WHOSE FOURTH AMENDMENT AND DOES IT MATTER? A DUE PROCESS APPROACH TO FOURTH AMENDMENT STANDING

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INTRODUCTION

Imagine that your name is Michael Wolstencroft, and you hold a comfortable position as an executive of the Castle Bank and Trust Company of the Bahamas.[1] Your position frequently brings you to the United States, and, like most business travelers, you travel with your briefcase.[2] A few months ago, your friend, Norman Casper, introduced you to Sybol Kennedy, and when you find yourself again on business in the Miami area, you pay her a visit at her apartment and head out to dinner on Key Biscayne, leaving the briefcase behind.[3]

What you don't know (and how could you?), is that Mr. Casper is an informant for IRS Special Agent Richard Jaffe, and your date for the evening is actually a private detective working for Casper.[4] While you are enjoying balmy tropical breezes, a delightful dinner, and Ms. Kennedy's engaging company, Casper has retrieved your briefcase from Ms. Kennedy's apartment, has taken it to the IRS-recommended locksmith (one whose discretion could be counted upon) to have a key made, and has brought it to the agreed-upon rendezvous point, where over 400 documents are removed and hurriedly photographed by an IRS expert.[5] As you leave the restaurant, the lookout who has been watching you throughout the evening gives Casper the signal that you have finished your dinner, and the briefcase and its contents are returned to Ms. Kennedy's apartment, all of this having taken place in the space of one and a half hours.[6]

Luckily for you, although you are likely outraged over this invasion of your privacy (not to mention your briefcase), the United States Government is not seeking information about you. Since Castle Bank is a suspected "illegal tax haven," the IRS commenced Operation Trade Winds, a large-scale investigation utilizing more than thirty informants, to seek out information about American citizens using the bank to shelter their money from their tax responsibilities.[7] Jack Payner is not as lucky as you. Although it is not his briefcase that was

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1. The following facts are set out in *United States v. Payner* (*Payner I*), 434 F. Supp. 113, 118-22 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980).

2. *Id.* at 119.

3. *Id.*

4. *Id.* at 118-19.

5. *Id.* at 119-20.

6. *Id.* at 120.

7. *Id.* at 118.

broken into, and, in fact, the Government was actually investigating an alleged drug dealer named Allen Palmer, the documents photographed by Casper furnished the evidence[8] that eventually led to the indictment of Payner for falsifying his income tax returns.[9]

Criminal Procedure scholars are certainly familiar with the facts underlying the Supreme Court's decision in *United States v. Payner* (*Payner III*),[10] a decision that has become somewhat of a poster child for the perverse result that renders such conduct by the Government permissible (and perhaps even encouraged) under the Court's current Fourth Amendment standing doctrine.[11] However, when Criminal Procedure students first come across this case, the reaction is universally disbelieving: "Can the Government *really* do that?" Oh yes, it can.

The events depicted above, aptly termed "the briefcase caper" by Casper himself,[12] occurred fresh on the heels of the Supreme Court's decision in *Rakas v. Illinois*,[13] which held that a defendant has standing to suppress evidence discovered during an arguably unlawful *search* only if she has a legitimate or reasonable expectation of privacy in the place searched.[14] Thus, the Court conditioned a defendant's ability to challenge the Government's investigatory activities on her ability to demonstrate that the substantive definition of a search, derived from *Katz v. United States*,[15] has been met *as to her*, thereby merging standing with the substantive scope of the Fourth Amendment.[16]

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8. *Id.* at 122. As part of the investigation, Casper also sent Kennedy to visit Wolstencroft in the Bahamas for the purpose of retrieving more information, which she did by stealing a rolodex file from his office, which was later, of course, turned over to Special Agent Jaffe. *Id.* at 120.

9. *Id.* at 122.

10. 447 U.S. 727 (1980).

11. The use of the word "permissible," does not imply that the Government's conduct was legal. The Government clearly violated the Fourth Amendment, and Wolstencroft may arguably have sued in tort to vindicate his Fourth Amendment interests. However, the evidence was nonetheless admissible against Payner, and thus, *as to him*, the Government's investigative activities were, in effect, permissible. *See Payner I*, 434 F. Supp. at 126.

12. *Id.* at 133 n.71 (internal quotation marks omitted).

13. 439 U.S. 128 (1978).

14. *Id.* at 148-49. The Court emphatically affirmed *Rakas*'s holding in *United States v. Salvucci*, 448 U.S. 83, 92-93 (1980), and in *Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980), expressly stating that only the legitimate expectation of privacy in the searched location was sufficient to grant "standing," even when the defendant claims a possessory interest in the item seized, a question arguably left open in *Rakas* itself: "Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Rakas*, 439 U.S. at 148.

