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A Sixth Amendment Inclusionary Rule for Fourth Amendment Violations

SCOTT W. HOWE

Early in the tenure of Chief Justice Roberts, a five-Justice majority of the Supreme Court signaled that it was ready to consider eliminating the exclusionary rule as a remedy for Fourth Amendment violations. The central concern was that, even after decades of limiting the rule through new exceptions, it purportedly lacked utility in balancing protections against the competing dangers of crime and police abuse, the only rationale on which it has been grounded in the modern era. That existential reappraisal never openly occurred, and the exclusionary rule, in further reduced form, still survives. Yet, given the Court's recent conservative shift, there is reason to think that such a fundamental reassessment could now happen. On that view, the methods by which the Court could eliminate the exclusionary rule become important, as do some central normative questions that abolition would raise: In a world without court-ordered suppression, how, if at all, should the Constitution protect criminals against government searches and seizures? And how should it balance protection for law-abiders between the competing dangers of crime and police abuse? For the sake of exploring the implications, this Article assumes that the Court will, indeed, eviscerate the exclusionary rule as a judicially mandated remedy. The Article discusses four routes that the Court could follow. All of them, like the exclusionary rule, have defects. However, one stands out for protecting law-abiders somewhat from police overreach while only modestly protecting criminals and for resting on a constitutional grounding. The Court could substitute for the exclusionary rule an "inclusionary rule" based on the right to jury trial in the Sixth Amendment.

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A Sixth Amendment Inclusionary Rule for Fourth Amendment Violations

SCOTT W. HOWE *

INTRODUCTION

One of the harder questions to answer about the Fourth Amendment¹ concerns how the doctrine should aim to safeguard criminals. This question typically arises in discussions about the kinds of interests that the Fourth Amendment protects, which, according to the Supreme Court's rulings for more than a century, include interests used to commit and cover up crimes.² The question also arises in discussions of remedy, because the Court, again for more than a century, has imposed evidence exclusion in criminal cases for violations,³ although, in the last fifty years, it has created many exceptions.⁴ The question can take several forms, but, in the context of hypotheticals, it might go like this: "How can a terrorist ever have a legitimate expectation of being able to hide a bomb in his suitcase?" In another context, the question might be: "How can a murderer have a protected interest in concealing his dead victim in the trunk of his car?" In more abstract terms, the question is essentially this: "Why should Fourth Amendment law ever protect liberty,

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¹ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

² See *Weeks v. United States*, 232 U.S. 383, 392 (1914) (asserting that "[t]his protection reaches all alike, whether accused of crime or not"); see also *Boyd v. United States*, 116 U.S. 616, 622, 638 (1886) (describing one issue as whether "a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws . . . is . . . an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Constitution" and answering that question affirmatively).

³ See, e.g., *Weeks*, 232 U.S. at 398 (concluding that papers seized from petitioner in violation of the Fourth Amendment were not admissible against him in his criminal trial).

⁴ See JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMMONS, *I UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION* 354–79 (7th ed. 2017) (discussing various exceptions to the Fourth Amendment exclusionary rule).

privacy, and property interests when they are used for committing or covering up crime?”

That question is a central subject of this Article. The answer would not be simple even if current Fourth Amendment law were static. Yet, the priority of interests that the doctrine protects, and in what fundamental ways, continues to be disputed even among the Justices.⁵ Moreover, the doctrine on how to treat criminals under the amendment may soon change in ways that will also affect the answer.⁶

The Supreme Court has focused over the years mostly on the remedial aspect of the problem of how to treat criminals under the amendment—mostly, that is, on the exclusionary rule. The Court has not provided an extensive rationale for its conclusion that law-breakers in the first instance have Fourth Amendment interests to help them commit and hide their crimes. On that score, the Court has not claimed in the modern era to have found and followed an original understanding.⁷ However, in 1914, apparently on the view that the text did not except criminals, the Court concluded in *Weeks v. United States* that the Fourth Amendment “reaches all alike, whether

⁵ See, e.g., Janine Young Kim, *On the Broadness of the Fourth Amendment*, 74 SMU L. REV. 3, 4–6 (2021) (noting various interests that Supreme Court Justices and commentators have contended the Fourth Amendment should protect and disagreement within the Court over whether privacy or property interests should be paramount); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1857–58 (2016) (advocating a view of the Fourth Amendment that would protect a variety of values beyond liberty, privacy, and property); Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 881, 885–87 (2014) (noting the Court’s vacillation between libertarian and pragmatic conceptions of the Fourth Amendment).

⁶ See *infra* text accompanying notes 42–53.

⁷ In *Boyd v. United States*, the Court contended that it identified and was following an original understanding of the Fourth Amendment. *Boyd*, 116 U.S. at 623. Later, the Court rejected much of what the *Boyd* opinion said. The *Boyd* Court stated that law-breakers were effectively immunized by the Fourth Amendment against searches for or seizures of their “private books and papers.” See *id.* at 622, 630. Also, the *Boyd* Court stated that searches for and seizures of “excisable” items, contraband, or stolen goods were simply not “unreasonable.” See *id.* at 623–24; see also Kim, *supra* note 5, at 35–36 (noting that *Boyd* suggested “that the Fourth Amendment protects against government trespass where the individual has a full and legitimate property interest in the item to be seized, but not otherwise”). Later, in *Gouled v. United States*, the Court underscored that government agents could not search for mere evidence of crime, such as the shirt allegedly worn by a robber, or the private papers of the aggrieved party, but only for items such as contraband or the instrumentalities of a crime. See 255 U.S. 298, 309 (1921). However, the Court subsequently abandoned the view that government agents could not search for mere evidence, although it did not purport to follow the original understanding. See *Warden v. Hayden*, 387 U.S. 294, 306–07 (1967) (holding that police could search for clothing worn by an armed robber in the commission of the crime). The Court also abandoned the idea that private books and papers were not subject to searches and seizures under the Fourth Amendment. See *Andresen v. Maryland*, 427 U.S. 463, 465–84 (1976) (holding that neither the Fifth Amendment nor the Fourth Amendment prevented police officers from searching the petitioner’s law office, based on a search warrant, for private papers to be used against him in a fraud prosecution). The Court also has ruled that searches for and seizures of contraband or stolen goods are unreasonable absent compliance with the procedural requirements of the Fourth Amendment. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 645, 660 (1961) (discussing the search of a home and seizure of obscene materials).

accused of crime or not.”⁸ Since that time, the Court has acted in accordance with the *Weeks* proposition, with little further elaboration.⁹

As for the exclusionary rule, the Court first definitively applied it in *Weeks* in the federal context¹⁰ and extended it to the states in *Mapp v. Ohio*.¹¹ (Note that the very existence of this remedy underscores the more basic *Weeks* proposition—that law-breakers have protected interests on which they can rely to some extent to pursue and cover up crime.¹²) The amendment says nothing about remedy, and the rationales for the Court’s early imposition of evidentiary suppression were not entirely clear, although they were not focused on deterrence of police misconduct.¹³ The rationales included the idea that an effective remedy was implicit in the Fourth Amendment prohibition,¹⁴ that exclusion was required by the Fifth Amendment privilege,¹⁵ that notions of judicial integrity that forbade acquiescence in unconstitutional conduct mandated suppression,¹⁶ and, perhaps, that it was simply inconsistent with the

⁸ *Weeks*, 232 U.S. at 391–92.

⁹ In later decisions, for example, the Court repeatedly held that an improper search is not validated by the discovery of evidence of crime. *See, e.g.*, *Byars v. United States*, 273 U.S. 28, 29–30 (1927) (declaring it immaterial “that the search was successful in revealing evidence” of crime, and ordering the evidence suppressed in petitioner’s criminal trial); *Sibron v. New York*, 392 U.S. 40, 62–63 (1968) (holding a search to be without probable cause although it turned up illegal heroin, and declaring that the results of a search may not “serve as part of its justification”); *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (*per curiam*) (holding that a search without Fourth Amendment justification could not find validation as a search incident to a subsequent arrest based on the results of the illegal search).

¹⁰ The Court clearly applied it in *Weeks*, but had arguably also applied it in *Boyd*, although the Court saw the Fifth Amendment privilege at play in *Boyd*, 116 U.S. at 630–35, and that privilege, unlike the Fourth Amendment, expressly embodies an exclusionary principle.

¹¹ *Mapp*, 367 U.S. at 655.

¹² *See, e.g.*, *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (mandating exclusion of evidence about stolen stereo equipment based on violation of defendant’s Fourth Amendment rights, and asserting that the Constitution sometimes “insulates” a defendant’s “criminality”).

¹³ *See, e.g.*, TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE 3* (2013) (noting that in the late nineteenth and early twentieth centuries, the Court viewed the prohibition on the admission of unconstitutionally obtained evidence as “a constitutional right belonging to the citizen”).

¹⁴ *See Olmstead v. United States*, 277 U.S. 438, 462 (1928) (commenting on the “striking outcome of the *Weeks* case . . . that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction”); *see also* Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 138 (1984) (asserting that the majority opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), indicated that exclusion was an essential part of the Fourth Amendment prohibition).

¹⁵ *See, e.g.*, *Olmstead*, 277 U.S. at 478–79 (Brandeis, J., dissenting) (“And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion [in violation of the Fourth Amendment] must be deemed a violation of the Fifth.”); *see also* Edward S. Corwin, *The Supreme Court’s Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 191, 203 (1931) (asserting that *Boyd* created “the rule that evidence obtained in violation of a person’s rights under the Fourth Amendment may not under the Fifth Amendment be validly received against him in any criminal prosecution in federal court”).

¹⁶ *See Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting) (asserting that “for my part I think it a less evil that some criminals should escape than that the Government play an ignoble part” and that “[i]f the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed”).

broader postulates of our Constitution for evidence obtained in violation of the Fourth Amendment to support a criminal conviction.¹⁷ In 1961, the *Mapp* Court said that exclusion was an inherent right of the aggrieved defendant¹⁸ and was also a matter of good social policy.¹⁹ However, the Court soon concluded that the *Mapp* opinion was partly wrong; the aggrieved defendant has no personal right to exclusion.²⁰ The post-*Mapp* Court initially justified exclusion solely on an instrumental theory focused on deterrence of police misconduct.²¹ This somewhat narrow instrumentalism soon morphed into a broader utilitarianism that weighs deterrence benefits against social costs.²² Since the 1970s, the Court has justified exclusion entirely on the notion that, despite the costs, exclusion is appropriate in a fraction of criminal cases involving violations to promote police compliance with Fourth Amendment doctrines,²³ presumably for the primary benefit of law-abiders.²⁴ On this view, the exclusionary rule directly protects criminals in an effort to indirectly protect everyone else

¹⁷ The Supreme Court has not always specified the constitutional basis for its rights-based constitutional rulings. For example, in *West Virginia State Board of Education v. Barnette*, the Court ruled that two young sisters, both Jehovah's Witnesses, could not be expelled from public school for failing to salute the United States flag and recite the pledge of allegiance. 319 U.S. 624 (1943). The Court declared that a state cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642. The opinion cited no specific clause as the basis for the ruling. Laurence Tribe has described *Barnette* as "rel[ying] on no single clause of the Bill of Rights but on the broader postulates of our constitutional order." Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 26 (2015), https://harvardlawreview.org/wp-content/uploads/2015/11/vol129_Tribe.pdf.

¹⁸ *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) ("Our decision . . . gives to the individual no more than that which the Constitution guarantees him . . ."); *see also* 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, 1380–89 (1983) (describing how the exclusionary rule developed and contending that it is essential to disincentivize and thereby help prevent Fourth Amendment violations).

¹⁹ *See Mapp*, 367 U.S. at 657 (asserting that the exclusionary rule "also makes very good sense").

²⁰ *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 29 (1968) ("The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that 'limitations upon the fruit to be gathered tend to limit the quest itself.'") (quoting *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930)).

²¹ *Id.* at 12.

²² *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 350 (1974) ("Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule."); *United States v. Leon*, 468 U.S. 897, 913 (1984) ("[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief.").

²³ *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1897 (2014) (noting that under the Court's recent case law, the exclusionary rule "must yield a marginal deterrence benefit at least commensurate with the substantial social costs of suppressing reliable evidence"); Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 243 (2010) ("The exclusionary rule is based on the premise that the deterrent effect on police conduct outweighs the injustice of suppressing relevant and material evidence.").

²⁴ *See, e.g.*, *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (asserting that "the purpose of suppression . . . is to compel law enforcement compliance with the Fourth Amendment and thereby prevent the invasions of law-abiding citizens' privacy").

from police misconduct.²⁵

This modern explanation for the exclusionary rule is vulnerable. According to prevailing discourse, the principal problem is not that court-ordered exclusion conflicts with the original understanding.²⁶ That argument would be complicated by vastly changed circumstances.²⁷ The modern explanation for the exclusionary rule is vulnerable on its own terms. First, it rests on an assessment that purports to weigh a category of costs against an incommensurate kind of benefit,²⁸ and the value, or negative value, to be assigned to both the costs and the benefits rests largely with the beholder.²⁹ There also is not much helpful data to clarify the degree to which

²⁵ See, e.g., *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (“But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”).

²⁶ There is no affirmative argument, based on originalism, that criminals are protected through an exclusionary rule like that articulated in *Weeks* and *Mapp*. Suppression in criminal cases was never mentioned by the Framers as an enforcement mechanism. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 21 (1997). Likewise, the pre-founding-era common law inherited from England “conceded the admissibility” of unlawfully obtained evidence. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING (602–1791)* 759 (2009). The Supreme Court also did not employ court-ordered suppression until 1886, and, even then, the Court did so only by combining the Fourth Amendment with the more clearly exclusionary Fifth Amendment privilege against compelled self-incrimination. See *Boyd v. United States*, 116 U.S. 616, 634–35 (1886). Moreover, for an additional perspective on perhaps why court-ordered exclusion for violations was not part of the original understanding, see *infra* Part IV.B.

