warrants are "so obviously deficient" as to preclude reasonable reliance. Groh v. Ramirez, 540 U.S. 551, 558 (2004).

[324] U.S. CONST. amend. IV.

[325] *See Herring*, 129 S. Ct. at 704.

[326] *Id.*

ring narrowed earlier decisions on the limits of reasonable reliance under the Fourth Amendment.[327]

To be sure, *Herring* and other good-faith cases remain open to criticism when reconceived as Fourth Amendment merits decisions.[328] For now, however, it is enough to show that the outcomes and many of the principles underlying the Court's reasonable-reliance cases are entirely compatible with the due process exclusionary rule.[329]

IV. REVISING AND EXTENDING EXCLUSIONARY DOCTRINE

Besides explaining why the exclusionary rule should exist, the Due Process Clauses also supply guidance in establishing the metes and bounds of exclusionary rights. The basic theme of this Part is that difficult exclusionary questions can often be resolved by asking whether the government has conducted a search within the scope of its lawful investigative authority. If so, then any resulting evidence comports with the constitutional requirements for evidence acquisition and may be offered at trial as the basis for depriving an individual of life, liberty, or property. Applying this due process approach, this Part discusses a variety of contested exclusionary issues, including the distinction between scope and manner rules (section A); the purported exceptions for attenuation, inevitability, and personal identity (section B); and, finally, issues regarding digital surveillance technologies (section C).

A. Scope Versus Manner

Focusing on due process leads to a fundamental distinction: between the *scope* of the government's investigative authority and the *manner* in which that authority is exercised.[330] The police act within

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[327] *See* Whiteley v. Warden, 401 U.S. 560, 568–69 (1971) (granting habeas relief because "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest," *id.* at 568). *Whiteley*, a habeas case that afforded relief based on a Fourth Amendment violation, had already been narrowed by *Stone v. Powell*, 428 U.S. 465 (1976), which held that the Fourth Amendment exclusionary rule does not generally apply in habeas proceedings.

[328] One might object that the revisionist approach described in the main text would prevent the Court from reconsidering its own Fourth Amendment decisions, since reliance on such decisions would always be reasonable. But defendants could argue that an officer had *un*reasonably relied on a past decision, either because she misunderstood the decision or because it did not extend to the new facts at hand. And, in adjudicating that claim, the Court could repudiate its past reasonableness conclusions. In fact, that is exactly what happened in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). *See* Davis v. United States, 131 S. Ct. 2419, 2433–34 (2011).

[329] The "reasonable reliance" approach outlined in the main text would still differ from the reasoning of *Herring* insofar as it would not eliminate the need for suppression where the police have acted in the face of mere uncertainty (without relying on applicable authority). *See infra* p. 1964.

[330] *See* Maryland v. King, 133 S. Ct. 1958, 1970 (2013) (holding that a search "must be reasonable in its scope and manner of execution"); *see also* Richard M. Re, Comment, United States v. Ankeny*: Remedying the Fourth Amendment's Reasonable Manner Requirement*, 117 YALE L.J.

the scope of their investigative authority when their searches disclose only information that the government had authority to learn. By contrast, police act in a constitutional manner when their searches are not unreasonably harmful or degrading. So whereas scope rules limit the evidence that the government may lawfully obtain for later use at trial, manner rules impose additional constraints on police by securing interests such as physical well-being, dignity, and property.[331] The Constitution itself reflects this dichotomy, as it separately proscribes unreasonable "searches," which disclose information and evidence for trial, and "seizures," which impinge on private control over persons and property.[332] Because only scope rules constitute procedures for the acquisition of evidence, only scope rules trigger the due process exclusionary rule.[333] This traditional judicial inquiry into the functions and purposes of Fourth Amendment rules offers an administrable alternative to the causality and deterrence arguments that underlie current exclusionary doctrine.[334]

1. Probable Cause and Excessive Force. — Imagine that police engaged in a lawful search incident to arrest[335] inflict a gratuitous injury while turning out an arrestee's pockets. The injury would violate the Fourth Amendment's prohibition on unreasonable seizures and give

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723, 727 (2008) (arguing that suppression is appropriate for scope violations, but not manner violations). Professor Albert W. Alschuler has recently drawn a similar distinction between "two types of Fourth Amendment rules" — namely, "rules about *when* the police may search," and "rules about how a search must be conducted." Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1756 (2008) (capitalization omitted). And Alschuler recognizes that *Hudson* "appears largely to withdraw the exclusionary remedy when the police have violated" the second of these categories — that is, "rules about how a search must be conducted." *Id.* at 1757. But Alschuler would flip the rules for these categories. *See infra* note 337.

331 Courts have long referred to unreasonable searches and seizures that tortiously invade dignitary and property interests as defects in the "manner" or "mode" of a search. *See supra* note 165 (discussing *La Jeune Eugenie*); *infra* note 361 and accompanying text (discussing *Ker v. Illinois*).

332 U.S. CONST. amend. IV; Horton v. California, 496 U.S. 128, 133 (1990) ("A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.").

333 To adapt the Court's language, the key due process question is whether the government's trial evidence "has been come at by exploitation of" an unlawful search. Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

334 Consider *United States v. Adams*, 740 F.3d 40 (1st Cir. 2014), where officers allegedly violated a statutory rule by executing a warrant while carrying firearms. Drawing on *Hudson v. Michigan*, 547 U.S. 586 (2006), the court ruled in large part based on the scope/manner distinction. Even if "the manner of its execution was not authorized by statute," *id.* at 42, the court reasoned, "the warrant authorized the agents to enter the home and conduct the search," *id.* at 43. The statutory violation had "no impact either on the scope of the search or on the extent of the evidence collected." *Id.* The due process exclusionary rule would replace the First Circuit's deterrence and causality reasoning with attention to the chain of legal authorizations for the government's acquisition of evidence.

335 *See, e.g.*, United States v. Robinson, 414 U.S. 218, 224 (1973).

rise to a meritorious damages action. Yet the unreasonable manner in which the police exercised their search authority would not negate their authority to learn what was in the arrestee's pockets. Under the search-incident-to-arrest doctrine, police in possession of probable cause have Fourth Amendment authority to learn what is in an arrestee's pockets as soon as they place him under arrest.[336] In this situation, the probable cause requirement operates as a scope rule, whereas the prohibition on excessive force operates as a manner rule. And, because the police in this hypothetical adhered to the applicable scope rule, any evidence discovered in the defendant's pockets should be admissible. Though collected in an unconstitutional manner, the evidence lay within the scope of the government's investigative authority.

The distinction between scope and manner in Fourth Amendment cases is a unique product of the due process exclusionary rule. A proponent of deterrence, for example, should not draw this distinction, but should instead view suppression as just another potentially useful means of discouraging police from committing misdeeds, including the misdeed of performing searches in an unreasonable manner.[337] Likewise, a proponent of intrinsic values like judicial integrity should view any unreasonable search as tainted, so that admission of the search's fruits would require the court to condone a lawless act.[338] Similar reasoning has in fact prompted some courts to suppress evidence for manner violations, such as when police conduct potentially lawful searches that take too much time or occur in ways that endanger the suspect.[339] But those cases are the exception and, from a due process

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[336] *See id.* at 235.