15. 389 U.S. 347 (1967). The reasonable expectation of privacy test is actually derived from Justice Harlan's concurring opinion: "My understanding of the rule . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognized as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

16. As the definition of standing became coextensive with, and synonymous with, the

Returning to Mr. Payner, he was unable to claim a legitimate expectation of privacy in someone else's briefcase, even though that briefcase contained information about his own finances.[17] Therefore, he lacked (in pre-*Rakas* terms) standing to suppress the illegally seized documents that furnished the evidence against him, notwithstanding the shocking illegality of the Government's methods in obtaining that evidence.[18] With its hands tied by the Supreme Court's recent decision in *Rakas*, the district court selected two avenues by which to arrive at what it intuitively felt was the correct result—a result that would not implicitly condone and encourage the Government's misconduct.[19] Thus, although Mr. Payner concededly did not have Fourth Amendment standing to contest the search of Wolstencroft's briefcase, the district court exercised its supervisory powers to exclude the evidence nonetheless.[20] However, even if the district court was confident in the exercise of such power, the court's primary justification for excluding the proffered evidence was anchored, instead, in due process.[21]

On the Government's first appeal, the Court of Appeals for the Sixth Circuit found that the supervisory powers justification was sufficient, and rather summarily affirmed the lower court's decision without addressing the due process rationale.[22] The Supreme Court reversed the Sixth Circuit's decision, stating that

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definition of a search, the Court eliminated standing as a separate, threshold inquiry, reasoning that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas*, 439 U.S. at 139. I will continue to use the term in its traditional sense—to denote the legal capacity of a defendant to seek suppression in her criminal trial. I have elsewhere critiqued the Court's merger of standing and substance, arguing, among other things, that the merger solidified and entrenched the Court's narrow view of what constitutes a Fourth Amendment search. *See* Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570, 571 (2008) [hereinafter Soree, *The Demise of Fourth Amendment Standing*]. In addition, I have also urged a more balanced approach to the reasonable expectation of privacy test that would offer a more meaningful examination of governmental conduct (or misconduct) in defining the Fourth Amendment search. *See* Nadia B. Soree, *Show and Tell, Seek and Find: A Balanced Approach to Defining a Fourth Amendment Search and the Lessons of Rape Reform*, 43 SETON HALL L. REV. 127, 133-34 (2013).

17. *Payner I*, 434 F. Supp. at 126.

18. *See Payner III*, 447 U.S. 727, 731-32 (1980).

19. *See Payner I*, 434 F. Supp. at 130-35.

20. *Id.* at 135 ("The Court finds the Government's action . . . was both purposefully illegal and an intentional, bad faith act of hostility directed at Wolstencroft's reasonable expectation o[f] privacy. The Court therefore finds that the evidence obtained by the Government as a result of the seizure of Wolstencroft's briefcase must be excluded under this Court's supervisory function." (footnotes omitted)).

21. *Id.* at 133 ("That outrageous behavior on the part of the Government infringes Payner's Due Process rights, and can only be deterred by granting Payner's motion to suppress.").

22. United States v. Payner (*Payner II*), 590 F.2d 206, 207 (per curiam) (6th Cir. 1979) ("Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal."), *rev'd*, 447 U.S. 727 (1980).

the supervisory power of the courts serves the same interests as the exclusionary rule: deterrence and judicial integrity.[23] The Court found that the district court had overstepped the proper bounds of its supervisory power when that power was used "as a substitute for established Fourth Amendment doctrine."[24] In other words, the district court could not undo, through its supervisory power, what the Supreme Court had done in *Rakas*. Perhaps because the Sixth Circuit had not addressed the due process rationale, the Supreme Court dismissed a due process right to exclusion in a footnote relegated to the end of the majority opinion by concluding that the Due Process Clause is only implicated "'when the Government activity in question violates some protected right of the *defendant*.'"[25]

The district court provided ample justification for a due process requirement of exclusion, beginning with an iteration of the long-standing "principle that all criminal prosecutions must meet the bare minimum requirements of Due Process of law."[26] The district court turned to *Rochin v. California*,[27] in which the Court overturned the defendant's conviction for morphine possession when the evidence supporting that conviction was obtained by forcibly utilizing a stomach pump to extract the contents of the defendant's stomach.[28] The *Rochin* Court found this method of obtaining evidence "offend[s] those canons of decency and fairness" and "shocks the conscience," thus supporting the Court's adoption of an exclusionary principle grounded in due process.[29] The district court in *Payner I* touched on the concept of judicial responsibility in ensuring the integrity of its proceedings.[30] However, much of the discussion centered on the role of due process exclusion in deterring egregious governmental misconduct,[31] offering a conception of due process exclusion as a matter of third-party standing.[32] It should come as no surprise that the Supreme Court, having recently decided against recognizing third-party standing in the Fourth Amendment context,[33]

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23. *Payner III*, 447 U.S. at 735-37.

24. *Id.* at 735 n.8.

25. *Id.* at 737 n.9 (quoting Hampton v. United States, 425 U.S. 484, 490 (1976)).

26. *Payner I*, 434 F. Supp. at 126-27.

27. 342 U.S. 165 (1952).

28. *Payner I*, 434 F. Supp. at 127 (discussing *Rochin*, 342 U.S. at 172).

29. *Rochin*, 342 U.S. at 169, 172.

30. *See Payner I*, 434 F. Supp. at 124.

31. *See id.* at 125, 126-32.

32. *Id.* at 129 n.65 ("However, under the Due Process concept, the *Janis* balancing test shifts markedly in favor of extending standing to third parties, such as Payner, to raise the exclusionary rule because an element of the Due Process violation is *outrageous* official conduct which violates the constitutional rights of an individual, situated like Wolstencroft, in a fashion which is knowing, purposeful, and with a bad faith hostility toward the right violated. Such intentional bad faith conduct is as susceptible of deterrence as any crime committed purposefully by an ordinary civilian." (emphasis added)).