²⁷ Those favoring a court-ordered exclusionary rule could reject, on the basis of “inattention to historical context,” an originalist position favoring a founding-era enforcement approach. See Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 532–33 (2013). First, Carol Steiker has explained that “[t]he racial diversity and divisions that characterize twentieth-century American society were unimagined by, and indeed unimaginable to, our eighteenth-century forebears.” Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838 (1994). Professor Steiker has argued that the exclusionary rule was partly a response to the failure of law enforcement after the Civil War Amendments to treat Blacks as equal members of society. *Id.* at 841. Second, Lawrence Rosenthal has explained that there were few law enforcement officers in the colonies during the founding era, and their duties consisted mostly in the “execution of warrants” and in “responding to breaches of the peace, offenses committed in their presence, and pursuing offenders when summoned in the wake of crime.” Rosenthal, *supra*, at 533. They generally did not investigate. George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 TEX. TECH L. REV. 199, 201 (2010). And they generally undertook a search or seizure without judicial permission only with substantial care because, while they were immune from liability for executing a warrant, they otherwise faced the threat of tort liability for errors. Rosenthal, *supra*, at 534; see also Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552 (1999) (“Warrant authority was the potent source of arrest and search authority.”). Today, tort damages are rarely imposed on and paid by police officers who violate the Fourth Amendment, due, in part, to the qualified immunity doctrine created and enforced by the Court regarding § 1983 claims and due, largely, to indemnification by their public employers. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8–9 (2017) (noting that qualified immunity doctrine plays a minor role in shielding police officers from financial liability); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (“Police officers are virtually always indemnified.”).

²⁸ See *Re*, *supra* note 23, at 1897 (describing the competing values as “incommensurable”).

²⁹ Because the Court approaches the cost-benefit questions without regard to the seriousness of the crimes involved, the exclusionary rule also “has no sense of proportionality.” Rychlak, *supra* note 23, at 243.

changes on the deterrence side of the equation are effective³⁰ or the degree to which they produce changes on the other side, particularly under varying crime-type, geographical, and temporal circumstances.³¹ High-quality empirical investigation on the subject is also notoriously difficult.³² Consequently, the Court's assertions about the costs and benefits are typically non-refutable.³³

In this context, exclusion can always readily be viewed as a lose-lose proposition for the law-abiding. If exclusion does not affect police behavior much, suppression forces the community to bear the loss of evidence supporting the defendant's guilt for no compelling benefit.³⁴ Alternatively, if the exclusionary rule significantly restrains police behavior, it is logical to suppose that it would also encourage crime, a seemingly negative consequence for law-abiders that, along with the cost of suppression in the individual case, could easily be thought to outweigh the police-restraining benefit. Although good data about the effects of the exclusionary rule are limited, empirical study has not reassured us against this latter concern.³⁵ Consequently, considered within these parameters, neither an ineffective nor an effective exclusionary rule (as measured by its influence on police) may sound attractive.³⁶

³⁰ See, e.g., Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 368–69 (asserting that “[n]o one is going to win the empirical debate” because empirical research cannot confirm how much the rule deters police violations).

³¹ See, e.g., Re, *supra* note 23, at 1901 (asserting that when weighing “the deterrent benefit against the potential costs of increased crime,” the “courts have access to virtually no relevant data”).

³² See, e.g., Rosenthal, *supra* note 27, at 542 (noting that, while there is general agreement that “exclusion has some deterrent effect,” there is a dearth of “reliable evidence” on the “magnitude” of the effect “in light of the many methodological problems that face those who seek to study” the question).

³³ See Re, *supra* note 23, at 1901 (noting that the Court's exclusionary-rule decisions “seem to resist falsification”).

³⁴ See generally Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970) (noting, at that time, the dearth of empirical evidence that suppression deters police violations, but also clarifying that his study was inadequate to provide “empirical substantiation or refutation” on the issue).

³⁵ See Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 159 (2003) (“The empirical evidence reveals a significant increase in crime rates following the involuntary adoption of an exclusionary rule as the penalty for an unlawful search and seizure.”).

³⁶ Given that the Court has construed the Fourth Amendment to confer protected interests on criminals and law-abiders alike, a broader perspective on the exclusionary rule would acknowledge that the amendment itself imposes the costs and that the exclusionary rule never does more than attempt to put the parties in the position that they would have been in had there been no government violation. See, e.g., MACLIN, *supra* note 13, at xii–xiii (citing Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 197, 199 (Eugene W. Hickock, Jr., ed., 1999)). If the Fourth Amendment were construed not to assist persons to pursue and cover up criminal endeavors, this claim would disappear. See *infra* note 62.

A broader perspective on the exclusionary rule would also acknowledge that, even within the context of a utilitarian analysis, it is relevant whether the failure to provide an effective remedy for police violations would over time promote crime. As Justice Brandeis famously contended, “Crime is contagious. If the

The creation of exceptions to the exclusionary rule is also a poor solution if suppression is generally seen as non-utilitarian and utility is its only justification. Based on the view that the exclusionary remedy often does not substantially deter police violations or that utility is not maximized when it does, the Supreme Court has recognized a variety of exceptions.³⁷ Even so, some costly consequences from exclusion potentially remain because suppression still survives as a judicial response to a substantial amount of police behavior.³⁸ Also, because of the exceptions, courts now deny effective and readily available relief to many criminal defendants, although the police supposedly violated their Fourth Amendment rights to help secure their convictions.³⁹ In *Marbury v. Madison*,⁴⁰ Chief Justice Marshall famously warned that ours could not be called a “government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right.”⁴¹ Contrary to Marshall’s admonition, exceptions to the exclusionary rule cast many purportedly aggrieved but apparently guilty persons as semi-sympathetic figures, at least to observers who believe we should honor constitutional protections.

Given the problems, it is perhaps not surprising that the Roberts Court, several years ago, hinted that it was ready to fundamentally rethink the exclusionary rule. In *Hudson v. Michigan*,⁴² a five-Justice majority expressed concern that the costs of exclusion may generally outweigh the benefits.⁴³ The majority opinion called “into question the entire rationale of the exclusionary rule, not just [its application] in the knock-and-announce context” that the case presented.⁴⁴ There were subsequent signals that the Court might go in a different direction. The Court decided two cases, *Herring v. United States*⁴⁵ and *Davis v. United States*,⁴⁶ in which it laid the

government becomes a lawbreaker, it breeds contempt for law” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

³⁷ See DRESSLER, MICHAELS & SIMMONS, *supra* note 4, at 354–79 (discussing various exceptions to the Fourth Amendment exclusionary rule).

³⁸ See Re, *supra* note 23, at 1899 (“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.”).

³⁹ See Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 114–15 (2003) (discussing the difficulty for criminal actors to prevail in a constitutional tort action for infringements of their Fourth Amendment interests and the additional difficulty of gaining more than small damage awards).

⁴⁰ 5 U.S. (1 Cranch) 137 (1803).

⁴¹ *Id.* at 163.

⁴² 547 U.S. 586 (2006).

⁴³ See *id.* at 597–99. For more information on *Hudson*, see *infra* text accompanying notes 101–104.

⁴⁴ David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005–2006 CATO SUP. CT. REV. 283, 284 (2006).

⁴⁵ 555 U.S. 135 (2009).

⁴⁶ 564 U.S. 229 (2011).

groundwork to further undermine the rule without abolishing it completely.⁴⁷ By making suppression turn on whether there was egregious police conduct by the particular officer carrying out the search,⁴⁸ those two cases provided a foundation for the Court to eventually create an expansive “good-faith exception for routine search-and-seizure cases.”⁴⁹ A leading scholar on the subject, Tracey Maclin, asserts that such a move would go “nine-tenths of the way toward repealing the exclusionary rule.”⁵⁰ Yet, neither the current remains of the exclusionary rule nor an even more shriveled “bad faith” form of it has a plausible constitutional grounding,⁵¹ which helps reveal why the Court may be ready to go farther.⁵² Given that, of the five Justices in the

⁴⁷ See, e.g., MACLIN, *supra* note 13, at 336–47 (discussing the *Harris* and *Davis* opinions and explaining how they can provide the foundation for the Court to substantially but not entirely abolish the exclusionary rule).

⁴⁸ In *Herring*, a sheriff’s investigator in Coffee County, Alabama, relied on a telephone report from neighboring Dale County’s sheriff’s office that there was an outstanding arrest warrant for Bennie Dean Herring and arrested him. *Herring*, 555 U.S. at 137. A search incident to arrest revealed that Herring illegally possessed methamphetamine and a pistol. *Id.* Ten to fifteen minutes later, the police discovered that the listing of the warrant in the Dale County database was erroneous. *Id.* at 138. Thus, the arrest violated the Fourth Amendment according to prevailing doctrine, *id.* at 139, and evidence of the drugs and the gun were the fruit. Nonetheless, the Supreme Court ruled that suppression was inappropriate because the police error resulted from isolated, ordinary police negligence that was “attenuated” from the illegal arrest. *Id.* at 144. The Court asserted that the exclusionary rule serves only to deter “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.” *Id.* *Herring* thereby became the first Supreme Court decision post-*Mapp* to hold that police negligence in violating the Fourth Amendment was not enough to warrant suppression. See MACLIN, *supra* note 13, at 339.

In *Davis*, the Court concluded that the “reasonable good-faith belief” exception, applicable where the police rely on a warrant issued on less than probable cause, see *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring in judgment)), should extend to cover a police search based on judicial precedent that was later overruled. *Davis*, 564 U.S. at 231–32. Expanding on *Herring*’s focus on police culpability, the Court asserted that exclusion is inappropriate when police search or seize “with an objectively ‘reasonable good-faith belief’ that their conduct is lawful” or when their violation “involves only simple, ‘isolated’ negligence.” *Id.* at 238. Unlike in *Herring*, however, the Court made no mention of attenuation, implying that even unattenuated police negligence in violating the Fourth Amendment was not enough to justify suppression. See MACLIN, *supra* note 13, at 341–42. Although the Court would have to narrow the rule more, Professor Maclin contends that *Davis* and *Herring* together may portend that the Court could eventually hold that only “purposeful, bad-faith police misconduct” can justify exclusion. *Id.* at 343.

⁴⁹ MACLIN, *supra* note 13, at 342.

⁵⁰ *Id.*

⁵¹ The current exclusionary rule cannot find a plausible constitutional grounding if only because its contours are insensible given its supposed explanation in utility. For example, there is no good explanation for why the rule does not apply in civil cases. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 791 (1994). There is no good explanation for why the rule in the form of a *punitive* suppression order does not apply to illegal arrests or cases of illegal searches where no evidence was recovered. See *id.* at 796–98; Re, *supra* note 23, at 1895–96. There is no good explanation for why the rule does not apply to violations of the Fourth Amendment rights of third parties. See Re, *supra* note 23, at 1896. Further, there is no good reason why the rule does apply in cases of serious crimes where the utility analysis would seem to favor admission. See *id.* at 1896–97.

⁵² See Re, *supra* note 23, at 1888 (noting that the *Herring* opinion endorsed views critical of *Mapp*, a case of bad-faith violation, which suggests that the majority was skeptical about retaining even a bad-faith exclusionary rule).

majority in *Hudson*, three Justices (Roberts, Thomas, and Alito) remain on the Court and are now part of a six-Justice majority appointed by conservative presidents (including Gorsuch, Kavanaugh, and Barrett), the Court might well be prepared to abolish the exclusionary rule entirely.⁵³

On that view, the methods by which the Court could eliminate the exclusionary rule become important, as do the central normative questions that abolition would raise: In a world without court-ordered suppression, how, if at all, should the Constitution protect criminals against government searches and seizures? And how should it balance protection for law-abiders between the dual dangers of crime and police abuse? For the sake of exploring the implications, this Article assumes that the Court will, indeed, eviscerate the exclusionary rule as a judicially mandated remedy.

The first three Parts of the Article consider alternative ways in which the Court, in removing the exclusionary rule, could effectively prevent law-breakers from using Fourth Amendment protections or Court-imposed remedies to help them pursue and conceal their crimes. Part I explores the merits and demerits of using a forfeiture theory to abandon the long-standing notion that criminals have protected Fourth Amendment interests for purposes of committing and hiding their crimes,⁵⁴ an approach that would eliminate any basis for an exclusionary remedy. Part II discusses whether the Court should use a similar forfeiture theory to reach the somewhat different conclusion that criminals have no constitutionally based claim to a remedy for a violation of their Fourth Amendment interests when they have used them to commit or hide their crimes. Part III discusses the pros and cons of doing what *Hudson* suggested—simply abandoning the exclusionary remedy as non-utilitarian and, on grounds that the Fourth Amendment says nothing about remedy, leaving the question to Congress and the states. All three approaches have serious demerits, but reliance on any of them would thwart criminals from using the Fourth Amendment to their advantage.

Part IV describes an alternative approach that, although a significant change of course for the Court, would provide some protection to law-abiders from police overreach. The Court could substitute for the exclusionary rule an “inclusionary rule.” Its grounding in the Constitution could rest on a combination of the Fourth Amendment and the right to jury trial in the Sixth Amendment. This approach would continue to require trial judges to resolve Fourth Amendment claims in criminal cases and, upon finding a violation involving evidentiary fruits, to include an instruction to the jury describing the violation and advising the jurors to decide whether to ignore the evidentiary fruits or even acquit the defendant of some or all of the charges. This approach has problems even beyond its substantial change of direction for the Court. Yet, it would probably protect criminals only

⁵³ Professor Maclin contends that Roberts, Thomas, and Alito are “ready to do so.” MACLIN, *supra* note 13, at 342.

⁵⁴ See *supra* notes 7–10 and accompanying text.

modestly. At the same time, it would preserve the ability of the Supreme Court to develop and refine Fourth Amendment law through criminal cases and to at least moderately deter violations against law-abiders, whether or not juries usually would ignore the evidentiary fruits. Moreover, this approach would have a constitutional grounding that could largely clarify the contours of its application, which distinguishes it from the current exclusionary rule and most other proposals to substitute an alternative remedy.⁵⁵

I. FORFEITURE OF FOURTH AMENDMENT INTERESTS

One way to eliminate the exclusionary rule would be to reject the existence of legitimate liberty, privacy, or property interests to pursue or cover up crime. If law-breakers do not have cognizable Fourth Amendment interests for purposes of pursuing and hiding their offenses, they do not have a claim for a remedy on the ground that their legitimate interests have been infringed. On this view, the Court should now revise the claim in *Weeks* that the Fourth Amendment applies to all alike, whether they be law-breakers or law-abiders.⁵⁶ The Court could abandon that idea and thereby eliminate the basis for an exclusionary remedy.