[337] Some deterrence-based thinkers would flip the rule argued in the main text by concluding that suppression is especially appropriate in cases of manner violations. For example, Alschuler argues that "[i]n cases in which the issue is simply whether to search or not, the police ordinarily have nothing to lose by searching in violation of the Fourth Amendment." Alschuler, *supra* note 330, at 1757. "If the police had not conducted their illegal search," after all, then "the criminal would have escaped punishment." *Id.* at 1756. And an illegal search could offer a number of potential "gain[s]," such as the recovery of contraband. *Id.* at 1757. Alschuler therefore concludes that "the exclusionary rule is more likely to induce compliance with rules about how a search must be conducted than to induce compliance with rules about when a search may occur." *Id.* at 1756. This deterrence analysis discounts the possibility that the exclusionary rule might encourage police to obtain probable cause and conduct a legal search, instead of either not searching or illegally searching.

[338] *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting) (arguing that integrity values demand suppression for manner violations).

[339] Consider *United States v. Edwards*, 666 F.3d 877 (4th Cir. 2011), where the defendant challenged "an officer's use of a knife to cut a sandwich baggie containing suspected narcotics off [the defendant's] penis, an act performed at night on a public street." *Id.* at 879. The divided court suppressed the evidence on deterrence grounds, while expressly specifying that it was "the *manner* in which the search was conducted [that] was unreasonable." *Id.* (emphasis added); *see also* United States v. Song Ja Cha, 597 F.3d 995, 997 (9th Cir. 2010) (suppressing the fruits of an unconstitutionally lengthy search). For a counterpoint, see the 2–1 decision in *United States v. Ankeny*, 502 F.3d 829, 835–38 (9th Cir. 2007) (holding that a SWAT team's violent entry into a house did

standpoint, are incorrect. Suppression is unwarranted when evidence is collected pursuant to the procedures that define the government's investigative authority.[340]

The scope/manner distinction also recasts the law of forcible entries into residences. Consider the difference between the knock-and-announce rule and the requirement of probable cause — both of which apply to searches of private residences. In *Hudson v. Michigan*, the Court declined to suppress evidence when police executing a valid search warrant failed to knock and announce their presence, as required by the Fourth Amendment.[341] Though it plodded through various deterrence and policy arguments,[342] the most persuasive portion of *Hudson* effectively held that the knock-and-announce requirement is a substantive tort principle.[343] It restricts the government's ability to undertake sudden, forcible entries and so diminishes the risk of unnecessary injury to suspects' persons, property, and dignity.[344] Those interests, though important, are collateral to whether the government has legal authority to learn private information for use as evidence at trial.[345] Given that historically well-founded understanding of the knock-and-announce requirement and its purposes, *Hudson* was correct to conclude that the knock-and-announce rule is a manner rule incapable of triggering suppression. Contrast this with the probable cause requirement for acquiring warrants in the first place.[346] When an officer searches a home on a hunch, she gains access to private information in drawers and cabinets, even though she had no authority

not trigger suppression because discovery of the evidence at issue was not "causally related to the manner of executing the search," *id.* at 837). The Seventh Circuit has purported to respect the approaches of both the Fourth and Ninth Circuits, *see* United States v. Collins, 714 F.3d 540, 543–44 (7th Cir. 2013), while generally declining to suppress evidence in excessive force cases, *see* United States v. Watson, 558 F.3d 702, 705 (7th Cir. 2009).

340 *See* McGuire v. United States, 273 U.S. 95, 98 (1927) (distinguishing between "the personal liability of the officers making the search and seizure for their unlawful destruction of" property and "the right of the government to introduce in evidence [an item] seized under a proper warrant").

341 547 U.S. 586, 594 (2006).

342 *See id.* at 594–99.

343 *See id.* at 593–94. This portion of the Court's analysis expressly disclaimed reliance on causality principles. *See id.* at 593 ("Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.").

344 *See id.* at 594; *see also* Wilson v. Arkansas, 514 U.S. 927, 931–33 (1995) (collecting additional historical sources).

345 *See Hudson*, 547 U.S. at 593 ("The interests protected by the knock-and-announce requirement . . . do not include the shielding of potential evidence from the government's eyes."). For similar reasoning from the Roberts Court, see *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006) ("The violation of the right to consular notification, in contrast, is at best remotely connected to the gathering of evidence.").

346 *See* Coolidge v. New Hampshire, 403 U.S. 443, 479 (1971) (discussing Carroll v. United States, 267 U.S. 132 (1925)).

to acquire that information.[347] Thus, the probable cause requirement is a scope rule, and its violation rightly triggers suppression.

2. Stops and Warrants. — The distinction between scope and manner rules is not always perfectly clear, as Fourth Amendment rules can sometimes contain both scope and manner requirements. Take the different aspects of the stop-and-frisk rule set out in *Terry v. Ohio*.[348] Under *Terry*, police must have reasonable suspicion to conduct a brief investigative stop and frisk.[349] This reasonable-suspicion requirement is a scope rule, just like the probable cause requirement discussed above. But in applying *Terry*, the Court has also provided that the duration of any detention must be reasonable.[350] This durational requirement implicates both scope and manner issues. Imagine for example that police engaged in a *Terry* stop immediately find evidence, but then prolong the stop for several hours simply to terrorize the suspect. That infringement of the durational requirement would not entail discovery of evidence outside the government's investigative authority and so would be properly remedied only at tort. In other cases, however, the durational requirement can act as a scope rule by establishing a temporal limit on the government's authority to conduct additional investigative steps. This aspect of the *Terry* rule arises with some frequency in connection with protracted car stops that allow police to bring otherwise unavailable drug-sniffing dogs to the scene.[351] In these cases, the police exceed the temporal limits of their investigative authority, just as when they exceed a warrant's temporal limits. Therefore, any discovered evidence should be suppressed.

There can be room for debate as to whether particular Fourth Amendment rules should be viewed as going to scope or manner. Take the most foundational Fourth Amendment rule of all: the warrant requirement. From one standpoint, there is a plausible case that the warrant requirement is a manner rule, since it regulates the means by which the government evaluates its evidence of probable cause. This point has been spun out doctrinally in various ways. For example, commentators have suggested that police in possession of probable cause would inevitably conduct their search.[352] Alternatively, some suggest that the failure to obtain a warrant is never the cause of dis-

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[347] *See id.* at 467.

[348] 392 U.S. 1 (1968).

[349] *Id.* at 27.

[350] *See* Arizona v. Johnson, 129 S. Ct. 781, 788 (2009).

[351] *See, e.g.*, United States v. Bell, 555 F.3d 535 (6th Cir. 2009); *cf.* United States v. Sharpe, 470 U.S. 675 (1985) (reviewing a detention caused by an officer's delayed arrival).