33. By insisting that only defendants whose personal Fourth Amendment rights were violated were able to seek suppression, the Court in *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978),

would follow suit when offered a similar rationale in relation to due process.

Part I of this Article emphasizes what the facts of *Payner* make quite obvious: current Fourth Amendment standing doctrine is highly susceptible to exploitation by police and other government agents who effectively have been given carte blanche to violate the Fourth Amendment as long as the evidence uncovered implicates someone other than the most direct victim of the violation. However, as the facts of *Payner* may seem somewhat removed from the most common, everyday police-citizen encounters—after all, *Payner* concerned an ongoing investigation of white-collar criminal activities involving off-shore accounts[34]—the Article returns to the more familiar setting that triggered the Court's decision in *Rakas*: the search of a car with multiple occupants. Part II of the Article argues that defendants whose very own Fourth Amendment rights have been violated have an individual due process right to exclusion. Thus, the Article envisions an exclusionary rule mandated by the Due Process Clause, which is a departure from the Court's current understanding of exclusion as a judicially created remedy meant to deter future Fourth Amendment violations. For support, the Article turns to the Court's early exclusionary rule decisions, tracing the transformation of exclusion from its constitutionally-based roots to its current deterrence-based approach, as well as to the structure and function of the Fourth Amendment itself, which the Article proposes is a specific application of due process.

Finally, Part III of the Article argues that once exclusion is grounded in due process, defendants have a right to exclusion even when the Fourth Amendment violation "belongs" to another. This Part suggests a broad "target" theory of standing, under which defendants have a due process right to exclusion when the Government violates the Fourth Amendment rights of one individual for the purpose of obtaining incriminating information about anyone other than, or in addition to, the individual whose direct rights the Government initially violated.

I. FROM BRIEFCASES TO AUTOMOBILES: FOURTH AMENDMENT PROTECTION FOR PASSENGERS

Although the misconduct in *Payner* seems blatantly offensive, the

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effectively closed the door on the possibility of third-party standing and then locked it tight by eliminating the separate standing inquiry. Soree, *The Demise of Fourth Amendment Standing*, *supra* note 16, at 575-76, 582-83 (discussing the merger of standing into the substantive Fourth Amendment inquiry and providing an overview of third-party standing generally). The irony, of course, is that if deterrence of future Fourth Amendment violations is the sole justification of the exclusionary rule, then all exclusion effectively acts as a third-party remedy. *See* Donald A. Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure,* 23 U. MICH. J.L. REFORM 591, 624 (1990) ("So long as the Court subscribes to the proposition that the ruptured privacy of the victims' homes and effects cannot be restored, every application of the exclusionary rule involves the vicarious assertion of fourth amendment rights." (footnote omitted) (internal quotation marks omitted)).

34. *See Payner I*, 434 F. Supp. at 118-22.

investigation in that case does not represent the majority of government activities that trigger Fourth Amendment concerns. While the investigation of white-collar crime at issue in *Payner* provides a clear example of how the Court's standing doctrine endangers Fourth Amendment rights,[35] the type of search at issue in *Rakas v. Illinois*,[36] where police searched a car containing multiple occupants,[37] is a great deal more common. According to a recent Department of Justice study, in 2008, nearly 60% of all police-resident contact related to traffic situations.[38] While approximately 44% of all such contact involved drivers of vehicles, 3% of all United States residents experiencing interactions with the police did so as passengers in vehicles, with both these rates showing a steady increase over a six-year period.[39]

Moreover, roughly 5% of traffic stops resulted in a search, with approximately 60% of the ensuing searches (of either the driver or vehicle) conducted with the driver's consent.[40] Consenting or not, however, only about 20% of drivers whose vehicles were searched "believed police had a legitimate reason to do so[,]"[41] and more troubling still, "[b]lack drivers were about three times as likely as white drivers and about two times as likely as Hispanic drivers to be searched during a traffic stop."[42] So, what about any passengers who may be riding in these cars that are being searched?

In *Rakas*, the Court, in applying its new approach to standing, held that those who were "merely passengers" had no "legitimate expectation of privacy" in the areas of the car that were searched.[43] This result led Justice White, in dissent, to express his fear that, since the fruits of a search of multi-occupant vehicles will generally be inadmissible against only the vehicle's owner, "[t]his decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant."[44]

The Court offered "mere" passengers a glimmer of hope in *Brendlin v. California*,[45] holding that in the course of a traffic stop the vehicle's passengers

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35. The district court, in *Payner I*, found that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties . . . ." *Id.* at 132-33.

36. 439 U.S. 128 (1978).

37. *Id.* at 130.

38. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 3 tbl.2 (2011), *available at* http://www.bjs.gov/content/pub/pdf/cpp08.pdf.

39. *Id.*

40. *Id.* at 10.

41. *Id.* at 11.

42. *Id.* at 1.

43. Rakas v. Illinois, 439 U.S. 128, 148-49 (1978).

44. *Id.* at 168 (White, J., dissenting).

45. 551 U.S. 249 (2007).

are subjected to a Fourth Amendment seizure, as is the driver.[46] In fact, the Court expressed the same concern voiced by Justice White in his *Rakas* dissent, that a contrary rule "would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."[47] Thus, although passengers are unable to challenge the *search* of the vehicle they occupy, they may at least seek exclusion of evidence derived from a search that stems from an unlawful *stop* of the vehicle.