A forfeiture theory could help explain this position. The law-breaker can be seen as justifiably penalized for his wrongdoing by the police intrusion on his liberty, privacy, and property to discover and seize the evidence or his body and by his subsequent prosecution, conviction, and sanction.⁵⁷ Without malefaction like his, the police would not need to invade anyone's Fourth Amendment interests to root out crime. Although an extreme view, the law-breaker's criminal behavior and cover-up could perhaps even be seen as complicity in the causal events leading up to the kind of aggressive search and seizure tactics about which he would complain in a suppression motion. From either perspective, his wrongdoing would justify holding that he forfeits the liberty, privacy, and property interests that would otherwise support such a motion.

Declining to protect liberty, privacy, and property to the extent that they

⁵⁵ See *supra* note 51 and *infra* note 139 (making the point that the current exclusionary rule and other proposals do not satisfy these criteria).

⁵⁶ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

⁵⁷ Legal forfeiture has applied in other situations involving wrongdoing by an actor seeking a related legal benefit. For example, a "forfeiture of the right to appeal" under the "fugitive disentitlement doctrine" justifies the dismissal of an appeal filed by a criminal defendant who becomes a fugitive during the pendency of the appeal. See Martha B. Stolley, *Sword or Shield: Due Process and the Fugitive Entitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751, 753 (1997) (discussing how appellate courts typically treat criminal defendants who become fugitives during the pendency of their appeals); see also *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-42, (1993) (discussing the Court's fugitive disentitlement case law); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1571-72 (6th ed. 2017) (discussing this forfeiture doctrine). Likewise, under the Federal Rules of Evidence, a party forfeits the right to offer hearsay evidence under the exceptions listed in Rule 804(b), which require an unavailable declarant, if that party procured or wrongfully caused the declarant's unavailability. FED. R. EVID. 804(a).

are used for criminal ends would have multiple benefits. It would eliminate Fourth Amendment issues from criminal cases, saving the resources of the courts. It would eliminate the purported “windfall”⁵⁸ that we presently confer on criminal defendants who win evidentiary suppression, while also clarifying why they are not entitled. It would stop signaling that the law aims to protect criminal behavior and any concomitant encouragement to crime. Further, it would end the confusing message that comes with the exclusionary rule exceptions that the Court does not care enough about those supposed constitutional violations to provide their sufferers with an effective and readily available remedy.

This forfeiture-of-interests approach would also neuter all justifications for the exclusionary rule that build on the proposition that there has been a government violation of the Fourth Amendment. The approach would undermine the notion that a criminal defendant can serve as a proxy for law-abiding persons, which is part of the prevailing deterrence-of-police-misconduct theory for the exclusionary rule.⁵⁹ Such a criminal defendant has forfeited the interests that would give him the proxy status to represent the law-abiding. Likewise, this approach would render moot other theories that the Court has used in the past to justify exclusion, such as that a Fourth Amendment infringement requires exclusion under the Fifth Amendment privilege, or that judicial integrity requires that the courts not acquiesce in unconstitutional conduct, or perhaps that the broader postulates of the Constitution require exclusion of the evidentiary fruits of a Fourth Amendment violation.⁶⁰ It would also sideline similar theories proposed by commentators to support suppression,⁶¹ such as that the Due Process Clauses require exclusion of the evidentiary fruits of a Fourth Amendment violation.⁶² None of those theories apply if the defendant has forfeited through wrongdoing the underlying liberty, privacy, and property interests that could give rise to a Fourth Amendment motion to suppress.

This rights-forfeiture approach also has benefits beyond justifying abandonment of the exclusionary rule. The approach explains why criminal

⁵⁸ MACLIN, *supra* note 13, at 2.

⁵⁹ See *supra* notes 23–25 and accompanying text.

⁶⁰ See *supra* notes 14–17 and accompanying text.

⁶¹ The rights-forfeiture approach would neutralize the argument that the exclusionary rule never does more than try to place the parties in the status quo ante, so that the Fourth Amendment itself imposes the costs in terms of lost convictions and impaired law enforcement. See MACLIN, *supra* note 13. Under the rights-forfeiture approach, there is no Fourth Amendment violation.

⁶² See *Re*, *supra* note 23, at 1890 (arguing that the exclusionary rule should be viewed as “a product of the Fourth Amendment and the Due Process Clauses working together”). Cf. Albert W. Alschuler, *Regarding Re’s Revisionism: Notes on The Due Process Exclusionary Rule*, 127 HARV. L. REV. F. 302, 303, 307–308, 323–24 (2014) (supporting the proposition that the Due Process Clauses can ground an exclusionary rule, but disagreeing with aspects of *Re*’s argument and favoring a more robust exclusionary rule than the one *Re* proposes).

actors should not have any remedy under 42 U.S.C. § 1983⁶³ for their detention, prosecution, and sentence upon conviction. The federal courts have been forced to use pretzel logic or no logic at all to address why those outcomes are not proximately caused by a clearly established⁶⁴ police violation of the aggrieved defendant's Fourth Amendment rights and do not constitute compensable injuries for purposes of § 1983.⁶⁵ Clearly established police violations are sometimes an important factual cause of the detentions, prosecutions, and sentences and are not so divorced from them by any intervening party's actions as to relieve the police from liability under conventional notions of proximate causation.⁶⁶ A more straightforward explanation would focus on the wrongdoing of the criminal actor in the first

⁶³ As currently codified, the statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court provided, as a matter of federal common law, an equivalent cause of action for violations by federal officials. *Id.* at 397.

⁶⁴ Unless the violation is of clearly established law, the police officer would enjoy immunity from personal liability in a § 1983 suit, according to the Supreme Court's "qualified immunity" doctrine. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967) (inventing the "qualified immunity" doctrine).

⁶⁵ *See, e.g., Lingo v. City of Salem*, 832 F.3d 953, 960 (9th Cir. 2016) (in response to claim that arrest and subsequent harms resulted from illegal search where criminal charges were ultimately dropped, asserting, *inter alia*, that "the government's use of illegally obtained evidence is [not] itself a constitutional concern"); *Black v. Wington*, 811 F.3d 1259, 1268 (11th Cir. 2016) (in response to claim that arrest and subsequent detention was based on illegal search where criminal charges were dropped, asserting, *inter alia*, that "[e]xclusion of the evidence found by [the officers] on the basis that they had no legal right to search the [area] would, in effect, be an application of the exclusionary rule to this case.") (quoting *Wren v. Towe*, 130 F.3d 1154, 1158 (5th Cir. 1997)); *Townes v. City of New York*, 176 F.3d 138, 146 (2d Cir. 1999) (in response to claim that arrest was based on illegal stop where the resulting evidence was erroneously admitted but the conviction was ultimately reversed, asserting, *inter alia*, that "the trial court's refusal to suppress the evidence" was "an intervening and superseding cause of Townes's conviction."); *see also Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994) (declaring, without an explanation, that "the 'injury' of being convicted and imprisoned (until [the] conviction has been overturned)" is not an "actual, compensable injury" as required by § 1983).

⁶⁶ *See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW* 192 (7th ed. 2016) (noting that a responsive intervening cause does not relieve the initial wrongdoer (here, the police officer) from liability where (as here) the subsequent events would not be unforeseeable).

instance as warranting the denial of § 1983 remedies for such outcomes.⁶⁷ The rights-forfeiture theory provides that explanation given that § 1983 would not apply if there is no violation of a constitutional right.⁶⁸

Note that, without concern over expanded remedies for law-breakers as a cost of enforcement, the Court could also adjust Fourth Amendment law to better protect the liberty, privacy, and property interests of the law-abiding. For example, the Court could tighten the current law on police reliance on exigencies to search, which blinks reality about what is a police threat to enter premises without authority.⁶⁹ Further, the Court could abandon the ruling in *Illinois v. Gates*,⁷⁰ a decision on the standard by which to judge probable cause, when based on an informant's tip, which was facially illogical and arguably too prosecution-oriented.⁷¹ Likewise, the Court could modify the qualified immunity doctrines that it constructed, on dubious technical legal grounds, to avoid over-deterrence of police officers in § 1983 actions seeking monetary remedies.⁷²

While attractive at first blush, however, this rights-forfeiture theory raises problems. First, it would require the use of a presumption that would

⁶⁷ Admittedly, the notion that the police officer's illegal arrest was not the proximate cause of the detention, prosecution, conviction, and sentence was a long-standing argument used by courts to deny relief to the prisoner. See Alschuler, *supra* note 62, at 308.

⁶⁸ See *supra* note 65.

⁶⁹ See *Kentucky v. King*, 563 U.S. 452, 455–56 (2011) (holding that warrantless police act of banging on apartment door “as loud as [they] could” and yelling, “[t]his is the police” or “[p]olice, police, police,” was not a violation of the Fourth Amendment nor a threat to enter in violation of the Fourth Amendment and, thus, the police could enter on an exigency theory if they subsequently heard noises inside that indicated occupants were destroying illicit drugs).

⁷⁰ 462 U.S. 213 (1983).

⁷¹ In *Gates*, the Court abandoned a two-pronged standard for assessing informant tips that it had previously enforced in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). See *Gates*, 462 U.S. at 227–30. Under the *Aguilar-Spinelli* test, the magistrate was required to find that the informant had an adequate basis of knowledge and was a credible person. See, e.g., *Aguilar*, 378 U.S. at 114. Under *Gates*, the basis of knowledge and veracity prongs are not treated as separate requirements. See *Gates*, 462 U.S. at 233. The Court called for a “totality-of-the-circumstances” assessment that allowed the strength of one prong to make up for weakness in the other. See *id.*

Commentators have generally criticized as illogical the Court's view that the two prongs are not independently important. See, e.g., Wayne R. LaFare, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1065–70 (1987) (contending that all of the rationales offered by the *Gates* majority for abandoning the two-prong standard were unpersuasive); Alexander P. Woollcott, Recent Development, *Abandonment of the Two-Pronged Aguilar-Spinelli Test: Illinois v. Gates*, 70 CORNELL L. REV. 316, 329 (1985) (asserting that *Gates*'s abandonment of the two-prong test neutralized the “protection against the issuance of warrants based on purely conclusory information provided by potentially unreliable informants”). It is doubtful that information that an informant is credible should be understood to indicate that the informant would not rely on hearsay, and it is even more clearly untenable to assume that a report of first-hand knowledge by an informant means that the informant is a truth-teller. See DRESSLER, MICHAELS & SIMMONS, *supra* note 4, at 134–36 (discussing several criticisms of the *Gates* majority opinion and concluding that it was “probably wrong” that “strength in the basis-of-knowledge prong can make up for weakness in the informant's veracity”).

⁷² See William Baude, *Is Qualified Immunity Unlawful?* 106 CALIF. L. REV. 45, 51 (2018) (explaining that there are no technical legal grounds that can sustain the modern doctrine of qualified immunity constructed by the Court).

rise and fall in unsettling ways. Imagine, for example, that the police in a murder investigation claim to have discovered a bloody knife in the defendant's home through a search and seizure that would have amounted to a Fourth Amendment violation if no evidence of crime turned up and he were innocent. Under the rights-forfeiture approach, the defendant would have no grounds for a motion to suppress. He would be *presumed* to have forfeited the otherwise legitimate interests in liberty, privacy, and property that could support the motion by virtue of having relied on them to pursue or hide his crime.

Yet, what if the defendant contended that the police planted the bloody knife and otherwise framed him for the murder? Although the rights-forfeiture presumption could perhaps still justify refusing suppression at the criminal trial, it seems that it should not necessarily deny his litigation of the Fourth Amendment claim in a § 1983 action. The reason is that his claim of innocence based on a set-up might be true! If he were acquitted, the presumption of forfeiture of his Fourth Amendment rights seemingly should disappear. He would then have grounds to pursue a § 1983 remedy for the improper police search.

But what if the government simply dropped the murder case and did not go forward? Could the defendant then pursue a § 1983 action? The answer probably should be yes, although it is not clear how the answer should play out in the pre-trial civil process on a defense motion for summary judgment based on forfeiture. How much proof of the plaintiff's criminal guilt or innocence should one or the other of the parties have to offer to support or overcome the motion?

Moreover, what if the police had searched his house and found nothing relevant but defendant were ultimately found guilty of the murder? Could defendant pursue the § 1983 action for the search? It seems that he should be able to do so, at least in theory. But, to play devil's advocate, why did the forfeiture of his privacy and property interests not arise and survive, given that he was, in some sense, always hiding the murder by not coming forward and confessing it?

Further, what if the defendant were found guilty but still claimed that the police planted the bloody knife in his home? If we say in the prior scenario that the failure of the police to find anything during the search would, in theory, give rise to a non-exclusionary remedy for the improper search, that bears on our answer to this new scenario. Would not our defendant in this new scenario also have, at least in theory, a § 1983 remedy? These hypotheticals reveal that the explanations as to when and why the presumption of forfeiture arises and disappears is more complicated than we might initially imagine.⁷³

⁷³ Consider what should be the outcome if the police conduct a search that turns up evidence of crime by a guilty party in the residence or business premises of an innocent party to which the guilty party has no connection. Should the innocent party have a § 1983 action for money damages if the search

There are other conundrums associated with this rights-forfeiture approach. One of them would arise from acknowledging that even lawbreakers should retain some Fourth Amendment interests. Consider arrests involving excessive force, such as police shootings of non-dangerous, but clearly guilty, fleeing suspects.⁷⁴ Despite the implementation of a rights-forfeiture approach, it seems that those aggrieved criminal actors should still have a protected Fourth Amendment interest in their bodily integrity and recourse of some sort, even if not through an exclusionary rule.⁷⁵ However, to make this concession is to begin to acknowledge that it goes too far to say that criminal actors forfeit all of their Fourth Amendment interests in the process of committing and covering up their crimes. Indeed, should we not also protect against the unreasonable destruction of the criminal actor's property⁷⁶ or unnecessary intrusion into his privacy caused, for example, by a police invitation to the press to accompany them during the search of defendant's residence?⁷⁷ Also, what about a public strip and cavity search of a person caught with a small amount of marijuana?⁷⁸ But, then, precisely how do we define what interests remain nonforfeited, and how do we justify the distinctions drawn?