[352] *See* cases cited *infra* note 354; *see also* AMAR, *supra* note 80, at 193 n.137 ("In essence, I am suggesting that the Court's 'inevitable discovery' doctrine be vastly widened.").

covering evidence.[353] Adopting the first of these formulations, the Seventh Circuit has already concluded that most warrant violations can be excused by the inevitable discovery doctrine.[354]

That is a truly remarkable result, and one that shows the deep tensions underlying current exclusionary doctrine. Violations of the warrant requirement supply *the* paradigmatic justification for the suppression of evidence, as indicated by any number of canonical Supreme Court decisions.[355] Yet by following the causality-focused strand in existing case law, the Seventh Circuit has allowed the inevitability exception to swallow the warrant rule. The due process exclusionary rule both reframes this issue and suggests its proper resolution. As a matter of Fourth Amendment law, the warrant requirement helps demarcate the scope of the government's "reasonable" investigative authority, since the police must seek guidance from neutral magistrates in order to ensure that they are justified in searching a given location at all.[356] Of course, the government's case for probable cause does not improve just because a magistrate approved a warrant. But it is nonetheless true that a search that has been pre-approved by a level-headed magistrate is more likely to be justified than one initiated by zealous police.[357] In that sense, obtaining a warrant is like obtaining a new piece of evidence supporting probable cause. The Court has therefore been correct to treat the warrant requirement as the kind of procedural requirement that defines the scope of the government's investigative authority — the Seventh Circuit notwithstanding.

3. Arrest and Extradition. — The scope/manner distinction also resolves an old puzzle: if unlawful searches should normally trigger suppression of evidence, then why don't illegal arrests call for the re-

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[353] *See* Amar, *supra* note 17, at 794 ("The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the knife into evidence.").

[354] United States v. Tejada, 524 F.3d 809, 813 (7th Cir. 2008) ("[W]hen a warrant is *sure* to issue (if sought), the exclusionary 'remedy' is not a remedy, for no legitimate privacy interest has been invaded without good justification, but is instead a substantial punishment of the general public." (quoting United States v. Elder, 466 F.3d 1090, 1091 (7th Cir. 2006)) (internal quotation marks omitted)); *see also* United States v. Marrocco, 578 F.3d 627, 637–38 (7th Cir. 2009); United States v. Buchanan, 910 F.2d 1571, 1573 (7th Cir. 1990); Bradley, *supra* note 79, at 907.

[355] *E.g.*, Katz v. United States, 389 U.S. 347, 359 (1967); Johnson v. United States, 333 U.S. 10, 15–17 (1948).

[356] Among the most oft-quoted statements about the warrant requirement is that its "protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." Payton v. New York, 445 U.S. 573, 586 n.24 (1980) (quoting *Johnson*, 333 U.S. at 13–14).

[357] *E.g.*, United States v. Chadwick, 433 U.S. 1, 9 (1977) ("The judicial warrant . . . provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer . . . ."); *see also* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 915 (1991) ("A magistrate grants or denies a warrant application before he knows whether the police will find the evidence, or whether the suspect is a criminal. This does away with judicial bias . . . .").

lease of the arrestee?[358] Imagine that a fugitive is unconstitutionally stopped at an airport and later prosecuted. That person could be released on the ground that doing so would deter illegal arrests or promote abstract values like judicial integrity.[359] The due process exclusionary rule, by contrast, accords with current doctrine's decision to allow prosecution.[360] The bar on unreasonable seizures, including arrests, is a manner rule that secures control over one's person, much like the common law torts of trespass and false imprisonment.[361] Thus, an illegal arrest — when viewed apart from search principles like the doctrine of search incident to arrest — does not limit the scope of information available for use in evidence at trial.[362] If the defendant were simply released from an initially unlawful arrest, he would become immediately eligible for rearrest according to lawful procedures.[363]

The seminal treatment of this issue appears in the 1886 extradition case *Ker v. Illinois*.[364] The basic holding in *Ker*, now called the *Ker-Frisbie* doctrine, is that a defendant cannot normally challenge his conviction on the ground that he was brought to court through an illegal abduction.[365] In *Ker* itself, the defendant had been seized in Peru and forcibly returned to the United States for trial. This alleged violation of kidnapping and extradition laws, the defendant argued, deprived the U.S. court of jurisdiction over his case. *Ker* rejected the defendant's arguments while explicitly invoking a positive-law conception of due process:

> [U]nless there was some positive provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to

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[358] *See* Amar, *supra* note 17, at 791.

[359] Notably, Schrock and Welsh appear to take this position in critiquing the *Ker-Frisbie* doctrine. *See* Schrock & Welsh, *supra* note 21, at 362 n.276 ("That this is shocking cannot be gainsaid — the person is fair game for any form of body-snatching while the courts occupy themselves with chattels!").

[360] *See* United States v. Crews, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."); Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

[361] In *Ker v. Illinois*, 119 U.S. 436 (1886), the Court expressly stated that the defendant "could sue [his abductor] in an action of trespass and false imprisonment." *Id.* at 444. The Court also noted that the abductor could be prosecuted. *Id.*

[362] *Ker* made this point in so many words: "[F]or mere irregularities in the manner in which [the defendant] may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all . . . ." *Id.* at 440.

[363] See Kelly v. Griffin, 241 U.S. 6, 13 (1916) (Holmes, J.) (holding that the defendant is not "entitled to a chance to escape," since "[t]his proceeding is not a fox hunt").

[364] 119 U.S. 436.

[365] *See* Frisbie v. Collins, 342 U.S. 519, 522 (1952) ("This Court has never departed from the rule announced in *Ker v. Illinois*, that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" (citation omitted) (quoting *Ker*, 119 U.S. at 444)).

> see how [the defendant] can say that he is there 'without due process of law,' within the meaning of the constitutional provision.[366]

So it was not enough for the abduction to be illegal, in the sense that the perpetrator of the abduction could be sued or even prosecuted. Rather, the defendant's due process claim depended on whether positive law gave the defendant a personal right against extradition by abduction. The Court somewhat surprisingly concluded that the treaty at issue conferred no such right.[367] More recently, the Court arrived at a similar conclusion in *United States v. Alvarez-Machain*.[368]

Still, the Court's positive-law conception of due process has teeth: in *United States v. Rauscher*,[369] issued the same day as *Ker*, the Court held that someone extradited pursuant to a particular treaty had a personal right to be tried in the United States only for the crime of extradition.[370] *Rauscher* thus demonstrates that a failure to adhere to an extradition treaty — unlike the typical arrest — can effectively place defendants outside the scope of U.S. jurisdiction. And trying a defendant without jurisdiction would create a procedural defect in any resulting conviction. This rule makes sense. Unlike the typical arrestee, a defendant who invokes an extradition treaty is entitled to a sensible remedy within the confines of the criminal justice system — namely, return to his home jurisdiction — and that remedy vindicates the purposes of extraditionary rules.[371] Once again, exclusionary doctrine focuses not on the generalized notion that the government should follow the law, but on the particular idea that defendants are owed their procedural rights.