Brendlin, however, may not be all that much of a victory for passengers subjected to traffic stops. After all, the Court in *Whren v. United States*[48] held that as long as officers who stop a vehicle have probable cause to believe that the driver has committed a traffic offense, the stop is reasonable regardless of the subjective motivations of the officer in deciding to effectuate the stop.[49] This of course results in a regime in which officers may choose from a myriad of minor traffic offenses to justify stops of vehicles. And, even if officers are motivated by racial animus or engaging in racial profiling, the stop will not provide a means to suppress evidence under the Fourth Amendment.[50]

Despite the relative ease with which police may lawfully stop a vehicle, even as a pretext, some circuit courts have gone even further in eroding the Fourth Amendment protection of passengers. The Sixth, Ninth, and Tenth Circuits have adopted and "applied a *heightened* 'factual nexus' test"[51] that passengers must overcome when seeking suppression of evidence as fruit of an unlawful seizure, at least where the initial stop of the car is lawful (which will often be the case) but is then unlawfully extended as officers decide to conduct a search. Under this approach, no matter how egregious the violation, the passenger defendant must demonstrate a narrowly construed but/for causal relationship between *her* unlawful seizure and the discovery of the evidence being used against her.

For example, in *United States v. Carter*,[52] officers stopped a van with a temporary tag.[53] Upon investigating, the officers confirmed that the driver had recently purchased the vehicle, that his license was valid, and also established the absence of any outstanding warrants in the driver's name.[54] After questioning the driver and defendant, a passenger in the van, the officers were not entirely satisfied with the accounts of where they had been and felt that both the driver and the defendant appeared nervous.[55] Nonetheless, one of the officers notified

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46. *Id.* at 263.

47. *Id.*

48. 517 U.S. 806 (1996).

49. *Id.* at 813.

50. *Id.* ("But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

51. United States v. DeLuca, 269 F.3d 1128, 1142, 1148 (10th Cir. 2001) (Seymour, J., dissenting).

52. 14 F.3d 1150 (6th Cir. 1994).

53. *Id.* at 1151.

54. *Id.*

55. *Id*. at 1151-52.

the driver that "he was free to leave."[56] Before he was able to leave, however, the officer asked for consent to search the vehicle for contraband, which the driver refused.[57] Upon that refusal, the officer informed the driver "that he would have to call a superior" and "took [the driver] by the arm and confined him, over protest, in the back of the patrol car."[58] If this police behavior exemplifies the norm for roadside traffic stops, it is no small wonder that such a large percentage of vehicle searches pursuant to these stops are conducted pursuant to consent.[59]

The superior arrived on the scene and reiterated the request for consent to search.[60] Although the superior testified that the driver consented orally to his request, the driver did not sign a consent form, and the magistrate ruling on the suppression motion found that the driver "never consented in any way to the search of his vehicle."[61] The ensuing search of the van uncovered five suitcases containing 437 pounds of marijuana.[62] The driver was successful in his motion to suppress—after all, as the driver and owner of the van, he was permitted to contest the search itself, and the indictment against him was dismissed.[63]

Carter, the passenger, also sought to suppress the marijuana found in the van as fruit of his own unlawful seizure.[64] The Sixth Circuit, interestingly, did not reach the question of whether the initial stop was lawful, although clearly the continued detention and arrest of the driver were not.[65] Thus, the Sixth Circuit leaves open the possibility that the passenger may have to overcome this heightened causal test even if the initial stop was unlawful.[66]

> [W]e shall assume, for purposes of analysis, not only that the subsequent arrest of the driver was unconstitutional, but also that the detention of Mr. Carter, if not illegal from the outset, became illegal when the driver was arrested. It does not follow from any of this, however, that the discovery and seizure of the marijuana represented "fruit" of Mr. Carter's

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56. *Id.* at 1152.

57. *Id.*

58. *Id.*

59. *See* EITH & DUROSE, *supra* note 38, at 10.

60. *Carter*, 14 F.3d at 1152.

61. *Id.* These facts also highlight the very real possibility of police perjury in the context of supposedly consensual searches and also demonstrate the strong-arm techniques that some officers may resort to in order to obtain consent. Therefore, it is not unreasonable to suspect that many, or at least a good part, of the searches that are classified as consent searches may in reality be nonconsensual.

62. *Id.*

63. *Id.* at 1153-54. The judge granted the suppression motion because he found the search to be unlawful. *Id.* Alternatively, however, had the driver consented, the search would nonetheless have been a direct result of the driver's unlawful seizure. *Id.*

64. *Id.* at 1152. Carter also unsuccessfully tried to claim a reasonable expectation of privacy in the van based on the fact that he had placed personal items inside the vehicle. *Id.*

65. *See id.* at 1154.