How many people, moreover, have occasionally relied on their Fourth Amendment interests for mostly acceptable purposes, while simultaneously relying on them secondarily for minor, criminal ones? Imagine a great performance artist who only commits a crime by concealing a small amount of marijuana along with several blues harmonicas in his trousers on his way to a musical extravaganza involving the harps (and enhanced by his marijuana usage) at which he stands to make several thousand dollars. Suppose he would also probably bring pleasure to a large gathering of fans who often give him a series of rousing ovations. Should the police and local government be free from any requirement of compensation for stopping and searching him at a

would clearly have violated the Fourth Amendment had no evidence of crime turned up? The answer probably should be yes, but it is not clear.

⁷⁴ See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (prohibiting under the Fourth Amendment the use of deadly force to prevent the escape of a felony suspect unless the officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others").

⁷⁵ See *id.* at 22 (affirming the possible liability of defendants in a § 1983 suit for a police killing by excessive force of a fleeing felon).

⁷⁶ See *United States v. Ramirez*, 523 U.S. 65, 71 (1998) ("Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful . . .").

⁷⁷ See *Wilson v. Layne*, 526 U.S. 603, 614 (1999) ("[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.").

⁷⁸ Such a strip search could be impermissible although it would be permissible in the station house or jail setting. See *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 322–23 (2012) (upholding embarrassing strip searches, including of body cavities, of petty noncontraband offenders in jail settings).

drug “checkpoint” without reasonable suspicion,⁷⁹ seizing his effects, arresting him, and thereby preventing his performance, only because he possessed a small amount of illegal cannabis? If not, the challenge is to explain how doctrine could reject his reliance on liberty, privacy, and property for criminal ends, but honor his reliance for other purposes.

The rights-forfeiture approach is also vulnerable to the claim that it is revisionist in the extreme. The textual objection is not compelling. As noted, the Fourth Amendment does not explicitly exclude criminal actors from its protections.⁸⁰ However, critics favoring rights forfeiture could counter that unauthorized invasions of the liberty, privacy, and property interests of persons using them for criminal ends are generally not “unreasonable” in the language of the amendment.⁸¹ To the extent that history matters, this argument coincides with the common-law “ex post success rule,”⁸² which held that if the constable, even without authority, seized a suspect who *was* a felon or items that *were* stolen or contraband, he was not liable.⁸³ Nonetheless, the Court has long followed a contrary view regarding criminal actors⁸⁴ and explicitly so more than a century ago in *Weeks*,⁸⁵ which also underscores that rights forfeiture arguably would be the most historically jarring of the alternatives proposed by which the Court could eradicate the exclusionary rule.

II. FORFEITURE OF A CONSTITUTIONALLY-GROUNDED REMEDY

As a second option to eliminate the exclusionary rule, the Court could declare that lawbreakers forfeit their constitutionally-based claim to a remedy when they rely on their Fourth Amendment interests to commit or hide their crimes. This approach, unlike the rights-forfeiture approach, avoids the contention that the Fourth Amendment does not explicitly

⁷⁹ In *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000), the Supreme Court rejected under the Fourth Amendment a drug interdiction checkpoint program that involved suspicionless vehicle stops that was aimed primarily at enforcement of criminal drug laws.

⁸⁰ See *supra* text accompanying note 13; U.S. CONST. amend. IV.

⁸¹ There is a plausible rejoinder to this counterargument building on the second clause in the amendment: The demand that police officers sometimes seek a warrant based on “probable cause” suggests, given that “probable cause” includes evidence of criminal behavior, that the amendment gives criminals some protection. Nonetheless, that constitutes an ethereal protection for criminals if the first clause trumps the second. The criminal would forfeit his Fourth Amendment liberty, privacy, and property rights by virtue of the government’s discovery of evidence of his criminal behavior (rendering the invasion “[r]easonable”) where a warrant was not secured. U.S. CONST. amend. IV.

⁸² Steiker, *supra* note 27, at 829; see also Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1192 (2016) (“What ‘unreasonable’ meant in the seventeenth century was ‘against reason,’ which translated into ‘against the reason of the common law.’”).

⁸³ See Amar, *supra* note 51, at 767 (noting that, at common law, “ex post success was a complete defense”).

⁸⁴ See, e.g., Rosenthal, *supra* note 27, at 528 (“It is [well-settled] that an unreasonable search cannot be justified by what is found.”) (citations omitted).

⁸⁵ See *supra* notes 8–9 and accompanying text.

exclude lawbreakers from its protections. Under this approach, delinquents have Fourth Amendment interests by virtue of the text, but have lost any constitutionally-grounded claim to a remedy due to their wrongdoing.

A “constitutionally-grounded” remedy for present purposes is one that the Court has concluded the Constitution gives it the authority—but not the obligation—to impose.⁸⁶ The prevailing view today is that the exclusionary rule to enforce the Fourth Amendment is of that kind,⁸⁷ even if such a grounding seems implausible in light of the diminished and contorted contours of the current rule.⁸⁸ The explanation may come down to the notion advocated at times by scholars, but not endorsed by the Court, that there exists something akin to “constitutional common law.”⁸⁹

The view that a lawbreaker forfeits the constitutionally-grounded remedy for the violation of his Fourth Amendment rights would operate similarly in several important respects to the rights-forfeiture approach. First, like the rights-forfeiture approach, the remedy-forfeiture approach makes the criminal actor’s wrongdoing the focus of attention. His dereliction is the reason he is not entitled to what would otherwise be a constitutionally-justified remedy—evidentiary suppression—for the violation of his Fourth Amendment interests.

This remedy-forfeiture approach also has several of the same practical benefits as the rights-forfeiture approach. It would eliminate Fourth Amendment suppression motions from criminal cases, saving substantial judicial and prosecutorial resources. It would end the practice of granting evidentiary suppression in favor of some criminal defendants and stop any concomitant encouragement to crime. It would also provide a rationale about why such defendants are not entitled to the benefit that the exclusionary rule provides. Further, it would end the rather arbitrary disparities that the exceptions to the exclusionary rule currently cause in the way we treat criminal defendants who are aggrieved by Fourth Amendment violations.⁹⁰

⁸⁶ *Davis v. United States*, 564 U.S. 229, 243–44 (2011). In *Davis*, the Court described the suppression remedy as “a ‘prudential’ doctrine, created by this Court to ‘compel respect for the constitutional guaranty.’” *Id.* at 236 (citations omitted).

⁸⁷ *See, e.g.*, Rosenthal, *supra* note 27, at 530, 545 (explaining that “contemporary doctrine” rejects any claim that the Fourth Amendment generally “requires the use of the exclusionary rule,” but that exclusion is sometimes necessary to achieve constitutionally adequate deterrence).

⁸⁸ *See supra* note 51 and accompanying text.

⁸⁹ For the foundational article, see Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). For arguments against constitutional common law as a normative theory, see Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978). For a short rebuttal to Schrock & Welsh, see Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1172–76 (1986).

⁹⁰ For example, it is not compelling that there is a lesser deterrent effect if a Fourth Amendment right is enforced in federal habeas rather than on direct appeal in a criminal case. However, in *Stone v. Powell*, 428 U.S. 465, 481–82 (1976), the Court held that Fourth Amendment rights cannot be enforced in federal habeas proceedings where the prisoner received a full and fair hearing on the issue in state court. That holding appears especially dubious given its exemption for those who did not receive an

Like the rights-forfeiture approach, this remedy-forfeiture approach also could respond to any theory that the Court has offered (and some others, as well) to support the exclusionary rule. It would counter the prevailing justification that law-breakers effectively represent law-abiders in the judicial effort to deter police violations of the Fourth Amendment because, under this approach, the law-breaker has forfeited the remedial right that would otherwise make him an appropriate proxy. At the same time, this approach could deflect claims that suppression is the product of the implicit demands of the Fourth Amendment, the operation of the Fifth Amendment privilege, the mandates of judicial integrity, the mandates of the Due Process Clauses, or the force of aggregated provisions of the Constitution.⁹¹ Those theories do not work if the offender's abuse of his Fourth Amendment rights bars his reliance on those rights to appeal for a remedy.

However, this remedy-forfeiture approach also poses what some may see as problems. Unlike the rights-forfeiture approach, this approach cannot justify the denial of claims by law-breakers under § 1983 for damages associated with their detentions, prosecutions, and sentences upon conviction.⁹² Those are statutory remedies, unlike the exclusionary rule, which has been constitutionally-grounded (unconvincingly)⁹³ even if not constitutionally required. And, as we have seen, where a clearly established Fourth Amendment violation by the police has contributed to a law-breaker's detention, prosecution, and conviction, the courts often have not offered the most satisfying explanations as to why the offending police officer should be relieved from liability under § 1983 for the full harm that ensues for the law-breaker, including imprisonment.⁹⁴ Under the remedy-forfeiture approach, the lower courts would have to continue to offer unimpressive rationales for why all the damaging consequences are not remediable under the statute.⁹⁵ On this score, then, the rights-forfeiture approach is superior.⁹⁶

Another problem focuses on history. The Court has, for many decades, rejected the notion that an aggrieved criminal defendant has a *personal* claim to a constitutionally-grounded remedy for improper police searches and seizures.⁹⁷ The Court also has chipped away under a utilitarian analysis at the only constitutionally-grounded remedy in play—the exclusionary rule.⁹⁸

adequate hearing in state court. That factor would not bear significantly on whether enforcing the Fourth Amendment in federal habeas would help deter improper police behavior.

⁹¹ See *supra* notes 14–17, 62–63 and accompanying text.

⁹² For the text of § 1983, see *supra* note 63.

⁹³ See *supra* note 51 and accompanying text.

⁹⁴ See *supra* notes 64–65 and accompanying text.

⁹⁵ See *supra* note 65.

⁹⁶ See *supra* notes 67–68.

⁹⁷ See *supra* notes 20–25 and accompanying text.

⁹⁸ See *supra* notes 20–25 and accompanying text.

To now declare that the criminal defendant *forfeits* a claim to such a remedy would depart from the foundation and trajectory of the Court's last half-century of opinions on the exclusionary rule.⁹⁹ It might be slightly less discordantly revisionist than the rights-forfeiture strategy. However, the sharp incongruity with past decisions can still be seen as a mark against it.

A final demerit for this remedy-forfeiture approach is its lack of explanatory transparency. If the exclusionary rule is something constitutionally inspired but not constitutionally required, eviscerating it on a "forfeiture" theory seems like an evasion of some more truthful explanation. The forfeiture notion does not seem quite so disingenuous when used to void certain liberty, privacy, and property rights of the law-breaker that survive for the law-abider. But, even in that context, there is deception, which means that this demerit could also have been listed for the first approach. The exclusionary rule has been maintained in the modern era not as a constitutional requirement but as a constitutionally authorized remedy based on non-textual policy considerations.¹⁰⁰ In that light, the more transparent explanation for eviscerating it is that whatever prudential arguments were thought to justify it in the past are now considered inefficacious. A forfeiture contention (either of rights or remedies), unless combined with that more transparent explanation, obscures more than reveals why those policy considerations are no longer valid.

III. ABANDONMENT OF THE UTILITARIAN JUSTIFICATION FOR THE REMEDY

Instead of relying on forfeiture notions to eliminate the exclusionary rule and effectively hiding the true explanation, the Court could follow the implications of its opinion in *Hudson v. Michigan*¹⁰¹ and merely declare that the only modern rationale that it has cited to maintain that remedy has become outdated. The only modern rationale for exclusion, of course, is deterrence of police misconduct.¹⁰² In *Hudson*, Justice Scalia, for the majority, suggested that federal civil-rights lawsuits, encouraged by post-*Mapp* legislative changes—including, for example, the extension of the remedy to reach the deep pockets of municipalities and the provision of statutory fees for plaintiff lawyers—can now adequately remedy Fourth Amendment violations.¹⁰³ He also suggested that police officers are less likely than during the pre-*Mapp* era to violate the Fourth Amendment because they

⁹⁹ See *supra* notes 20–25 and accompanying text.

¹⁰⁰ See *supra* notes 20–25 and accompanying text.

¹⁰¹ 547 U.S. 586, 588–602 (2006).

¹⁰² See *supra* notes 20–25 and accompanying text.

¹⁰³ See 547 U.S. at 597–98 (explaining why the Court should not assume that exclusion in the modern era is essential simply because the Court found that it was necessary deterrence nearly half a century earlier).

are generally better trained and more professional.¹⁰⁴ In an appropriate case, the Court could assert that those changes have made deterrence through suppression less important across the board such that a cost-benefit assessment now favors abandoning the exclusionary remedy entirely.

This non-utility approach brings some of the benefits of the second option—the forfeiture-of-remedies strategy. This non-utility approach would foreclose all Fourth Amendment suppression motions from criminal cases, saving public resources. It would eliminate the windfall in the form of suppression that we currently give to some criminal defendants and provide a rationale for taking that benefit away. It would also eliminate the rather arbitrary disparities, resulting from exceptions to the exclusionary rule, that currently arise in how we treat criminal defendants whose Fourth Amendment rights have been infringed.¹⁰⁵

The principal benefit of this non-utility approach, compared to the first two, is that it would not cast the Court as so much of a change agent. This approach would build on the gradual flow of precedent over the last half-century, during which the Court recast the justification for exclusion as resting on purely consequentialist considerations and then gradually restricted it by declaring it non-utilitarian on the margins over and over again.¹⁰⁶ The assertion of changed circumstances regarding the availability of federal civil-rights remedies and the professionalization of the police as the justification for the final blow would also help inoculate the Court against claims of judicial activism. Citing those changed circumstances would give the appearance that the Court has not become, by dint of its changed composition, an opponent of the exclusionary remedy, but rather that the remedy has merely outlived its usefulness.