B. Authority, Not Causality

Even when an unconstitutional search occurs, courts often choose not to suppress. These decisions are guided by a clutch of principles, including the doctrines of attenuation, inevitable discovery, independent source, and personal identity. These purported exceptions to the exclusionary rule are conventionally justified in terms of causality.[372]

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366 *Ker*, 119 U.S. at 440.

367 *See id.* at 443 ("[I]n invoking the jurisdiction of this court upon the ground that the prisoner was denied a right conferred upon him by a treaty of the United States, [the defendant] has failed to establish the existence of any such right.").

368 504 U.S. 655, 666 (1992) ("[T]he language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms.").

369 119 U.S. 407 (1886).

370 *See id.* at 424 ("That right, as we understand it, is that he shall be tried only for the offence with which he is charged in the extradition proceedings . . . ."); *cf.* Ford v. United States, 273 U.S. 593, 614–15 (1927) (declining to apply *Rauscher* to a similar claim).

371 *Rauscher*, 119 U.S. at 424 ("[H]e shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.").

372 *See, e.g.*, Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1099 (2011) (explaining that "the fruit of the poisonous tree, inevitable discovery,

For the benefits of exclusion to outweigh its costs, the argument goes, there must be a sufficiently strong causal link between an initial constitutional violation and a later discovery of evidence.[373]

The due process exclusionary rule rejects this causality-based reasoning and focuses instead on the scope of the government's lawful investigative authority. On reflection, all the foregoing "exceptions" to the exclusionary rule have the same basic structure: the police initially appear to have lacked Fourth Amendment authority to acquire certain information, but further reflection reveals that the police actually *did* have the necessary investigative authority after all. Therefore, the due process exclusionary rule does not apply in the first instance, and there is no need for special "exceptions" to come into play.

1. Attenuation. — The due process exclusionary rule clarifies the doctrine of attenuation, also known as taint or "the fruit of the poisonous tree" doctrine. Attenuation cases often turn on causality-based reasoning. Under this approach, a constitutional taint is said to arise only when there is a causal link between the violation of law and the discovery of evidence.[374] Yet courts have been unable to live with a simple but-for causality requirement, perhaps because the result would be oversuppression.[375] For example, the fruits of unlawful searches can prompt the police to focus future investigative efforts on a particular person, but that causal effect is often insufficient to taint any ultimately discovered evidence.[376] In an attempt to reconcile these results with causality principles, courts have held that but-for causality is insufficient to create a taint.[377] Attenuation has thus become like proximate causation in tort law, such that whether a sufficient causal connection is found depends on normative considerations.

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and independent source" doctrines all "raise a traditional causation inquiry" and that the "goal of all three doctrines is to balance the benefits of deterrence with the costs of the exclusionary rule").

373 *See* Dunaway v. New York, 442 U.S. 200, 217–18 (1979) ("When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts." *Id.* at 218.).

374 *E.g.*, Nardone v. United States, 308 U.S. 338, 341 (1939).

375 *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 276 (1978) (declining "to adopt a '*per se* or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest" (quoting Brown v. Illinois, 422 U.S. 590, 603 (1975))).

376 *See id.* at 279–80; United States v. Fofana, 666 F.3d 985 (6th Cir. 2012). For an example outside the Fourth Amendment context, see *United States v. Cozzi*, 613 F.3d 725 (7th Cir. 2010). Local police compelled a suspect to make incriminating statements, thereby tainting those statements under the Fifth Amendment and *Garrity v. New Jersey*, 385 U.S. 493 (1967). The police then tipped off federal authorities to investigate the suspect. The feds discovered incriminating evidence and prosecuted. Defying deterrence- and causality-based theories of constitutional taint analysis, *Cozzi* declined to suppress. 613 F.3d at 732; *see also* United States v. Slough, 641 F.3d 544, 553–54 (D.C. Cir. 2011) (discussing circuit split on this point).

377 *See* Hudson v. Michigan, 547 U.S. 586, 592 (2006).

In order to give content to the attenuation doctrine, courts and commentators have again focused on deterrence. That is, taint analysis is meant to deprive police of otherwise compelling incentives to engage in constitutional violations.[378] On this view, taint can be linked to foreseeability: if police misconduct unforeseeably caused the discovery of evidence, the argument might go, then any promise to suppress the resulting evidence is unlikely to deter the misconduct in question.[379] Only when police foresee evidence discovery would the threat of exclusion prompt caution. But suppression is called for even — indeed, especially — when police cannot reasonably foresee that their misconduct will lead to discovery of evidence. Otherwise, the exclusionary rule would have the least bite for the most unjustified searches. Imagine, for example, that police invade the home of an apparently innocent individual in order to terrorize him and, much to their surprise, discover a counterfeiting operation. Courts should suppress that discovery, notwithstanding its unforeseeability.

A better approach would turn away from deterrence and focus instead on the scope of the government's investigative authority. Under the Fourth Amendment, inferences based on information already in the government's hands can justify new searches and the acquisition of new information. So, during the course of an investigation, the amount of information lawfully accessible to the government steadily grows. A public observation justifies a stop, which substantiates an arrest, which provides the basis for a custodial interrogation, which finally convinces a judge to sign a wiretap warrant. Plainly, the events comprising each link in this chain are causally interrelated. But they are also *legally* related, in that each event provides the legal basis for the event that follows. By the end of the chain of events, the police have acquired the legal right to listen in on a suspect's telephone conversations — something that at first was utterly beyond the govern-

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[378] *See* United States v. Leon, 468 U.S. 897, 911 (1984) ("In short, the 'dissipation of the taint' concept that the Court has applied in deciding whether exclusion is appropriate in a particular case 'attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" (quoting *Brown*, 422 U.S. at 609 (Powell, J., concurring in part))); cases cited *supra* notes 373–76.

[379] *See Hudson*, 547 U.S. at 615 (Breyer, J., dissenting) (defending suppression in part because the "discovery of evidence in Hudson's home was a readily foreseeable consequence of [the police's] entry and their unlawful presence within the home"); *see also* Saul Levmore & William J. Stuntz, Essay, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 494 (suggesting that, under a foreseeability framework, "everything the police find as a result of an illegal search is excluded, *except* for evidence discovered in a manner extremely remote from the misconduct"); Michael Kimberly, Comment, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 YALE L.J. 177, 178 (2008) (arguing for suppression whenever police can reasonably foresee a mere possibility, as opposed to a likelihood, of discovering evidence). As these sources illustrate, deterrence scholars may disagree as to the degree of foreseeability required to trigger suppression.

ment's lawful ken. Because each link in the investigative chain comports with due process, the evidence at the end of the chain can serve as the lawful basis for a conviction.[380]

But what if the initial stop hadn't been permissible under the Fourth Amendment? The police would then have started their investigation by stepping outside their still-narrow investigatory authority. And the government's subsequent reliance on the forbidden information illegally acquired during the stop would only lead them further beyond the lawful scope of their authority. The police would never have become authorized to arrest, or to interrogate, or to impose the wiretap. The ultimately monitored telephone conversations would therefore have to be suppressed for having been collected in violation of pre-trial procedures established by the Fourth Amendment. Thus, the touchstone of taint analysis should be whether the information acquired during an initial unlawful investigatory action served as the legally necessary basis for a subsequent search. If so, then the subsequent action in fact had no legal basis, and the information that action disclosed must be suppressed as "tainted."