66. *See id.*

> unlawful detention. Suppose that at the time of the driver's arrest the police had summoned a taxi cab for Mr. Carter and told him he was free to leave. The marijuana would still have been discovered, because it was located in a van owned and controlled by [the driver] (who was not going anywhere until his vehicle had been searched) and not in a vehicle controlled by Mr. Carter.[67]

The Ninth Circuit, in *United States v. Pulliam*,[68] used similar reasoning to deny the passenger defendant's motion to suppress a gun found following the defendant's unlawful seizure.[69] Pulliam and his companion, Richards, aroused police suspicion in a known gang area, after which Richards drove the car in which they both left.[70] The officers followed the men, having made the decision "that they were 'going to follow them' and 'find a reason to stop them.'"[71] The reason presented itself by way of a broken break light, and the officers "also assert[ed] that the car rolled through a stop sign."[72] The officers, having approached the car with their weapons drawn, ordered both men out of the car, led them to the curb, handcuffed them, and patted them down, finding nothing of interest on Pulliam.[73] One officer went directly to the car, finding a gun under the passenger seat, which Pulliam later admitted was his.[74]

The district court granted Pulliam's suppression motion, finding that although the initial stop was lawful, "the officers had no reasonable basis for going further, and that the car search was invalid."[75] The Ninth Circuit agreed that Pulliam's detention was unlawful, but did not find the requisite causal connection between *his* detention, rather than the detention of the vehicle, and the search that revealed the gun.[76] The court suggested two ways in which Pulliam could have demonstrated that the gun was fruit of his detention: by demonstrating that something he said, or evidence found on him, during his detention prompted the search of the car, or by showing that, had he been permitted to leave, "he would have been able to do so in [the] car."[77]

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67. *Id.*

68. 405 F.3d 782 (9th Cir. 2005).

69. *Id.* at 783, 787.

70. *Id.* at 784.

71. *Id.*

72. *Id.* The court does not state the failure to stop as a fact, but merely as an assertion made by the officers, which, at least on this author's reading, suggests the possibility that the officers felt the need to add further justification for stopping the car.

73. *Id.*

74. *Id.*

75. *Id.* at 785.

76. *Id.* at 786.

77. *Id.* at 787 (alteration in original) (quoting United States v. DeLuca, 269 F.3d 1128, 1132 (10th Cir. 2001)) (internal quotation marks omitted). It is difficult, indeed, to imagine how a defendant would demonstrate a hypothetical answer to a question that he never asked: whether he could simply drive away in the automobile. In fact, the very reason that passengers are "seized"

The Ninth Circuit, however, stated that the outcome would have been different had the initial stop been unlawful: "But when, as here, the initial stop is lawful . . . . [t]he continued detention of the vehicle does not necessarily entail the detention of its occupants; they could simply be permitted to walk away."[78] Ironically, the majority cited to *Payner III* for the proposition "that the officers' supposedly nefarious motives have [no] relevance in this case."[79]

Finally, in *United States v. DeLuca*,[80] an officer stopped a car at a lawful "license and registration checkpoint."[81] Although the driver was able to produce a valid license and registration (the owner of the vehicle was in the rear seat), the officer felt that the occupants of the car, including DeLuca in the front passenger seat, appeared nervous, and the officer directed them to the shoulder, neglecting to return the license or registration.[82] The officer then obtained consent from the driver to search the car and eventually, with the aid of a drug-sniffing canine, discovered narcotics in the car.[83] Although the continued detention was unlawful,[84] the court denied DeLuca's motion to suppress based on his unlawful detention: "Mr. DeLuca has failed to show that had he requested to leave the scene of the traffic stop, he would have been able to do so in [the owner's] car."[85] In other words, the defendant, in order to prevail, had to demonstrate that the narcotics "would never have been found but for *his*, and only his, unlawful detention."[86]

How much Fourth Amendment protection can passengers in automobiles actually count on? After *Rakas*,[87] a mere passenger cannot contest the search of the car she occupies, and although passengers of stopped vehicles are seized as are the drivers, at least in three circuits, as long as the initial stop is lawful (or perhaps even if it is not),[88] it is of no consequence that the passenger's seizure ripens into an unlawful one if she cannot demonstrate the heightened factual nexus described above. As for the initial stop, it is not difficult to establish the existence of some traffic violation or other (officers have so many to choose

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in the first place is because "a sensible person would not expect a police officer to allow people to come and go freely" from the scene of a traffic stop, and "no passenger would feel free to leave in the first place." Brendlin v. California, 551 U.S. 249, 257 (2007). Therefore, it is highly unlikely that asking for permission to depart in the vehicle would ever even cross the passenger's mind.

78. *Pulliam*, 405 F.3d at 788.

79. *Id.* at 788 n.2 (referring to *Payner III*, 447 U.S. 727, 731-37 (1980)).

80. 269 F.3d 1128 (10th Cir. 2011).

81. *Id.* at 1130.

82. *Id.*

83. *Id.* at 1130-31.

84. *Id.* at 1131-32. The Government conceded the fact that once a valid license and registration were produced the continued detention, based solely on nervous appearance, was unlawful. *Id.*

85. *Id.* at 1133.

86. *Id.*

87. Rakas v. Illinois, 439 U.S. 128 (1978).

88. *See* text accompanying *supra* notes 66-67.

from), and the officer's motivations, even if "nefarious," are simply irrelevant.[89] More alarming, however, these cases raise the specter of police perjury as to consent,[90] or even as to the existence of the infraction that provides the basis for the initial stop.[91]

Judge Wardlaw, dissenting from the decision in *Pulliam*, was correct to fear that the majority's decision

> invites police officers to engage in patently unreasonable detentions, searches, and seizures every time an automobile contains more than one occupant. Should something be found, only the owner of the vehicle will be able to successfully move to suppress the evidence; the evidence will be admissible against the other occupants. After this decision, police officers will have little to lose, but much to gain, by legally stopping but illegally detaining vehicles occupied by more than one person.[92]

Justice White made a similar argument in his *Rakas* dissent, expressing his concern that "[a]fter this decision, police will have little to lose by unreasonably searching vehicles occupied by more than one person."[93] Given the incentive officers will have to conduct searches of multi-occupant vehicles, as well as the court's demonstrated indifference to blatant misconduct, even if such misconduct is racially motivated, it is necessary to reevaluate the court's standing doctrine. As standing acts as a constraint on the exclusionary rule, the next Part begins there, urging a conception of exclusion less vulnerable to such limitation—one that is rooted in due process and attains the status of a true constitutional requirement.