This non-utility approach, however, has imperfections. The first one also applied to the remedy-forfeiture approach. Like that second option, this non-utility approach cannot explain the rejection of suits by law-breakers alleging clearly established Fourth Amendment violations under § 1983 and seeking police liability for damages associated with their resulting detentions, prosecutions, and sentences upon conviction. The courts would have to continue to offer questionable reasoning for why all the damaging consequences for the aggrieved law-breaker are not remediable under that provision.¹⁰⁷ On this point, then, the first option—the rights-forfeiture approach—remains superior.¹⁰⁸

¹⁰⁴ See *id.* at 598–99 (asserting the “increasing professionalism of police forces” and “the increasing evidence” that they “take the constitutional rights of citizens seriously”).

¹⁰⁵ See *supra* note 90 and accompanying text.

¹⁰⁶ See *supra* notes 20–25 and accompanying text.

¹⁰⁷ See *supra* note 65.

¹⁰⁸ See *supra* notes 66–67 and accompanying text.

An additional demerit arises from the inability of this non-utility approach to overcome claims that the exclusionary rule is not fully explained as a prudential doctrine. Despite the Court's efforts in the modern era to cast the remedy as only about deterrence of police misconduct and, thus, utility, that is not the whole truth about its history.¹⁰⁹ As Richard Re has noted, the modern iteration of the rule is not fully consistent with the view that the goal is deterrence of police violations.¹¹⁰ If that were true, the Court would not, for example, continue to impose stringent standing requirements on criminal defendants as a prerequisite to their success on motions to suppress.¹¹¹ Whether a violation is of the aggrieved defendant's Fourth Amendment interests, or those of another person, has little, if anything, to do with the deterrent effect of suppression.¹¹² Such a requirement is, instead, consistent with the notion that exclusion is a personal right of the aggrieved party alone. The current doctrine reflects that the rule was originally thought to be required for reasons other than police deterrence.¹¹³ The non-utility explanation for abolition does not adequately confront that reality. On this score, therefore, it is inferior to the first two options—the forfeiture approaches.¹¹⁴

Another demerit of this non-utility approach is that it does not explain why we should ignore a constitutional right because it is inconvenient to honor it. If lawbreakers have Fourth Amendment rights, then lawbreakers should have a meaningful remedy for violations committed against them, at least when there is one readily available. Otherwise, as Chief Justice Marshall asserted, the Court is effectively dissembling when it asserts that lawbreakers have those rights in the first instance.¹¹⁵ On this score, then, a forfeiture theory is decidedly superior.

Probably the most serious problem with the non-utility approach, however, is that its basic premise may be false. The Court would be ceding control over the protection of law-abiders against police overreach to a potential tyranny of the majority (in legislatures or on civil juries) based on a wildly unsubstantiated proposition—that suppression is non-utilitarian for law-abiders. The Court has no good information to conclude that the exclusionary rule is ineffective and no good basis to decide that if it is effective the consequences are non-utilitarian.¹¹⁶

¹⁰⁹ See *supra* notes 20–25 and accompanying text.

¹¹⁰ See Re, *supra* note 23, at 1894–1902 (asserting that “deterrence arguments cannot justify central features of current exclusionary doctrine”).

¹¹¹ See *id.* at 1896 (contending that this requirement is “nonsensical from a deterrence standpoint”).

¹¹² See *id.* (noting that “the threat of springing Person A from prison could very well deter police from violating Person B’s constitutional rights”).

¹¹³ *Id.* at 1899.

¹¹⁴ See *supra* Parts I–II.

¹¹⁵ See *supra* notes 40–41 and accompanying text.

¹¹⁶ See generally Danielle Hayes, Note, *He Say, She Say: Utah v. Strieff and the Role of Narrative in Judicial Decisions*, 61 HOW. L.J. 611, 624–28, 631–32 (2018) (describing that studies of police activity

The exclusionary remedy may well significantly deter police violations of the Fourth Amendment against law-abiders in many circumstances, over and above any deterrent influence of § 1983 remedies. There is anecdotal evidence to that effect.¹¹⁷ There is also little doubt among the scholarly community or police, lawyers, and judges participating in the criminal justice system that exclusion has had some deterrent effect, despite the debate about the magnitude of its influence in differing circumstances.¹¹⁸ For example, after the implementation of the exclusionary rule in various jurisdictions, affected police departments quickly began emphasizing training of officers so as to avoid the political fallout that would occur if evidentiary exclusion for violations became common.¹¹⁹ It is reasonable to think that this newfound concern with following Fourth Amendment law would have deterred Fourth Amendment violations against law-abiders.

As Carol Steiker has explained, the exclusionary rule also has ensured “that the courts will develop a fairly comprehensive set of constitutional guidelines for law enforcement—guidelines that the political branches of government would otherwise [have] neglect[ed].”¹²⁰ The judiciary almost surely would not have developed this Fourth Amendment doctrine without an exclusionary rule giving defendants an incentive to challenge search and seizure practices in criminal cases.¹²¹ Accordingly, she notes that if the Court now completely abandons the exclusionary rule, we would plausibly expect to see not only little action to fill the gap from the political branches but a “resounding silence” from the judiciary in further developing important aspects of Fourth Amendment law through § 1983 suits.¹²²

after *Mapp* initially “suggest[ed] the rule was an effective deterrent,” but has produced “a mix bag of results” since the advent of exceptions to the exclusionary rule in 1974).

¹¹⁷ See, e.g., Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372–73 (2008) (noting that police respond to Supreme Court Fourth Amendment rulings and that those rulings would not have come about were there no exclusionary rule).

¹¹⁸ See, e.g., *id.* at 1373 (“Judges, prosecutors, defense attorneys, and police officers agree that the exclusionary rule has influenced police conduct for the better.”); see also Rosenthal, *supra* note 27, at 540–43 (“[T]he empirical debate centers on the magnitude of the exclusion’s deterrent effects; there is little debate about whether exclusion has some deterrent effects.”).

¹¹⁹ See, e.g., Alschuler, *supra* note 117, at 1372 (noting anecdotal evidence that the exclusionary rule achieves its deterrence effects largely through “long-term guidance and habit formation” occurring within police departments).

¹²⁰ Steiker, *supra* note 27, at 851.

¹²¹ Alschuler, *supra* note 117, at 1372–73; see also Steiker, *supra* note 27, at 851 (“By creating litigation incentives in a wide body of cases in which defendants will, of necessity, be provided with court-appointed counsel, the exclusionary rule ensures that the courts will develop a fairly comprehensive set of constitutional guidelines for law enforcement—guidelines that the political branches of government would otherwise neglect.”).

¹²² Steiker, *supra* note 27, at 851; see also Rosenthal, *supra* note 27, at 552 (noting that numerous “scholars have expressed concern that absent a vigorous exclusionary remedy, the development of Fourth Amendment law is likely to be stunted”); Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 421–22, 428 (2012) (including a study of federal appellate cases from 2005 to 2009 and revealing that virtually

There is also little reason to believe that § 1983 suits otherwise would have much deterrent effect on most police violations.¹²³ There is a high bar to injunctive relief.¹²⁴ And, in the relatively few cases when plaintiffs can get past immunity doctrines and other obstacles to damage relief,¹²⁵ civil juries generally remain unreceptive to claims alleging police misconduct.¹²⁶

The force of the exclusionary rule, moreover, is not, as the Court has often suggested, simply about the penalizing or disincentivizing effect operating directly on individual police officers.¹²⁷ Its influence may come mostly through its effect on police agencies more generally.¹²⁸ We can sensibly believe that police agencies will strive to avoid—through, for example, better training—the political problems that arise for them if criminals are set free based on police violations of the Fourth Amendment.¹²⁹ Moreover, as regards individual police officers, the influence is likely more complex than its direct effect on the thinking of those otherwise ready to violate.¹³⁰ As Professor Steiker has explained, the exclusionary rule may be effective “not so much for the fear that it inspires in the ‘bad cop,’ but rather in the way that it creates an alternative vision of the ‘good cop.’”¹³¹ By spurring the development of rules about what the Fourth Amendment demands, the exclusionary rule has helped give “good cops” an “aspirational counterpart” to the “highly

all those involving consent, *Terry* issues, and the vehicle exception were raised in criminal prosecutions rather than in § 1983 actions).

¹²³ Excessive force claims may produce more jury verdicts for plaintiffs than other claims, but even those will generally be small. *See* Leong, *supra* note 122, at 423 (noting that excessive force claims tend to be litigated in § 1983 actions); Calabresi, *supra* note 39, at 115 (noting “jury disinclination to give significant awards”).

¹²⁴ *See* Rosenthal, *supra* note 27, at 549–50 (noting that “plaintiff must establish a credible and nonspeculative threat that he will be subjected in the future to an allegedly unreasonable search and seizure” and, when brought against a municipality, plaintiff must prove an “actionable municipal custom, policy, or practice”).

¹²⁵ *See id.* at 548–50 (discussing various obstacles facing a typical § 1983 plaintiff alleging a Fourth Amendment violation by police).

¹²⁶ *See, e.g.,* Calabresi, *supra* note 39, at 114–15 (explaining that jurors are reluctant to identify with a criminal defendant or even with an innocent person illegally searched or seized by the police and, thus, are reluctant in a tort action against the police to render a verdict in the plaintiff’s favor).

¹²⁷ *See* Rosenthal, *supra* note 27, at 541 (contending that exclusion encourages police policy and training changes that promote compliance with Fourth Amendment doctrine).

¹²⁸ *See, e.g.,* William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399 (1981) (“[E]ven if a particular constable is indifferent to whether his arrests and seizures result in convictions, those who run the police department are concerned with successful prosecutions.”).

¹²⁹ *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 417 (2000) (asserting that the exclusionary rule operates on the political incentives of the police); Mertens & Wasserstrom, *supra* note 128, at 399 (“[A]t least the more professional police forces can be expected to encourage fourth amendment compliance through training and such guidelines as the department provides for conducting searches, seizures, and arrests.”).

¹³⁰ *See* Alschuler, *supra* note 117, at 1374 (contending that the exclusionary rule “works over the long-term by allowing judges to give guidance to police officers who ultimately prove willing to receive it”).

¹³¹ Steiker, *supra* note 27, at 852.

aggressive attitudes and behavioral patterns” that tend to develop within modern police forces.¹³²

For present purposes, however, the important point is that there is often a lack of clarity about the degree of deterrent influence of the suppression remedy. While the Court has little good empirical data to decide in what contexts it is effective, some of the Court’s unsupported contentions about its ineffectiveness should seem dubious even to critics of the exclusionary rule. For example, the Court’s unsupported assertion in *Herring* that suppression would only marginally deter *negligent* police violations is counter-intuitive.¹³³ As the dissenters noted, that position contradicts tort law’s response to negligent conduct by private actors.¹³⁴ Yet, the better criticism is not that the Court is demonstrably wrong about deterrence effects in one setting or another but that it has generally made assertions as if it had corroborating information when it is actually shooting in the dark.

When the exclusionary rule deters police violations, moreover, the Court has no special capacity to make or implement nuanced value judgments about whether the costs in crime outweigh the benefits in reduced police abuse for law-abiders. Critics could again justifiably contend that the Court has done a poor job on this score. For example, an intentional but relatively unobtrusive police violation, such as the opening of luggage without a search warrant when the owner is not present, might produce crucial evidence in a homicide case, and many of us might oppose suppression. Yet, the same kind of violation might produce crucial evidence in a marijuana possession case, but most of us might think the police violation to be the greater problem. Murder is not the same as marijuana possession in most contexts, including if the question is how to use suppression to maximize law-abiders’ utility. Nonetheless, the Court has not been able to accommodate crime-type distinctions in its suppression doctrine.¹³⁵ “The seriousness of the crime and the future threat posed by the criminal are irrelevant” under the doctrine.¹³⁶

The non-utility approach would not solve this lack of nuance connected to the seriousness of the crime. Even if the police were to commit a flagrantly obtrusive invasion of liberty and privacy in a minor cocaine possession case, evidentiary suppression would not ensue. Most of us might think that result is also suboptimal because of the need to restrain police aggression, if not for the protection of the cocaine possessor, then for the benefit of the

¹³² *Id.*

¹³³ See *Herring v. United States*, 555 U.S. 135, 147–48 (2009) (asserting that exclusion would produce only “marginal deterrence”).

¹³⁴ See *id.* at 153 (Ginsburg, J., dissenting) (arguing that the majority’s position “runs counter to a foundational premise of tort law—that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care”).

¹³⁵ See Rychlak, *supra* note 23, at 242 (noting that the exclusionary rule requires suppression even if “the crime involved is serious and the criminal is dangerous”).

¹³⁶ *Id.* at 243.

law-abiding. Yet, the larger point is not that the Court is demonstrably wrong about the value judgment in one particular context or another but that it lacks any special ability to decide those value questions for us or the capacity to implement them in a refined way.¹³⁷

The non-utility theory would also ignore that differing circumstances exist in different communities. On the dual problems of crime and police abuse, St. Louis may differ from Ann Arbor, and both may differ from Washington, Austin, Springfield, and Irvine, not to mention the smaller places in the great rural expanse. One community may be besieged by crime but not police abuse or vice versa, while another may have both problems, and another may have neither. Those differences could substantially influence value judgments about the propriety of an exclusionary remedy in criminal cases in those communities. Moreover, those circumstances could change over time in one community but not another. Yet, the Court's doctrine on suppression has treated the country as a static monolith,¹³⁸ and the non-utility theory for abandoning the rule would also follow that pattern.