As usual, the principles of due process exclusion span multiple constitutional rights. Thus, a warrant application is equally tainted whether it is based on evidence found during an illegal house search or a coercive interrogation. Take the seminal attenuation decision *Wong Sun v. United States*.[381] In *Wong Sun*, two defendants were victims of unconstitutional house searches. One of the two defendants confessed on the spot, with armed officers in his bedroom and standing by his children.[382] The other defendant did not confess on the scene, but instead waited several days before "voluntarily" turning himself in to the police to confess.[383] Both confessions were thus the causal products of illegal searches. Yet the Court did not view that point as dispositive.[384] Instead, the first confession was deemed inadmissible only because it was not "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[385] By contrast, the second confession — the one that had occurred long after the illegal search — *did* involve an act of free will that purged any taint.[386]

The due process exclusionary rule readily makes sense of all this. Under the Fourth, Fifth, and Sixth Amendments, police have the au-

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[380] *See supra* note 154 and accompanying text (discussing chains of legal authorization in connection with due process suppression).

[381] 371 U.S. 471 (1963).

[382] *Id.* at 474.

[383] *Id.* at 491.

[384] *Id.* at 487–88.

[385] *Id.* at 486.

[386] *Id.*; *id.* at 491 (admitting statement of Wong Sun).

thority to collect evidence through voluntary disclosures, no matter how the voluntary disclosures come about.[387] Therefore, the voluntary confession in *Wong Sun* disclosed information that the police were authorized to hear. By contrast, the police had no more authority to learn the contents of the involuntary confession than to learn anything else they uncovered during their illegal presence in the defendant's house. The Court has therefore been correct to hold, in a wide variety of voluntary confession cases, that causation and deterrence are not the proper touchstones.[388] Rather, the key is to ask whether the police had legal authority to learn what they did.

2. Inevitability and Independence. — Nix v. Williams[389] is the seminal "inevitable discovery" case. Police unconstitutionally elicited incriminating information from a murder suspect in violation of the Sixth Amendment, and that violation led to the discovery of the victim's body in a roadside ditch. Because a volunteer search party was already combing the relevant area, the Court held that the discovery would likely have occurred even without the violation and, therefore, that suppressing the body would not serve a deterrent function.[390] By conditioning its holding on the likelihood of discovering the evidence, the Court connected the exclusionary remedy to principles of causation. Only if the violation was causally necessary to the discovery, *Nix* reasoned, would suppression be warranted.

But linking exclusion with causation quickly leads to serious problems. First, a causation-based approach oddly suggests that the government's degree of investigative talent should dictate the scope of the exclusionary remedy. Suppression would never be appropriate if Sherlock Holmes, Hercule Poirot, or Nancy Drew were on the case, for example, since such master detectives would "inevitably" uncover any lead. Yet it is hard to imagine any reason for the Constitution to place special burdens on comparatively ineffective police. Second, focusing on causation requires courts to presume that illegally discovered evidence will never be discovered through lawful means. But, as Amar put it, "[c]riminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns — or

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387 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 478 (1966) ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.").

388 *See* New York v. Harris, 495 U.S. 14 (1990); Taylor v. Alabama, 457 U.S. 687 (1982); United States v. Crews, 445 U.S. 463 (1980); Brown v. Illinois, 422 U.S. 590 (1975).

389 467 U.S. 431 (1984).

390 *Id.* at 443. The "inevitable discovery doctrine" might more accurately be called the "likely discovery doctrine." *See id.* at 444 (requiring that the government "establish *by a preponderance* of the evidence that the information ultimately or inevitably would have been discovered by lawful means" (emphasis added)).

so our courts should presume."[391] Third, if the inevitable discovery doctrine were revised to place the burden of proof on the defendant, consistent with Amar's suggested presumption of lawful discovery, the result would be truly perverse: defendants would be more favorably treated in court if they could show that they took extraordinary steps to ensure that evidence of their crimes would never come to light through lawful means.

The solution to these problems begins by recognizing that *it should not matter* whether the police were, in fact, likely to discover the evidence in question, so long as they had authority to find it. Again, due process is satisfied so long as the government obtained the evidence in question in compliance with its investigative authority. The causal story of how and why the government came to exercise its lawful authority is largely beside the point, so long as the legally necessary authority existed. In *Nix* itself, due process prevented the government from relying on the defendant's unconstitutionally elicited statements to justify further investigative steps. But the government did not need to rely on those statements to justify its discovery of the murder victim's body in a roadside ditch. Because police could have looked into the ditch for any reason or no reason at all, the Court should have declined to suppress simply by noting that the discovery of the body invaded no privacy interest whatsoever. This approach has the great workability virtue of sidestepping what Amar has called "the almost metaphysical difficulties in knowing whether the bloody knife or some evidentiary substitute would have come to light anyway."[392] When it comes to due process, what matters is the scope of the police's actual investigative authority.

More recent decisions have discussed inevitability principles in cases where the police entered private spaces, as opposed to *Nix*'s search of a roadside ditch. These more analytically challenging cases generally reflect a reduced focus on causality-based reasoning. In *Segura v. United States*,[393] for instance, police illegally entered a dwelling, obtained a warrant without referencing what they had learned during their entry, and then searched the dwelling.[394] Despite the obvious causal link between the illegal entry and the later discovery of

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391 Amar, *supra* note 17, at 794; *see also id.* ("[A]ny party seeking to suppress truth and thwart justice should bear a heavy burden of proof."); Dripps, *supra* note 137, at 919 ("Even by its own logic, the connection between the Fourth Amendment and the exclusionary rule is overbroad, for exclusion often neutralizes evidence the police might have seized constitutionally."); Levmore & Stuntz, *supra* note 379, at 493–94 ("Yet, the probabilistic truth is that if the illegal search were *not* undertaken, there would be a substantial likelihood that the evidence would be obtained because the suspicious officer can continue to gather more information . . . ."); *supra* note 79.

392 Amar, *supra* note 17, at 794.

393 468 U.S. 796 (1984).

394 *Id.* at 800–01.

evidence, the Court declined to suppress evidence discovered pursuant to the independently justified warrant.[395] A proponent of deterrence-based reasoning should protest this result (and many have), since it creates the possibility that police might apply for warrants only after illegally getting a preliminary sense of whether any evidence might be found there.[396] Yet *Segura* was unimpeachably correct from a due process standpoint. The prosecution's trial evidence had been collected in compliance with all pertinent Fourth Amendment rules, including the warrant requirement.