II. EXCLUSION AS A DUE PROCESS RIGHT

A. From Due Process to Deterrence: A Tale of Transformation

This Part commences by briefly highlighting, through selected cases, the Fourth Amendment exclusionary rule's journey and transformation from a constitutionally required right to its modern identity as a quasi-remedy, the purpose of which is to deter future Fourth Amendment violations, not to remedy the harm that already occurred to the defendant seeking suppression.[94] In 1914,

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89. *See Pulliam*, 405 F.3d at 787-88 & 788 n.2.

90. *See supra* note 61 and accompanying text.

91. *See supra* note 72 and accompanying text.

92. *Pulliam*, 405 F.3d at 796 (Wardlaw, J., dissenting).

93. Rakas v. Illinois, 439 U.S. 128, 169 (1978) (White, J., dissenting).

94. There is already a great deal of excellent scholarly literature detailing this transformation and the history of the exclusionary rule. *See*, *e.g.*, Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173 (1991); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799 (2000); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565 (1982-1983), Thomas S. Schrock

the Court gave birth to an exclusionary rule that did not rely on Fifth Amendment self-incrimination exclusionary principles,[95] but that conceived of exclusion as a constitutional requirement arising directly from the Fourth Amendment violation itself in *Weeks v. United States*.[96]

In *Weeks*, the Court reversed a conviction supported by evidence obtained in violation of the Fourth Amendment and offered a justification for exclusion based on due process principles.[97] This approach conceived of courts themselves being bound by the Fourth Amendment, as well as being charged with ensuring that the executive branch complied with its requirements.[98] As to the first prong of this theory of exclusion, the Court considered the judiciary to be a partner in the enforcement of the law, and thus, equally subject to the constraints of the Fourth Amendment:

> The effect of the [Fourth] Amendment is to put the courts of the United States *and* Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and

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& Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974-1975); Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141 (1978). For present purposes, this Article will focus on a few principal cases that exemplify the shift in rationale for justifying the exclusionary rule, from its origins to its current deterrence-based conception. There are, of course, many more cases developing the Court's exclusionary rule jurisprudence, and the Court's focus on deterrence has led to numerous exceptions to the rule, including the doctrines of inevitable discovery, *see* Nix v. Williams, 467 U.S. 431, 443-44 (1984); attenuation, *see* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963); and the good-faith exception to the rule, *see* United States v. Leon, 468 U.S. 897, 919 (1984).

95. *See* Boyd v. United States, 116 U.S. 616, 633 (1886) ("[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 302-03, 310 (1967) (reasoning that the seizure of tangible, non-testimonial evidence does not in effect compel the defendant "to become a witness against himself" and holding that the Fourth Amendment permits the seizure of "mere evidence" in addition to contraband and fruits or instrumentalities of crime); *see also* Sunderland, *supra* note 94, at 142.

96. 232 U.S. 383, 392-94 (1914).

97. *Id.* at 398-99.

98. *Id.* at 392; *see also* Grant, *supra* note 94, at 77 (stating that the *Weeks* Court "established that the judiciary has the constitutional duty to give 'force and effect' to the Fourth Amendment by excluding unconstitutionally seized evidence"); Sunderland, *supra* note 94, at 143 (describing the "essence" of the *Weeks* Court's argument as urging "that all bodies entrusted with enforcement of the law, including the judiciary, must enforce that law as written").

> effect is obligatory upon *all* intrusted [sic] under our Federal system with the enforcement of the laws.[99]

As to the second, the *Weeks* Court emphasized the role of the courts as guardians of the Constitution:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[100]

We discover in this language a personal right, belonging to all people, to seek the enforcement of fundamental rights and due process of law. The Due Process Clause of the Fifth Amendment states that no person shall "be deprived of life, liberty or property, without due process of law."[101] As stated by Professor Lane Sunderland, whatever meaning we ascribe to due process, "it surely means at least this: the only condition under which one may be deprived of life, liberty or property is if that deprivation be in accordance with due process of law."[102]

That the *Weeks* Court envisioned a due process right to exclusion is made evident by its language admonishing the *courts* that their efforts, as well as those of "their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[103] The phrase "law of the land" is derived from the Magna Carta and is the source of what we refer to as due process of law.[104] At the very least, due process of law, or the law of the land, must refer to the provisions and great principles of law embodied in our most sacred legal text—the Constitution. According to *Weeks*, any court that enters a judgment of

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99. *Weeks*, 232 U.S. at 391-92 (emphases added).

100. *Id.* at 392. It is precisely this perception of the judiciary being bound by constitutional constraints that led the Court to hold that judicial enforcement of racially restrictive agreements between private parties constitutes a denial of equal protection. *See* Shelley v. Kraemer, 334 U.S. 1, 19-21 (1948). The Court, in reaching its decision, affirmed that "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Id.* at 15 (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930)) (internal quotation marks omitted).