In the end, if the utility of law-abiders is the focus, then a central contention about why the Court should eliminate the exclusionary rule is also a central contention about why the Court should not eliminate it without a constitutionally-grounded substitute. The argument, again, is that the Court is not a very good decision-maker. That does not mean the Court should rely on legislatures or civil juries in constitutional tort cases to find the right solution, given that the Fourth Amendment is not about majority rule. Yet, if they are not the right decision-makers either, what constitutionally-grounded remedy should the Court implement?¹³⁹

¹³⁷ Difficulties would significantly complicate the imposition of a "serious crimes" exception to the exclusionary rule, which may, in part, explain why the Court has not imposed it. See Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 11–29 (1987).

¹³⁸ The Supreme Court also has sometimes derided the notion that Fourth Amendment protections could "vary from place to place and from time to time." *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

¹³⁹ Commentators have proposed various substitutes for an exclusionary rule, such as punishing offending police officers with contempt citations and providing sentencing concessions or other administratively supervised remedies to aggrieved criminal defendants. See, e.g., Calabresi, *supra* note 39, at 115–17 (proposing sentencing concessions for aggrieved criminal defendants combined with punishments for offending police officers); Rychlak, *supra* note 23, at 249–53 (proposing criminal contempt and punishment for certain offending police officers while retaining evidentiary suppression in some cases); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting) (proposing administrative remedies for aggrieved criminal defendants); see also Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2 (2001) (proposing that courts "experiment with suppression orders that are contingent on the failure of the police department to pay damages set by the court"). Some of these proposals would require legislative enactment. For those that would not, it seems that, while their purpose is to achieve a utility-maximizing equilibrium for law-abiders, the Supreme Court would not have a good constitutional basis to impose them on the states and would not be in a good position to supervise them to achieve the utility-maximizing function.

IV. AN INCLUSIONARY RULE FOR FOURTH AMENDMENT VIOLATIONS

This Part proposes a constitutionally-grounded remedy for Fourth Amendment violations against criminal defendants that does not claim utility-maximization for law-abiders as its primary purpose or that the Court is the right decision-maker. The proposal is that the Court abandon the exclusionary rule but substitute a new remedy called an “inclusionary rule” that would find explanation largely in the Sixth Amendment right to jury trial. After describing the mechanics of the proposal in Subpart A, Subpart B takes up the explanation for its constitutional grounding, and Subpart C provides an assessment of its advantages and demerits.

A. *The Approach*

The proposed inclusionary rule would focus on criminal juries as arbiters of the remedy in criminal cases for Fourth Amendment violations. In the modern era, the idea that juries in criminal cases should play a role in enforcing the Fourth Amendment is not entirely new.¹⁴⁰ A few scholars, beginning with Ronald Bacigal, have proposed that criminal juries decide whether the police have violated the amendment¹⁴¹ or that separate screening juries, according to legislative enactment, decide whether to suppress evidence or fine police officers for violations.¹⁴² However, the inclusionary

¹⁴⁰ See generally Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994) (proposing a structure for Fourth Amendment decisionmaking that, as in the pre-revolutionary period, gives criminal juries a prominent role).

¹⁴¹ See generally Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791 (1981) (proposing criminal jury determination of search and seizure law if the trial judge rules against the defendant in a pre-trial hearing); Bacigal, *supra* note 140 (presenting an expanded version of the proposal); see also Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine*, 107 KY. L.J. 169, 215–17 (2018–2019) (advocating involving juries in Fourth Amendment search inquiries where positive law provides no clear answer); Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 735 (2016) (proposing that criminal juries, based on instructions, be allowed openly to evaluate the propriety of law enforcement action in rendering its verdict, without supplanting the role of the judge in resolving Fourth Amendment suppression motions); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 902 (2014) (arguing that criminal juries should decide criminal constitutional moral matters, including Fourth Amendment reasonableness); Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment from the Supreme Court*, 59 CASE W. RES. L. REV. 1, 4 (2008) (advocating that criminal juries resolve those Fourth Amendment issues that are “heavily dependent on the actions, beliefs, and perspectives of prudent, ordinary citizens”); Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839, 851 (2008) (suggesting that juries could determine whether a government intrusion was a “search” under the Fourth Amendment); George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 150 (1993) (proposing that jury panels dedicated to resolving all the motions set for a day or week decide whether there was a Fourth Amendment violation and that judges decide on suppression).

¹⁴² See George C. Thomas III, *Judges are Not Economists and Other Reasons to be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 48–49 (2001) (proposing a model, to be instituted by legislation, in which “a screening jury would decide whether to suppress the evidence or fine the officer”).

rule proposed here would involve juries in a more limited way, and the explanation for it would rest largely on the Sixth Amendment right to jury trial. The criminal trial judge would continue to decide whether there was a violation of the Fourth Amendment. In cases of violations involving evidentiary fruits, the judge would include an instruction describing the violation and advising the jury to decide whether to take further action, which would involve ignoring the evidentiary fruits and possibly acquitting the defendant of some or all of the charges.¹⁴³

Because the judge's instruction would be crucial to this approach, it would be subject to review on appeal.¹⁴⁴ The instruction should emphasize that the violation was of the United States Constitution, particularly the Fourth Amendment. The judge should summarize the facts making out the violation and advise the jury as to the level of culpability of the wrongdoers, whether it be purposeful, knowing, reckless, or negligent. The judge should identify the officials who acted wrongfully, if possible. The judge should also state what evidence was secured as a result of the violation and make clear that the jury is authorized to ignore that evidence in reaching its verdict on some or all of the charges.¹⁴⁵ Perhaps the judge could also add that the jury might weigh the nature of the police violation against the seriousness of the criminal allegations.¹⁴⁶ However, the judge should note that the law leaves the choice to each juror and should emphasize that each one is free to act according to their own judgment, conscience, and discretion.

While the proposal does not contemplate that evidence be admitted regarding the value of evidentiary exclusion, lawyers should be able to argue the question to a limited extent in their summations. Restricting the evidentiary presentation would help avoid turning the criminal case into a minitrial on that question. Also, because, as we will see, the inclusionary

¹⁴³ The proposal is that the inclusionary rule would not apply where there is no but-for connection between the violation and the evidence discovered.

Should the inclusionary rule apply where there are no evidentiary fruits? For example, what if the police illegally arrested the defendant but probable cause developed independently of the illegal arrest by the time of the defendant's trial? An example of such a scenario arose in *United States v. Crews*, 445 U.S. 463, 469 (1980). The proposal is that, as where there is no but-for connection between the violation and the evidence discovered, the inclusionary rule would not apply.

This position is not crucial to the proposal. If the inclusionary rule were held to apply in such cases, jurors would decide. (Where there were no evidentiary fruits, they would have to be told of their authority directly to decide for acquittal.) However, if that position were taken, the Court would then need to draw some line to clarify when a seizure of the defendant or a search that turned up nothing was otherwise too disconnected from the prosecution to warrant jury consideration.

¹⁴⁴ See *Hedgpeth v. Pulido*, 555 U.S. 57, 60 (2008) (“[V]arious forms of instructional error are not structural but instead trial errors subject to harmless-error review.”).

¹⁴⁵ Should the judge try to state the value of ignoring the evidence? Is the value in honoring the aggrieved defendant's Fourth Amendment rights, in promoting compliance by the police with the Constitution, or both? The proposal is that the judge would allow jurors to decide.

¹⁴⁶ The judge need not try to characterize the seriousness of the charges, because jurors could make that assessment.

rule would rest on the Fourth Amendment and the Sixth Amendment right to jury trial, it would not concern merely utility for law-abiders but also the jury's sense of whether to take further action to honor the defendant's Fourth Amendment rights.¹⁴⁷ In any event, as we have seen, there is not good empirical evidence on the effects of exclusion, and the ultimate utility question is a value judgment, not an empirical one.¹⁴⁸ Nonetheless, the lawyers could appropriately offer arguments before the jury about the justifications for ignoring or considering the evidentiary fruits that would parallel those allowed in death penalty sentencing trials concerning the utility and justness of a death verdict.¹⁴⁹

The proposed inclusionary rule would only apply in limited circumstances. First, because it would rest heavily on the Sixth Amendment right to jury trial, the rule would only apply in criminal jury trials.¹⁵⁰ It would not apply in civil cases, in probation or parole revocation hearings, or in the early stages of a criminal case, such as at the preliminary hearing or the grand jury. Should it apply in criminal bench trials? The proposal is that it should not, given that the defendant would choose, with the consent of the prosecutor and judge, whether to waive a jury trial.¹⁵¹ (The parties could nonetheless agree to have the judge clarify whether she would suppress in a bench trial.) Yet, in the context of a criminal jury trial, there would not be many exceptional situations where the evidentiary fruits of a violation of the defendant's Fourth Amendment rights would come in without the violation instruction.

Should the inclusionary rule apply where the police violate the rights of a third party and thereby secure evidence that incriminates the defendant? The proposal is that it would not apply in those cases, on grounds that we need not view the defendant as a proxy for law-abiders where the police have not infringed his Fourth Amendment rights. This conclusion implies that the remedy—consideration of his request for evidentiary suppression and possibly suppression itself—is also personal to the defendant by virtue of its grounding in his Fourth and Sixth Amendments rights, rather than in

¹⁴⁷ See *infra* text accompanying notes 154–192.

¹⁴⁸ See *supra* notes 27–32 and accompanying text.

¹⁴⁹ In death-penalty cases, trial courts need not allow parties to present all evidence bearing on the utility or morality of the death sanction. The Supreme Court has held that only evidence bearing on the offender's character, record, and crime is required. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). For a discussion of evidence that bears on the utility or morality of the death sanction but that does not meet this test, see Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 324–25 n.11 (1992). Despite the restriction on such evidence, lawyers are allowed to assert in closing argument, and often do, that the death penalty would or would not deter similar crimes and that it is or is not justified on moral grounds. See WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 112–13 (1991).

¹⁵⁰ See *infra* text accompanying notes 154–192.

¹⁵¹ As regards the rules on waiver of jury trial, see LAFAVE ET AL., *supra* note 57, at 1287–89.

something with an uncertain constitutional explanation, but purportedly justified by its utility for law-abiders (the current exclusionary rule).¹⁵²

Should the inclusionary rule apply to mistakes by non-law-enforcement government agents, such as magistrates or judges who erroneously issue warrants? The proposal is that it would apply, unlike the current exclusionary rule.¹⁵³ In such cases, the criminal defendant's Fourth Amendment rights have been violated. There is no persuasive reason to see those violations differently from police violations for purposes of allowing the criminal jury to learn of them and their consequences and to decide whether to take further action.

B. *The Constitutional Basis*

A combination of the Fourth Amendment and the Sixth Amendment right to jury trial¹⁵⁴ could justify the inclusionary-rule approach. The Fourth Amendment basis would require that there be a Fourth Amendment violation and, if so, it would then justify honoring the aggrieved party's liberty, privacy, and property rights and protecting those same rights held by others. The Sixth Amendment grounding would authorize jury action in response and limit it by requiring that it come in a criminal trial.

The Sixth Amendment protection would operate in its dual role as a personal safeguard for the charged defendant and as a structural assignment of decision-making authority.¹⁵⁵ According to academic convention, some constitutional provisions embody individual rights while others embody allocations of power.¹⁵⁶ The Sixth Amendment guarantee of jury trial in criminal cases is both—"a valued right of persons accused of crime" and "an allocation of political power to the citizenry."¹⁵⁷

¹⁵² *United States v. Leon*, 468 U.S. 897, 906 (1984). This is not crucial to the proposal if we recognize that constitutional doctrine is often not fully coherent. The inclusionary rule could be held applicable in such cases on the view that the court should let the jury determine how to balance the dual dangers of crime and excessive police aggression whether or not the defendant has standing.

¹⁵³ *See id.* at 916 (declaring that the exclusionary rule was not designed to punish the errors of judicial officers).

¹⁵⁴ *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .").

¹⁵⁵ *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994) ("Jury trial was a valued right of persons accused of crime, and it was also an allocation of political power to the citizenry."); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-85 (1991) (explaining that the Sixth Amendment right serves both functions).

¹⁵⁶ *See* Alschuler & Deiss, *supra* note 155, at 876 (asserting that academic convention divides constitutional provisions into two classes—those that "allocate governmental power" and those that "guarantee individual rights").

¹⁵⁷ *Id.* Cf. Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 405 (2009) ("[T]he right to a jury trial, particularly in the criminal context, was viewed almost exclusively as the people's right, not as a right of the accused . . .").

The Sixth Amendment right to jury trial has been understood as more important than the textually similar dual-role protection—the Seventh Amendment right to jury trial in certain civil cases.¹⁵⁸ First, the right in the Sixth Amendment, unlike that in the Seventh, has been deemed “fundamental to the American scheme of justice” and thus has been incorporated against the states.¹⁵⁹ Further, the right in the Sixth, unlike that in the Seventh, has been understood to give the judiciary less room to intrude on the authority of the jury to decide matters in favor of protected parties,¹⁶⁰ which, in the case of the Sixth Amendment, includes only criminal defendants, and, in the case of the Seventh Amendment, encompasses civil litigants more generally.¹⁶¹ Criminal trial courts “may not direct a verdict of guilty, in whole or in part, no matter how conclusive the evidence might appear.”¹⁶² To do so would impede the jury’s acknowledged power to render a verdict of not guilty “in the teeth of both law and facts,”¹⁶³ and would “invade the defendant’s constitutionally protected right to trial by jury.”¹⁶⁴ Criminal trial courts also must use great care in employing special verdict forms, lest they infringe on the criminal jury’s independence.¹⁶⁵ In contrast, federal trial courts in civil cases, among other actions that lessen the civil jury’s power, grant motions for summary judgment,¹⁶⁶ direct verdicts,¹⁶⁷ and

¹⁵⁸ See U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

¹⁵⁹ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); see also *McDonald v. City of Chicago*, 561 U.S. 742, 765 n.13 (2010) (listing the Seventh Amendment as not incorporated).

¹⁶⁰ See, e.g., *LaFave*, *supra* note 71, at 1397 (noting that use of special verdicts is common in civil jury trials but not in criminal jury trials).