The Court arrived at a similar result in *Murray v. United States*,[397] where officers illegally entered a warehouse, observed that it was full of narcotics, and then obtained a lawful warrant.[398] Unlike in *Segura*, the government in *Murray* sought to introduce at trial the very evidence that its officers had illegally observed during their initial entry.[399] Because the warrant application did not depend on improperly acquired information, the Court found an "independent source" of investigative authority.[400] So far, so good, from a due process standpoint. But then the Court added that the evidence would have to be excluded "if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry."[401] That last requirement may have been meant as a faint gesture toward deterrence concerns.[402] From the standpoint of due process, however, there is no reason to ask whether, if the police hadn't done wrong, they would have done right.[403] Instead, all that should have mattered was whether the police

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[395] *Id.* at 814 ("None of the information on which the warrant was secured was derived from or related in any way to the initial entry into petitioners' apartment . . . .").

[396] *See id.* at 817 (Stevens, J., dissenting) (arguing that the Court had created "an affirmative incentive to engage in unconstitutional violations of the privacy of the home"); Bradley, *supra* note 79, at 911.

[397] 487 U.S. 533 (1988).

[398] *Id.* at 535–36.

[399] *See id.* at 536.

[400] *See id.* at 537.

[401] *Id.* at 542. This deterrence-based condition has little bite in practice. It has been met, for instance, where there was "no evidence to suggest that these officers would *not* have sought a warrant" had the illegal search not occurred and, "[i]ndeed, the absence of knowledge of the evidence viewed via the illegal access could only have encouraged them further to seek a warrant." United States v. Dessesaure, 429 F.3d 359, 369–70 (1st Cir. 2005) (emphasis added).

[402] *See supra* note 401. Many judges and scholars have alleged that *Murray* effectively eliminated deterrence for warrant violations. *See Murray*, 487 U.S. at 544 (Marshall, J., dissenting) ("[T]he Court's decision . . . emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule."); Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 96 (1992); Bradley, *supra* note 79, at 911 ("*Murray* eliminated any disincentive for the police to commit such illegal searches." (emphasis omitted)).

[403] *Cf.* Hudson v. Michigan, 547 U.S. 586, 592 (2006) (stating that the police "would have" found the evidence had they acted lawfully); *id.* at 618 (Breyer, J., dissenting) ("Without that unlawful entry they would not have been inside the house; so there would have been no discovery."); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(a), at 352 (5th ed. 2012) (arguing that *Hud-*

possessed a lawful basis for obtaining the evidence in question. Again, the answer to that question was yes: the government's evidence was collected in full compliance with the Fourth Amendment, including the warrant requirement. Thus, there was no taint, and the resulting convictions would not violate due process.

3. Identity. — A similar analysis explains the essential but little-discussed rule that a defendant's person and identity are never suppressible, even if the defendant is illegally seized.[404] This principle plays a key role in immigration-related prosecutions, where the suspect's mere identity and presence in the country can together demonstrate a crime. More generally, the initial discovery of a suspect's identity is often integral to the assemblage of all other evidence arrayed against him. Some courts have defended the per se admissibility of identity evidence by asserting that unconstitutional searches do not "cause" the discovery of that evidence.[405] But that ad hoc analysis cannot justify the Court's categorical rule that identity is not suppressible. By contrast, a due process approach would begin by noting that an individual's identity is public information. So when the government seeks to establish the defendant's identity at trial, it can easily do so on the basis of public knowledge, official records such as birth certificates, or other widely accessible evidence that implicates no privacy interests whatsoever. Thus, there is generally no need for the government to establish identity through reliance on unconstitutionally collected evidence.

But this reasoning has limits. According to a number of courts, not just a defendant's identity, but also physical evidence of identity, such as fingerprints and mug shots, should be categorically immune from suppression, even if the physical evidence was created during an unconstitutional arrest.[406] This newfound exception for so-called "identi-

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son is "nothing more than an assertion that 'if we hadn't done it wrong, we would have done it right'"); David J.R. Frakt, *Fruitless Poisonous Trees in a Parallel Universe:* Hudson v. Michigan*, Knock-and-Announce, and the Exclusionary Rule*, 34 FLA. ST. U. L. REV. 659, 715 (2007).

[404] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest . . . ."); United States v. Crews, 445 U.S. 463, 479 (1980) (White, J., concurring in the judgment) (discussing the claim "that respondent's face can be suppressible as a fruit of the unlawful arrest"); Oaks, *supra* note 71, at 669 & n.14 (citing Frisbie v. Collins, 342 U.S. 519 (1952)).

[405] *See* United States v. Farias-Gonzalez, 556 F.3d 1181, 1189 (11th Cir. 2009). Other courts aim to deter by suppressing identity evidence only when collected with an investigative "motive." United States v. Olivares-Rangel, 458 F.3d 1104, 1113 (10th Cir. 2006). *But see* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2082 (2011).

[406] *See* Pretzantzin v. Holder, 736 F.3d 641, 646 & n.6 (2d Cir. 2013) (discussing circuit court disagreement on suppressing identity evidence); United States v. Navarro-Diaz, 420 F.3d 581, 584–86 (6th Cir. 2005) (same); People v. Tolentino, 926 N.E.2d 1212, 1214–16 (N.Y. 2010), *cert. dismissed*, 131 S. Ct. 1387 (2011) (discussing circuit split in deciding not to suppress identifying information collected during an unlawful traffic stop); Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1593–602 (2012).

ty evidence" is largely a product of the cost-benefit analysis recently endorsed in *Herring*, as courts have concluded that the police would suffer too great a price for their unconstitutional actions when fingerprints and the like are suppressed.[407] If that ad hoc balancing approach to the exclusionary rule were applied across the board, it would invite unlimited case-by-case assessments of whether particular categories of evidence should be suppressible. That approach goes too far for the due process exclusionary rule to tolerate. When police illegally generate evidence bearing on personal identity, such as by fingerprinting an illegally arrested suspect, they have obtained physical evidence that they were not authorized to collect.[408] Thus, the unconstitutionally produced evidence — even if it bears on the suspect's independently provable identity — cannot establish the lawful basis for a conviction and must be suppressed.

C. Digital Surveillance

The government's use of new investigative technologies has placed increasing strain on exclusionary doctrines designed to function in an analog world. This section outlines how the due process exclusionary rule can help courts meet some of the most pressing challenges posed by digital surveillance.