101. U.S. CONST. amend. V. Of course, most of the provisions enshrined in the Bill of Rights, including most of those involving criminal procedure, were incorporated against the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amends. IV, XIV. *See, e.g.*, WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF, at xv (7th ed. 2012).

102. Sunderland, *supra* note 94, at 149.

103. *Weeks*, 232 U.S. at 393.

104. *E.g.*, Sunderland, *supra* note 94, at 149.

conviction based on evidence obtained through a violation of any provision of the Constitution, "affirm[s] by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."[105]

By this account, the courts are entrusted with enforcing laws without violating fundamental constitutional principles and also with enforcing those principles against the other government branches.[106] This understanding of a due process right to exclusion under *Weeks* fully supports the argument for a constitutionally-required exclusionary rule, articulated by Professor Ruth Grant, based on a "unitary model" of government and a theory of "separation of powers."[107] The unitary model (and the judiciary's role in such a model) was first delineated by Professors Thomas Schrock and Robert Welsh as arising from *Weeks*.[108] According to this model, there is

> a conceptual and moral connection between the trial court and the evidence-seizing police. This connection exists because every search for or seizure of evidence points beyond itself to use at trial. Search, seizure, and use are all part of one "evidentiary transaction," and every such transaction presupposes a court as well as a policeman. Because the court is integral to the evidentiary transaction, it cannot insulate itself from responsibility for any part of that transaction, and specifically not from responsibility for the manner in which evidence is obtained.[109]

Within this unitary framework, "each participant in the proceedings is responsible for the constitutionality of the entire proceeding. The unitary model of judicial responsibility thus accords with the understanding of separation of powers as the means by which limits on government action can be maintained."[110]

Nearly half a century later, the Court was presented with a case that would prove an ideal vehicle to extend to state prosecutions the exclusionary rule announced in *Weeks* as "an essential part of the right to privacy" that previously had been "declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment] . . . ."[111] Officers searching for a suspect connected to a recent bombing arrived at the home of Miss Mapp, but were not

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105. *Weeks*, 232 U.S. at 394.

106. Interestingly, the *Weeks* Court charges all branches with the "*enforcement* of the laws" but refers to the executive actors as those who "*execute* the criminal laws." *Id.* at 392 (emphases added).

107. *See* Grant, *supra* note 94, at 176.

108. Schrock & Welsh, *supra* note 94, at 295-98.

109. *Id.* at 298.

110. Grant, *supra* note 94, at 199.

111. Mapp v. Ohio, 367 U.S. 643, 655-56 (1961). In 1949, the Court, in *Wolf v. Colorado*, held that the right to privacy protected by the Fourth Amendment was "implicit in the concept of ordered liberty and as such enforceable against the States through the Due Process Clause," but declined to hold that the exclusionary rule was "an essential ingredient of the right." 338 U.S. 25, 27-29 (1949) (internal quotation marks omitted), *overruled by Mapp*, 367 U.S. at 643.

permitted by her to enter.[112] Eventually, the officers broke in, confronted Mapp on the stairs, and refused to allow Mapp's attorney access to her.[113] When Mapp demanded to see a warrant, officers presented her with a piece of paper, which she secured "in her bosom," from where the officers forcibly retrieved it.[114] The Court described the police as acting in a "highhanded manner" and "running roughshod over appellant."[115] It further stated that an officer had "grabbed her, twisted (her) hand, and [that] she yelled (and) pleaded with him because it was hurting."[116] The officers then searched the second floor, including Mapp's bedroom and that of her daughter, as well as the basement, discovering the "obscene materials" that furnished the basis of her conviction.[117]

Although the *Mapp* Court quoted *Weeks* extensively and adhered to the due process model of exclusion,[118] the Court provided several alternative justifications for extending the exclusionary rule to the states. This resulted in an opinion that overstated its arguments, did not clearly indicate the primary rationale, and left the door open to the almost exclusively deterrence-based rationale that would ultimately prevail.[119] For example, the *Mapp* Court invoked the rationale of judicial integrity[120] and a theory of exclusion based on a synthesis of Fourth and Fifth Amendment self-incrimination concerns.[121] Both of these rationales, of

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112. *Mapp*, 367 U.S. at 644. Mapp resided on the top story of a two-family home. *Id.*

113. *Id.*

114. *Id.* The Court noted that no warrant was in fact produced at trial. *Id.* at 645.

115. *Id.* at 644-45.

116. *Id.* at 645 (internal quotation marks omitted).

117. *Id.*

118. The Court specifically focused on the *use* of unconstitutionally obtained evidence and quoted *Weeks*'s powerful language that if such use is condoned by the courts, the Fourth Amendment "might as well be stricken from the Constitution." *Id.* at 648 (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)). In addition, the Court invoked *Weeks*'s reference to "the fundamental law of the land," and concluded "that the Weeks rule is of constitutional origin." *Id.* at 648-49 (quoting *Weeks*, 232 U.S. at 393). Clearly, the *Mapp* Court understood the exclusionary rule as a constitutional rule and requirement, or it would not have had the authority to enforce the rule against the states. As described by Professor Sunderland, "The essence of *Mapp* is that the exclusionary rule is an essential part of the [F]ourth [A]mendment, and the right that [A]mendment embodies applies to the states through the [D]ue [P]rocess [C]lause of the [F]ourteenth [A]mendment." Sunderland, *supra* note 94, at 144.