¹⁶¹ See U.S. CONST. amends. VI, VII.

¹⁶² *LaFave*, *supra* note 71, at 1397.

¹⁶³ *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920).

¹⁶⁴ *LAFAVE ET AL.*, *supra* note 57, at 1397 (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (stating that a criminal trial judge may not direct a verdict in favor of the prosecution or instruct jury to do so); *Connecticut v. Johnson*, 460 U.S. 73, 84 (1983) (stating the same)); see also *Duncan*, 391 U.S. at 156 (asserting the framers’ view that “[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it”).

¹⁶⁵ See *LAFAVE ET AL.*, *supra* note 57, at 429 (noting that “special verdicts and special interrogatories can limit jury independence”); see also *United States v. Spock*, 416 F.2d 165, 182–83 (1st Cir. 1969) (holding that use of special questions to jury in criminal case violated defendants’ constitutional right to jury trial).

¹⁶⁶ See, e.g., FED. R. CIV. P. 56 (providing that a civil litigant may move for and a court may grant summary judgment).

¹⁶⁷ See, e.g., *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U.S. 674, 675 (1895) (approving trial court instruction directing civil jury to return a verdict for defendants); *Randall v. Balt. & Ohio R.R. Co.*, 109 U.S. 478, 482 (1883) (approving the same).

employ special verdict forms that lead the jury toward verdicts that accord with the law and the evidence.¹⁶⁸

The long history of judicial acceptance of the limited power¹⁶⁹ of the criminal jury to nullify¹⁷⁰—or, in other words, to “acquit against instructions”¹⁷¹—helps reveal a constitutional basis for the inclusionary-rule approach.¹⁷² That acceptance demonstrates recognition of the criminal jury’s purpose as more than simply “resolution of factual disputes.”¹⁷³ The apparent view that the Sixth Amendment right embraces this broader function¹⁷⁴ would allow the Supreme Court to use the provision to constitutionally ground the inclusionary-rule approach. The proposal contemplates telling jurors of their authority to decide the suppression question while the nullification power of criminal juries is not conferred on them through explicit instructions.¹⁷⁵ Yet, implementing the inclusionary-rule approach remains sensible as Sixth Amendment doctrine. The central reason not to tell jurors of their nullification power is to try to ensure that they only rarely use it and only in favor of the criminal defendant.¹⁷⁶ When jurors nullify, they ignore or override the law about which the judge instructs them. To implement the inclusionary-rule approach and openly instruct jurors on their authority regarding suppression would encourage them not to ignore or override existing law but to decide when to take further remedial action on grounds that the Court would

¹⁶⁸ See LAFAVE ET AL., *supra* note 57, at 429 (“The use of ‘special verdicts’ or ‘special interrogatories,’ whereby the jury is required to respond to a series of fact questions in connection with the return of its verdict, is a common practice in civil cases but not in criminal cases.”).

¹⁶⁹ The power is limited in that it appears, for example, that trial courts can excuse for cause members of a jury venire “who admit that they will not follow the law.” *Id.*

¹⁷⁰ Bacigal, *supra* note 141, at 817; DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 19 (2016).

¹⁷¹ See Alschuler & Deiss, *supra* note 155, at 912–14 (discussing the political power of early American juries to “acquit against instructions”).

¹⁷² The widespread view at the time of the founding was that criminal juries had even more power than that embodied in the notion of nullification. See *infra* text accompanying note 181.

¹⁷³ Bacigal, *supra* note 141, at 818.

¹⁷⁴ See *infra* note 184 and accompanying text; see also Raoul Berger, *Justice Samuel Chase v. Thomas Jefferson: A Response to Stephen Presser*, 1990 BYU L. REV. 873, 889–90 (endorsing the view that the nullification power was “embodied” in the constitutional right to jury trial in criminal cases). For a view questioning whether it is correct to assert that jury nullification, even in restricted form, is part of the Sixth Amendment right, see LAFAVE ET AL., *supra* note 57, at 1285–86.

¹⁷⁵ See LAFAVE ET AL., *supra* note 57, at 186 (“Courts have . . . rejected any constitutional right to an instruction that informs the jury that it has the power to disregard the law and acquit.”); see also CLAY S. CONRAD, *JURY NULLIFICATION 5* (2014) (“We want jurors to intervene on occasion . . . without us telling them about their power to do so . . .”). For the view that jurors should be told of their power to nullify, see Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CALIF. L. REV. 168, 168 (1972).

¹⁷⁶ See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1134–35 (D.C. Cir. 1972) (“There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law.”); Alschuler & Deiss, *supra* note 155, at 914 n.246 (noting that the power to disregard instructions can “disadvantage defendants rather than aid them”).

acknowledge are not closely regulated by legal rules or standards.¹⁷⁷ The Sixth Amendment can support this move.

The Court could ground the inclusionary-rule approach in the Sixth Amendment right without explicitly endorsing “nullification.” The Court may be hesitant to use such terminology out of concern that it could suggest that the accused has a limited right to law-nullifying jurors—an idea that is hard to qualify properly.¹⁷⁸ Instead, the Court could emphasize the traditional role of the criminal jurors in serving dual functions, and focus on their role as “political participants,”¹⁷⁹ charged with balancing the power of the judiciary by representing “popular-sentiment.”¹⁸⁰

Founding era history supports more than it undermines the inclusionary-rule approach. The Framers believed strongly in the importance of criminal juries¹⁸¹ in an era when juries decided cases through their authority to render general verdicts, typically with little or no binding instructions on law from the judge.¹⁸² Juries in that era were widely viewed as authorized to serve as judges of both the law and the facts.¹⁸³ Given those circumstances,

¹⁷⁷ For this reason, implementing the inclusionary-rule approach also need not be understood to contravene the proposition first articulated by the Court in *Sparf v. United States*, 156 U.S. 51 (1895), over a lengthy dissent, *see id.* at 163 (Gray, J., dissenting), that juries were no longer to be understood as judges of the law.

¹⁷⁸ *United States v. Dougherty*, 473 F.2d at 1133–34; *see also* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that prospective jurors in a capital case may be excluded for cause if their views disfavoring capital punishment would substantially impair their ability to perform their duties as jurors in accordance with the law).

¹⁷⁹ Amar, *supra* note 155, at 1187.

¹⁸⁰ *Id.* at 1189.

¹⁸¹ *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (noting the Framers’ regard for the criminal jury as a crucial safeguard against a rogue judiciary); Amar, *supra* note 155, at 1183 (noting that the criminal jury was guaranteed in both Article III, Section 2, of the body of the Constitution and in the Sixth Amendment); *see also* DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (listing as a grievance against George III his “depriving us . . . of the benefits of trial by jury”).

¹⁸² *See, e.g.,* Alschuler & Deiss, *supra* note 155, at 903–06 (explaining that “the authority of American juries to decide questions of law may have arisen from haphazard practice at a time when most judges lacked legal training” but that this power “became a symbol of trust in the public’s sense of justice”); *see also* Robert Ireland, *The American Jury: From Judge of the Law to Trier of the Facts*, in *A HANDBOOK OF JURY RESEARCH 2-1, 2-2* (Walter F. Abbott & John Batt, eds., 1999) (“Sometimes judges endeavored to instruct jurors, but seldom in binding fashion.”); John P. McClanahan, *The “True” Right to Trial by Jury: The Founders’ Formulation and Its Demise*, 111 W. VA. L. REV. 791, 808 (2009) (“At the time of the Founding, it was almost universally accepted that juries in criminal cases had the right to decide issues of law.”).

¹⁸³ Alschuler & Deiss, *supra* note 155, at 912; Amar, *supra* note 155, at 1185, 1191–95; Ireland, *supra* note 182, at 2-2; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590–95 (1939); *see also* HALE, *supra* note 170, at 27 (“By the late eighteenth century, the right to find a ‘verdict . . . according to conscience’ had achieved the status of conventional wisdom.”). *Cf.* William E. Nelson, *The Lawfinding Power of Colonial American Jurors*, 71 OHIO ST. L.J. 1003, 1028 (2010) (concluding that founding era juries in New England and Virginia, although not in Pennsylvania, New York, and the Carolinas, possessed law-finding authority).

Views on the legitimate authority of the criminal jury were evolving during the nineteenth century. *See* Alschuler & Deiss, *supra* note 155, at 906–10; Ireland, *supra* note 182, at 2-4. However, by mid-

the criminal juries contemplated by the Sixth Amendment may well have been thought vested with the authority to acquit not simply through nullification but *lawfully* when they thought the prosecution unconstitutional.¹⁸⁴ Moreover, colonial jurors confronting seizures in prosecutions for violations of English law had frequently acquitted, and it is “a fair inference” that some of those acquittals were “based, at least in part, upon their conclusion of law that the seizures were illegal.”¹⁸⁵ In that era, then, the importance of instructions openly acknowledging jurors’ authority to ignore evidence based on an illegal search and seizure would not have been apparent. “Most early American jurors were already aware of their power to judge the law.”¹⁸⁶ Hence, the imposition of an inclusionary-rule approach—with jurors being told of their authority to judge suppression—would seem essential to conform with the historical understanding of the Sixth Amendment jury-trial guarantee.¹⁸⁷

If criminal juries once passed on the propriety of searches and seizures, however, why not enlist them to do so again rather than limit them to deciding whether to suppress the evidentiary fruits of a violation?¹⁸⁸ The reason focuses on the need for guidance of police officers regarding the meaning of the Fourth Amendment. Changed circumstances that underscore why originalism allows an inclusionary-rule approach also underscore why originalism does not demand more. The need for legal guidance to direct the work of our now extensive law enforcement personnel¹⁸⁹ requires that the judiciary assume the task. We could not expect police officers to know how they are permitted to investigate crime through the unpredictable and unexplained general verdicts of juries.¹⁹⁰ The inclusionary-rule approach

century, at least fifteen of the thirty states still authorized criminal juries to resolve legal questions. *See* Alschuler & Deiss, *supra* note 155, at 910–11. Moreover, the Supreme Court did not disavow the notion that juries were legitimate judges of the law in federal court until *Sparf*, decades after the adoption of the Fourteenth Amendment, and, even then, only over a long and forceful dissent. *See generally*, *Sparf v. United States*, 156 U.S. 51 (1895) (rejecting the notion that criminal juries may rightfully disregard the law as provided them by the court and become judges of the law themselves).

¹⁸⁴ *See* Amar, *supra* note 155, at 1185 (noting that this view was widely endorsed by many constitutional theorists in the late eighteenth and early nineteenth centuries); *see also* VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 37 (1986) (asserting that “the writings of Adams, Jefferson, Elbridge Gerry, and other framers of the Constitution made it clear that they believed that the jury could, and should, decide law as well as fact.”).

¹⁸⁵ Bacigal, *supra* note 141, at 800.

¹⁸⁶ Conrad, *supra* note 175, at 65.

¹⁸⁷ Juries were not diverse at the time of the founding and typically were not so even by the early 1960s. *See* Alschuler & Deiss, *supra* note 155, at 878; *see also infra* text accompanying notes 199–202. Although juries are now more diverse, it seems that few, if any, serious critics would claim that an inclusionary-rule approach involving diverse juries should founder on that basis.

¹⁸⁸ *See supra* note 141 (identifying scholars who have argued for this approach).

¹⁸⁹ LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 67 (1993) (noting that there were no full-time police and few full-time criminals); Steiker, *supra* note 27, at 837.

¹⁹⁰ *See* Bacigal, *supra* note 140, at 391 (noting that the randomness of juries would present a problem in settling Fourth Amendment law according to fixed, legal principles).

constitutes a plausible construction of the Sixth Amendment that aims to be pragmatic.¹⁹¹

C. *An Assessment*

The implementation of an inclusionary rule would reflect a genuine concern not only with honoring the aggrieved defendant's Fourth Amendment rights but also with balancing the dangers of police abuse and crime. Regarding police, the effect intuitively would be to deter some violations of the Fourth Amendment against law-abiders. The prospect of a judge's instruction identifying a violation and the wrongdoers—in essence, a public reprimand—would often be unpleasant for the officers involved and their superiors. The prospect that jurors might also disregard any evidentiary fruits and even acquit the defendant for the violation would compound the police discomfort and encourage continued training about Fourth Amendment doctrine to promote compliance. At the same time, the likely effect on law-breakers, or potential law-breakers, would seem appropriately limited. Juries might often ignore the violations and convict the guilty defendant, especially in serious cases, and, if not on the greater offense charged, on the lesser-included one.¹⁹² Also, it appears implausible that persons who actually contemplate serious crimes or even minor ones would commonly expect that improper invasions of their liberty, privacy, or property interests that turn up evidence against them would generate sympathy from criminal juries. We cannot estimate the outcome of the approach with much precision, although it seems unlikely to prove as problematic as the Court's efforts to impose and then diminish the exclusionary rule.

A benefit of the inclusionary rule, moreover, is that it does not claim a correct utility regarding the use of evidentiary suppression. The inclusionary rule acknowledges that there is value merely in honoring the aggrieved defendant's Fourth Amendment rights. Also, being unable to estimate with great accuracy how it would play out everywhere in terms of its effect on crime and police abuse can be understood as a positive rather than a negative.

¹⁹¹ Should this construction of the Sixth Amendment right to jury trial apply to some other violations of constitutional rules governing police practices, such as those regarding suspect statements? Those questions deserve extensive consideration and are beyond the scope of this Article.

¹⁹² There are good reasons to suspect that juries made up of law-abiders would often be indifferent to violations committed against criminals. Many law-abiders may believe that the police will not commonly violate law-abiders' Fourth Amendment rights. See Bacigal, *supra* note 140, at 417 (asserting that law-abiding citizens may generally be “confident that the police will not direct unreasonable searches at them”). Or, if the jurors are white and middle-class, they may “often fear the robbers more than the cops because the robbers tend to be mostly poor and/or members of minority groups and because cops tend to focus their attention on just such disfavored groups.” Steiker, *supra* note 27, at 850. In addition, many jurors may simply believe that those who are doing nothing wrong have nothing to hide and should willingly submit to police intrusions. See, e.g., Tom Wicker, *Rights vs. Testing*, N.Y. TIMES, Nov. 28, 1989, at A25 (discussing Washington Post/ABC poll revealing that most respondents held such views).