1. Data Mining. — The due process exclusionary rule clarifies critically important questions that arise when illegal searches link individuals to preexisting incriminating records. The question is whether the defendant is entitled to suppression of the record itself. This issue is bound to become pivotally important in light of the government's increasing reliance on data mining to investigate crime. New identification systems are already making feasible the rapid identification of vast numbers of people, including through DNA testing and facial-recognition software.[409] And as Edward Snowden's recent public disclosures have powerfully demonstrated, government databases have already grown to include almost incomprehensibly vast troves of po-

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[407] *E.g.*, *Farias-Gonzalez*, 556 F.3d at 1189 ("[T]he exclusionary rule does not apply to evidence to establish the defendant's identity in a criminal prosecution, and accordingly, the fingerprint and photograph evidence in this case . . . is not suppressible."); *cf.* United States v. Guzman-Bruno, 27 F.3d 420, 421–22 (9th Cir. 1994) ("[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity." (alteration in original) (quoting Hoonsilapa v. INS, 575 F.2d 735, 738 (9th Cir. 1978)) (internal quotation marks omitted)).

[408] *See* Hayes v. Florida, 470 U.S. 811, 813–18 (1985).

[409] *See* Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1317 (2012); Sabrina A. Lochner, Note, *Saving Face: Regulating Law Enforcement's Use of Mobile Facial Recognition Technology & Iris Scans*, 55 ARIZ. L. REV. 201, 201, 214 (2013) ("In 2012, more than 50 law enforcement agencies across the United States began using a mobile device . . . to identify persons via facial recognition technology ('FRT') and iris scans." *Id.* at 201.).

tentially incriminating personal information.[410] Yet there are strong policy arguments on both sides of this exclusionary issue. On the one hand, it seems excessive to hold that a single police misstep should taint evidence accumulated through prior, legitimate actions. On the other hand, a strong deterrent may be needed to prevent the police from engaging in dragnets designed to link suspects to preexisting stores of incriminating data.

For the time being, these issues most commonly arise in connection with illegal stops leading to database searches. In what might be viewed as the paradigmatic scenario, a police officer illegally pulls over a car, checks the driver's license and registration against government records, discovers that the driver is the subject of an arrest warrant, and then arrests the driver before conducting an incidental search of the car.[411] This fact pattern raises two exclusionary questions. First, should the preexisting warrant application and its supporting documents be admissible against the driver? Second, should evidence uncovered during the incidental car search be suppressed? Courts have divided over these questions. Some have tried to apply current doctrine's amorphous attenuation analysis and so have asked whether the discovery of the arrest warrant broke the causal chain.[412] Focusing on deterrence and the need to discourage dragnets, other courts have asked whether the discovery of the preexisting record was foreseeable.[413] And yet other courts have asked whether, because of another line of investigation, discovery of the evidence was inevitable or independent of the violation.[414]

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[410] *See, e.g.*, Rory Carroll, *Welcome to Utah, the NSA's Desert Home for Eavesdropping on America*, THE GUARDIAN (June 14, 2013, 11:01 AM), http://www.theguardian.com/world/2013/jun/14/nsa-utah-data-facility, *archived at* http://perma.cc/UZH6-DFEV (reporting on a $1.7 billion NSA facility thought to be able to store internet and telephone data "at the rate of 20 terabytes — the equivalent of the Library of Congress — per minute"); James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES (Sept. 28, 2013), http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html, *archived at* http://perma.cc/PQQ9-YFWK.

[411] *E.g.*, State v. Frierson, 926 So. 2d 1139, 1140–41 (Fla. 2006).

[412] *See, e.g.*, United States v. Gaines, 668 F.3d 170, 173 (4th Cir. 2012); United States v. Simpson, 439 F.3d 490, 495 (8th Cir. 2006); United States v. Johnson, 383 F.3d 538, 546 (7th Cir. 2004).

[413] *See, e.g.*, United States v. Thomas, 736 F.3d 54, 62, 66 (1st Cir. 2013) (relying on *Herring* and cost-benefit analysis); United States v. Fofana, 666 F.3d 985, 989 (6th Cir. 2012) (noting that the government's discovery of "the link between [the defendant] and his alias" through an illegal search was "quite remote from what could reasonably have been expected to result from the search" such that "[s]uppressing it would have a minimal deterrent effect in the future"). In *Fofana*, the dissent responded that discovery of evidence was foreseeable and that the majority "creates incentives for agents to engage in similar conduct in the future." *Id.* at 994 (Moore, J., dissenting).

[414] *See, e.g.*, Pretzantzin v. Holder, 736 F.3d 641, 651–52 (2d Cir. 2013) (suppressing birth certificate as not "independent evidence" given the record); United States v. Cherry, 759 F.2d 1196, 1207–08 (5th Cir. 1985) (refusing to suppress fingerprint evidence taken as a result of an illegal arrest because the defendant would later have been legally arrested and fingerprinted).

The best approach is to follow the due process exclusionary rule in asking what evidence the government had authority to learn. Applying that inquiry to the above scenario, each side obtains a partial victory. First, the preexisting records are admissible. By hypothesis, the government had lawful access to the records associated with the original arrest warrant.[415] Therefore, nothing about the subsequent stop could justify suppression of the government's preexisting record. Put more categorically, what is lawfully learned at one time is lawfully learned forever, and the taint of a Fourth Amendment violation should never run backward in time.[416] Second, any new evidence discovered during the car search must be suppressed. The car search is purportedly justified by the officer's knowledge that the car's driver had been named in an arrest warrant. Yet the officer learned that the car was being driven by the target of an arrest warrant only by undertaking an unlawful investigative step — namely, the stop. Because the officer stepped outside the scope of her investigative authority, due process prohibited her from relying on the fruits of that transgression when taking new investigative steps.

This basic approach also illuminates how the exclusionary rule should operate in connection with DNA-based evidence of identity cross-referenced against genetic databases.[417] A DNA sample should be suppressed insofar as it was collected outside the scope of the government's investigative authority, such as when police draw blood incident to an unlawful arrest. By contrast, lawfully accessible DNA records should never be suppressed, even if the record is later connected to a defendant as the foreseeable consequence of a Fourth Amendment violation. So long as the government did not rely on the fruits of its illegal search to gain lawful access to the record, the record's admission into evidence comports with "due process."

2. The Mosaic Theory. — The Supreme Court may be on the brink of fashioning a fundamentally new set of Fourth Amendment rules organized around the "mosaic theory" of individual privacy. But these new rules raise new exclusionary questions, and scholars have suggest-

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[415] This assumption may not always hold true: querying a database may sometimes constitute an independent search requiring its own justification, even if the database is in the government's possession.

[416] *See* Maryland v. Macon, 472 U.S. 463, 471 (1985) ("The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." (quoting United States v. Crews, 445 U.S. 463, 475 (1980) (plurality opinion)) (internal quotation marks omitted)).

[417] *See generally* Maryland v. King, 133 S. Ct. 1958, 1968 (2013) (discussing "the Combined DNA Index System (CODIS)," which "connects DNA laboratories at the local, state, and national level").

ed that the sheer difficulty of answering them may counsel against doctrinal innovation.[418] Due process exclusion can help.

Under current doctrine, the government's compliance with the Fourth Amendment is assessed by inquiring into the reasonableness of searching or seizing individual pieces of evidence.[419] Courts ask, for example, whether pat downs and stakeouts were "reasonable" when viewed in isolation from larger investigations. But that conception of Fourth Amendment rules is now up for grabs as courts grapple with new, more sophisticated means of collecting and aggregating individual pieces of information. In response, courts and scholars have advanced the mosaic theory of the Fourth Amendment.[420] On this view, the aggregation of many pieces of even public information can give rise to an unreasonable Fourth Amendment "search." As the D.C. Circuit put it, "[a] person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, [or] an associate of particular individuals or political groups."[421] These deductions, the mosaic theory holds, can invade reasonable expectations of privacy. Already, five Supreme Court Justices have endorsed this general approach.[422]

The due process exclusionary rule provides a useful analytic framework for resolving the remedial questions posed by the mosaic theory of the Fourth Amendment.[423] As an initial matter, many of the mosaic theory's alleged remedial problems concern the vagueness and malleability of current doctrine's deterrence-based framework and so simply do not arise under the due process exclusionary rule. For example, the Court's recent exclusionary cases have exhibited aversion to murky judicial standards that might provoke extensive litigation,[424] and Professor Orin Kerr has pointed out that similar policy-based ar-

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[418] Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 346–47 (2012) ("Judges should be reluctant to open the legal equivalent of Pandora's Box." *Id.* at 346.); *cf.* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 860 (1999) (arguing that concerns with remediation often inform courts' views of substantive rights).

[419] *See* Kerr, *supra* note 418, at 314.

[420] *See, e.g.*, David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 392 (2013); Kerr, *supra* note 418, at 313.

[421] United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010), *aff'd in part sub nom.* United States v. Jones, 132 S. Ct. 945 (2012).

[422] *See Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring); *id.* at 963–64 (Alito, J., concurring in the judgment).

[423] Professor Orin Kerr also asked who would have standing to raise mosaic-based arguments in the event of prolonged surveillance involving multiple parties. *See* Kerr, *supra* note 418, at 342. That issue turns on the Fourth Amendment question of how to conceptualize expectations of privacy with regard to mosaic searches. *See supra* section III.A.1, pp. 1930–31.

[424] *See* Hudson v. Michigan, 547 U.S. 586, 594–98 (2006).

guments could be used to oppose suppression when the government engaged in unduly prolonged surveillance.[425] These amorphous policy considerations simply have no role in a due process approach.

Kerr has also suggested that violations of the mosaic theory might trigger the exclusionary rule's good-faith exception. "If courts cannot specify ex ante with clarity when police conduct aggregates sufficiently to constitute a search," Kerr argues, then "officers may understandably cross the line without personal culpability."[426] Under a due process approach, however, the good-faith exception is recast as a Fourth Amendment rule that the police act reasonably when they reasonably rely on legal authorities.[427] So, in the absence of supportive precedent on which the police might rely, unreasonably protracted surveillance would be, well, unreasonable. The exclusionary rule should therefore apply, even if the unreasonable officers are honestly uncertain as to the propriety of their actions.

Most interestingly, Kerr drew attention to challenges that arise under both current doctrine and a due process approach. For example, Kerr asked whether to suppress evidence of a crime obtained on Day 2 of a hypothetical ten-day-long surveillance operation, assuming that surveillance lasting longer than a week is unreasonable.[428] From a deterrence perspective, this question calls for an intractable assessment of incentive effects. For example, suppressing all ten days of surveillance would powerfully deter police from exceeding the one-week cap, but it would also mean excluding information that was not the causal fruit of the police misconduct. By contrast, the due process exclusionary rule makes Kerr's question simple. As discussed above, lawfully acquired information, once obtained, can never be retroactively tainted.[429] So an observation that is admittedly lawful on Day 2 cannot become inadmissible because of events on Day 7.

Yet Kerr's hypothetical does not exhaust the questions posed by the mosaic theory. Imagine that a protracted surveillance operation spanning many weeks reveals a suggestive pattern of activity that cannot be reduced to any single incident. Perhaps police notice that their sus-

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[425] *See* Kerr, *supra* note 418, at 340–41 (arguing in part that mosaic violations, like the knock-and-announce violations at issue in *Hudson*, would likely lead to significant litigation); *see also Jones*, 132 S. Ct. at 954 (majority opinion) (raising this workability objection against the mosaic theory).

[426] Kerr, *supra* note 418, at 341.

[427] *See supra* section III.B.6, pp. 1942–45.

[428] *See* Kerr, *supra* note 418, at 343 ("Should the evidence from day two be suppressed because it was part of the mosaic triggered after seven days, even though the collection of that evidence was not a search when it occurred? Or is the evidence from day two an inevitable discovery because it would have been discovered if the monitoring had stopped before the amount of monitoring crossed the mosaic threshold [of seven days]?").

[429] *See supra* note 416 and accompanying text.

pect uses different phones to call a certain telephone number every Tuesday. Police might then infer — based on evidence spanning more than seven days — that the phone number in question is connected to criminal activity. This inferential discovery is not like observing an out-and-out crime on Day 2 of a lengthy surveillance (as in Kerr's example above). Rather, each individually observed trip or phone call would be innocuous until placed within a much larger pattern of interrelated observations. Moreover, this kind of inferential observation could arise only after a violation of Kerr's hypothetical rule against surveillance lasting more than a week.

Under the mosaic theory, an inference of this type might be an unreasonable "search" if predicated on an unreasonable period of observation. Put another way, *the inference itself* might lie beyond the government's lawful investigative authority. Courts might then suppress the inference that the telephone number is linked to criminality, but admit the individually lawful observations on which that inference was based. So, to continue the example, the government might introduce a telephone call that occurred on Day 10 to establish the defendant's whereabouts at that time, even if the government could not inform the jury that the defendant followed an incriminating pattern of behavior spanning more than seven days.

By providing a manageable framework for future suppression cases, the due process exclusionary rule can mitigate anxieties about innovation in Fourth Amendment law and encourage recognition of new constitutional privacy rights.

CONCLUSION

We often speak of "the Fourth Amendment exclusionary rule," yet no such rule exists. Viewed in isolation, neither the text, nor the history, nor even the purpose of the Fourth Amendment calls for suppression of evidence in criminal cases. Instead of disputing these points, supporters of suppression have reached for policy arguments rooted in deterrence or atextual moral norms such as equitable restoration. As a result, courts either do or don't suppress evidence based on their own views of good policy. Meanwhile, practitioners and commentators anxiously await the day when the Supreme Court reconsiders whether to have an exclusionary rule at all.

The Supreme Court should instead recast current doctrine in terms of a "due process exclusionary rule." By focusing on the legal wrong of being convicted without process, this approach would provide the harmless error doctrine with a constitutional foundation. It would explain and justify the Court's practice of applying a singular exclusionary doctrine across a wide variety of constitutional rights. And it would clarify the exclusionary rule's proper scope, while providing a workable framework for addressing the new challenges posed by digi-

tal search technologies. Perhaps most importantly, focusing on due process would bring the exclusionary rule into the fold of modern constitutional law, allowing it to rest on arguments rooted in the Constitution's text and history.