In this view, the inclusionary-rule approach would produce different results in different counties depending on the counties' circumstances related to existing crime and police abuse rates. Assuming that concerns about crime and police abuse vary in different counties, it is appropriate that the responses would differ as well.

The inclusionary-rule approach would also allow for variation based on the type of crime involved. The same police violation might be treated differently in a capital murder prosecution than in a minor drug possession prosecution. Unlike the Supreme Court, juries could consider Fourth Amendment violations on a case-by-case basis without having to articulate principles that would apply across the nation.

The inclusionary-rule approach also would not reflect deference to majority rule. It would accomplish something different than leaving the question of remedy for violations in criminal cases to Congress and the states. The inclusionary-rule approach would also differ, more specifically, from allowing civil juries in constitutional tort cases to decide what to do regarding aggrieved criminal defendants. The reason is that, unlike in constitutional tort cases, the government has the burden of proof in criminal cases, and criminal juries do not operate based on majority rule. *Ramos v. Louisiana* recently clarified that criminal jury verdicts favoring conviction must be unanimous throughout the states.¹⁹³ The unanimity requirement means that “[a] jury must reach a unanimous verdict in order to convict.”¹⁹⁴ In some cases, a mistrial rather than a conviction would result, and, in a few, where all of the jurors concurred on the need to ignore the evidentiary fruits, an acquittal as opposed to a conviction could follow.¹⁹⁵

In reducing police abuse against minorities, the inclusionary-rule approach would also seem substantially more effective as a constitutionally-grounded remedy rather than simply abandoning the exclusionary rule, despite the history of racial discrimination in the composition of American criminal juries.¹⁹⁶ The racial bias problem and the absence of an incorporated mandate of jury unanimity would have undermined this approach as a protection for minorities if the Court had implemented it in *Mapp* in the early 1960s. However, along with unanimity rules,¹⁹⁷ the law of jury composition has changed.¹⁹⁸ The modern Court has

¹⁹³ 140 S. Ct. 1390, 1397 (2020).

¹⁹⁴ *Id.* at 1395.

¹⁹⁵ *See id.* at 1394.

¹⁹⁶ *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 172–80 (1997) (discussing the racial exclusion of Black prospective jurors during the late 1800s through the 1990s); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 105–07 (1999) (discussing the Supreme Court's toleration of racial exclusions of Black prospective jurors for decades after declaring race discrimination in jury selection unconstitutional).

¹⁹⁷ *See supra* text accompanying notes 187–188.

¹⁹⁸ *See supra* text accompanying note 186.

required that states take steps to promote representative jury pools.¹⁹⁹ Also, in the *Batson* line of cases, the Court has taken modest steps to ensure that litigants do not use peremptory strikes to eliminate prospective jurors based on race or gender.²⁰⁰ The Court reiterated this proscription most recently in *Flowers v. Mississippi*.²⁰¹ Those changes, along with changes in racial attitudes, could help modestly to mitigate racial discrimination in the operation of the rule.²⁰²

This approach would also help the Court avoid claims from both proponents and opponents of the exclusionary rule that it is acting without good information and in the face of its own incapacity. As we have seen, a central objection to the Court's decisions both maintaining and undermining the exclusionary rule is that the Court lacks a good basis to make such decisions or the ability to act in a nuanced fashion.²⁰³ By turning decisions about when to suppress and acquit over to criminal juries, the Court could avoid those justified criticisms.

Perhaps the most important benefit of the inclusionary rule is that it would allow the Court to continue to use criminal cases to direct law enforcement and lower courts on the meaning of the Fourth Amendment. Given the possibility of jury suppression and acquittal, criminal defendants would continue to have a strong incentive (in addition to discovering information about the government's case through pre-trial hearings on the claims) to raise Fourth Amendment issues in pre-trial motions seeking an instruction on any violation. Trial judges would also continue to hold hearings and render rulings on those motions in much the same way that they do under current doctrine. On review of those rulings, appellate courts, including the Supreme Court, would be able to continue to develop Fourth Amendment law to guide the police. The same would not be true if the Court pursued any of the options for eliminating the exclusionary remedy that have been presented in the first three parts of this article.

The inclusionary rule approach, however, could not be expected to achieve any utility maximizing equilibrium between the dangers of crime and police abuse facing law-abiders. The inclusionary rule does not purport to focus juries on the problem of maximizing utility for law-abiders.

¹⁹⁹ See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (noting that the exclusion of Blacks, women, or Mexican-Americans from jury venires could violate the representativeness requirement); *Peters v. Kiff*, 407 U.S. 493, 502–04 (1972) (plurality opinion) (holding that the systematic exclusion of Blacks from grand and petit juries violated due process).

²⁰⁰ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (discussing race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143, 145 (1994) (discussing gender).

²⁰¹ See 588 U.S. 1, 31 (2019) (holding that trial court committed error in allowing state's peremptory strike of Black prospective juror).

²⁰² Despite these changes, Black citizens still tend to be underrepresented on juries for a variety of reasons. See KENNEDY, *supra* note 196, at 232–37 (explaining a variety of grounds for their underrepresentation, including their underrepresentation on voter registration lists).

²⁰³ See *supra* text accompanying note 139.

Juries also will not know much about how to maximize utility even if they focus on it. Jurors often will not know the situation regarding crime and abusive police in a particular neighborhood where the events occurred or even in the larger county where they are called to serve. Some counties encompass many different communities, and the proposal does not call for evidentiary presentations on the general problems of crime and police abuse in the locality. Jurors could still act on crime-type distinctions and police-culpability nuances that the Supreme Court has been unable to implement.²⁰⁴ Some jurors might also appreciate local concerns that are relevant to the problems. In their summations, lawyers could also allude to the relevant considerations. Yet, many jurors would likely not know how to come to a much better resolution of the problems (in a utility-maximizing sense) than would Supreme Court Justices.

Because “the great majority of criminal cases” result in guilty pleas,²⁰⁵ the inclusionary rule would also only produce an instructional reprimand and jury consideration of a Fourth Amendment violation in a small proportion of cases. The rule would probably influence plea negotiations somewhat, and prosecutors in plea-bargained cases might sometimes communicate to police officials their displeasure that a police violation of the Fourth Amendment warranted an extra prosecutorial concession. The same could be said regarding the current exclusionary rule. However, the influence of the inclusionary rule on plea bargaining and, thus, in deterring violations of the Fourth Amendment, might be even murkier given the uncertainty over how jurors would react to a violation instruction.

This approach would also perpetuate one of the demerits attributed to the two approaches presented in Parts II and III. It would not eliminate the need for federal courts to give contorted reasons for denying criminals damages in § 1983 actions for clearly established Fourth Amendment violations that helped cause their detentions, prosecutions, convictions, and sentences.²⁰⁶ Only the first option presented in Part I, involving rights forfeiture, provides a good explanation for those outcomes.²⁰⁷

This inclusionary rule approach may also give criminals at least some potential assistance in committing and covering up their crimes. Although this concern seems inconsistent with concerns that the approach may have modest deterrent influence, the larger point is that we cannot be sure. To the extent that the rule results in reprimanding instructions from trial judges and jury actions favoring accused persons, it would protect criminals and might also modestly encourage crime.

A final, major concern is that implementing this approach would constitute a significant change of direction for the Court. After so many

²⁰⁴ See *supra* notes 131–132 and accompanying text.

²⁰⁵ LAFAVE ET AL., *supra* note 57, at 1194.

²⁰⁶ See *supra* note 65 and accompanying text.

²⁰⁷ See *supra* notes 67–68 and accompanying text.

decades with the exclusionary rule, substituting the inclusionary rule might suggest that constitutional law lacks an enduring meaning. The move might seem to square more easily with the view that constitutional law is not “an expression of values written into the Constitution by the framers, but . . . the product of a continuing process of valuation carried on by those to whom the task of constitutional interpretation has been entrusted.”²⁰⁸ For some observers, that perspective would be unsettling. Moreover, the Court might not be fully able to counter it even by pointing to the historical powers of the criminal jury or by noting the Court’s lack of previous consideration of the Sixth Amendment right to jury trial as a basis to address Fourth Amendment violations.

CONCLUSION

By assuming that the Supreme Court will abolish the exclusionary rule and by considering potential alternatives, this Article has demonstrated a conundrum that surrounds the Fourth Amendment. The alternatives are all problematic. This point may be reason enough for the Court to maintain an admittedly flawed exclusionary rule. Yet, there remain good grounds to rank the options. A comparison among them bears, if not on what approach the Court should have pursued in the past,²⁰⁹ then on what approach it should follow if, as it has hinted, it might eliminate court-ordered exclusion in the future.

This Article favors an inclusionary rule as the best alternative to the exclusionary rule. The approach has flaws, but it would appear to be a workable method to promote the utility of law-abiders. By allowing the judiciary to continue to use criminal cases to develop search and seizure doctrine to guide law enforcement, while also allowing criminal juries, after an instruction reprimanding violators, to decide the suppression question, the approach could moderately promote government compliance with the Fourth Amendment. At the same time, because jurors might frequently not ignore the evidentiary fruits, particularly in serious criminal cases involving minor or only negligent violations, the approach would seem to protect and encourage lawbreakers only modestly in their efforts to commit and cover up crimes.

The inclusionary-rule approach would also represent an effort to implement an acceptable balance between crime and police abuse, though

²⁰⁸ Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1033–34 (1981).

²⁰⁹ Neither the article’s assumption that the Court will eliminate the exclusionary rule nor its presentation of alternative approaches rests on a view that the implementation of the rule in federal court and its incorporation against the states were mistakes. The exclusionary rule may have been deemed essential for combating severe racial discrimination in search and seizure practices. *See, e.g.*, Steiker, *supra* note 27, at 838–41. For more on how racial-discrimination problems would have plagued an inclusionary-rule approach if it had been adopted before reforms were implemented that modestly promoted racial diversity on juries, see *supra* text accompanying notes 196–202.

that is not its overriding purpose. The approach does not claim a correct utility regarding the use of evidentiary suppression. Jurors would not be told to try to effectuate such an equilibrium. The inclusionary rule acknowledges that there could be value merely in honoring the aggrieved criminal defendant's Fourth Amendment interests. However, jurors would decide on the value of suppression in the process of deciding whether to suppress.

The inclusionary-rule approach would also rest on a constitutional theory that would explain the basic contours of its application. Because it would depend heavily on the Sixth Amendment right to a jury trial in criminal cases, it would not apply in civil cases, in probation or parole revocation hearings, or in the early stages of a criminal case, such as the preliminary hearing or the grand jury. On this score, it is superior to the current exclusionary rule, which has no constitutionally grounded explanation.²¹⁰

Before presenting the inclusionary-rule approach in Part IV, this Article proposed three routes that the Court could follow to eviscerate the exclusionary rule without imposing a constitutionally grounded substitute: Part I presented a rights-forfeiture theory; Part II presented a remedy-forfeiture theory; and Part III presented a nonutility theory. Those approaches would rely primarily on legislatures to protect law-abiders from Fourth Amendment violations. The principal protection envisioned would come from legislatively authorized civil rights suits. It is not apparent that there is a better constitutionally grounded substitute for the exclusionary rule than the inclusionary rule.²¹¹ Thus, if the Court were convinced that evidentiary suppression in criminal cases is always nonutilitarian for law-abiders and that the Constitution cannot support an inclusionary rule, those first three proposals would seem to represent the available options.

In that case, which of those first three routes to evisceration would be preferable? One might be tempted to pick the approach presented in Part I: Criminals should, with a few exceptions, forfeit Fourth Amendment interests that would help them commit and hide their crimes and, thus, also forfeit the associated remedies by virtue of their wrongdoing. However, it would seem essential to couple that approach with an explanation from the Court about why evidentiary suppression is non-utilitarian across the spectrum of Fourth Amendment violations. For more than fifty years, the Court has pronounced that the exclusionary rule is all about utility, both when parts of the rule have been preserved and when other parts of it have been pared.²¹² For the Court now to offer forfeiture as the sole reason for abolition would be disingenuous.

²¹⁰ On the point that the contours of the exclusionary rule in its current or some even more contracted form have no persuasive constitutional explanation, see *supra* note 51.

²¹¹ See *supra* note 139.

²¹² See *supra* notes 20–25 and accompanying text.

With that caveat (and a few others),²¹³ the rights-forfeiture approach would allow a simple answer to the big question: how can the Fourth Amendment give criminals protection in their efforts to commit and hide their crimes? The answer would be that it does not because they would forfeit those rights through their abuse of them to pursue their criminal ends. The rights-forfeiture approach would also allow a simple answer to another big question: how can criminals purportedly have all the Fourth Amendment rights to liberty, privacy, and property that law-abiders have, and yet we do not give them a readily available remedy—evidentiary suppression—when those rights are violated to their great detriment? The answer again would be that criminals no longer have such rights because they forfeit them through their wrongdoing.

In the end, however, none of the approaches discussed in this Article clearly deserves honorable mention as a second choice to the inclusionary-rule approach. From the perspective of maximizing utility for law-abiders, a central argument for why the Court should eliminate the exclusionary rule is also a central argument for why the Court should not eliminate it without imposing a constitutionally grounded substitute that, to a modest degree, protects criminals. The Court lacks the information and capacity to convincingly declare that the exclusionary rule maximizes utility for law-abiders. Yet, the Court also lacks the information and capacity to convincingly deny that a suppression remedy, implemented in some form—by local criminal juries—is utilitarian for law-abiders. The inclusionary-rule approach is a worthy alternative to turning the enforcement of the Fourth Amendment over completely to some form of majoritarian rule. And, by good fortune perhaps, the inclusionary-rule approach finds support in the historical powers of the criminal jury that are plausibly viewed as embodied in the right to jury trial in the Sixth Amendment.

²¹³ See *supra* text accompanying notes 73–78.