119. Sunderland, *supra* note 94, at 144.

120. *Mapp*, 367 U.S. at 659 ("[T]here is another consideration—the imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." (citation omitted) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960) (internal quotation marks omitted)).

121. *Id.* at 656 ("Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.?"). Justice Black, concurring in the opinion, based the right to exclusion on this rationale, finding that the

> Fourth Amendment does not itself contain any provision expressly precluding the use

course, support a constitutional basis for exclusion.[122] However, the *Mapp* Court also offered a practical reason to extend the exclusionary rule to state proceedings: "the purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[123] This language provided future Courts with grist for an anti-exclusionary mill that would produce numerous limitations and exceptions to the exclusionary rule.

For example, in *United States v. Calandra*,[124] the Court, in holding the Fourth Amendment exclusionary rule inapplicable to grand jury proceedings, speculated that excluding evidence in this context would have negligible deterrent effect.[125] Further, the harm suffered by the victim of the unlawful government intrusion, according to the Court, "is fully accomplished by the original search without probable cause. Grand jury questions based on evidence obtained thereby involve no independent governmental invasion of one's person, house, papers, or effects."[126] Thus, the *Calandra* Court elevated deterrence as the primary justification for the exclusionary rule.[127] By focusing solely on the preservation of privacy as the protected interest under the Fourth Amendment, rather than recognizing that the *use* of illegally obtained evidence also violates the Fourth Amendment, and thus Due Process, the Court dismissed a personal, constitutionally required right to exclusion.[128] In the Court's words,

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> (T)he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.[129]

The exclusionary rule was transformed into "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect,

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> of such evidence . . . . Reflection on the problem, however, . . . has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

Id. at 661-62 (Black, J., concurring).

122. *Id.* at 657.

123. *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217) (internal quotation marks omitted).

124. 414 U.S. 338 (1974).

125. *Id.* at 351.

126. *Id.* at 354.

127. *Id.* at 347.

128. *Id.* at 347-48.

129. *Id.* at 347 (alteration in original) (citation omitted) (quoting Linkletter v. Walker, 381 U.S. 618, 637 (1965)) (internal quotation marks omitted).

rather than a personal constitutional right of the party aggrieved."[130]

As for judicial integrity, the Court, in *Stone v. Powell*,[131] downplayed the importance of "preserving the integrity of the judicial process" as a justification for exclusion,[132] and in *United States v. Janis*,[133] equated judicial integrity with "the inquiry into whether exclusion would serve a deterrent purpose."[134] Of course, with deterrence as the primary and perhaps sole justification for exclusion, the Court is free to decline to enforce the exclusionary rule any time it believes exclusion will not sufficiently deter future behavior, or when the deterrence is simply not worth the cost to society of lost convictions.

Thus, a knock-and-announce violation does not trigger the exclusionary rule, as "the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot."[135] While the Court seems willing to accept that flagrant violations are capable of being discouraged by the threat of exclusion,[136] an exclusively deterrence-based approach recognizes little

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130. *Id.* at 348.

131. 428 U.S. 465 (1976).

132. *Id.* at 485-86 ("Although our decisions often have alluded to the 'imperative of judicial integrity,' they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context." (citation omitted) (quoting United States v. Peltier, 422 U.S. 531, 536-39 (1975))). The *Powell* Court held that a defendant is not entitled to habeas corpus relief arising from a claim that his conviction was based on unconstitutionally seized evidence if the Fourth Amendment claim was fully litigated through the state trial and review process. *Id.* at 494.

133. 428 U.S. 433 (1976).

134. *Id.* at 458 n.35. The *Janis* Court held the exclusionary rule inapplicable in federal civil proceedings when evidence was seized unlawfully but in good faith. *Id.* at 453-54.

135. Hudson v. Michigan, 547 U.S. 586, 596 (2006). The Court in *Wilson v. Arkansas* held that the common-law requirement of knocking and announcing before entering the home is part of the Fourth Amendment reasonableness inquiry. 514 U.S. 927, 930 (1995). Therefore, a search conducted without adhering to this requirement violates the Fourth Amendment, and constitutes an unlawful search. *Id.* at 934. The Court, in *Hudson*, applied a novel approach to attenuation, reasoning that the finding, and therefore the exclusion, of evidence was attenuated from, or not directly related to, the purposes of the knock-and-announce requirement. *Hudson*, 547 U.S. at 593 ("The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes."). The *Hudson* majority also pointed to the existence of other available means of deterrence, such as civil suits or internal police department discipline, *id.* at 597-99, and referred to "suppression of evidence [as having] always been our last resort." *Id.* at 591.

136. *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975) (holding that Miranda warnings are one of several factors relevant to determining whether a statement made subsequent to a Fourth Amendment violation is sufficiently attenuated from the violation and therefore admissible). A "particularly" important factor is an assessment of "the purpose and flagrancy of the official misconduct." *Id.* at 604. In *Brown*, two detectives surprised the defendant as he returned home to his apartment and, with guns drawn, broke in, searched the apartment, and arrested Brown with no warrant and no probable cause. *Id.* at 592. As another example, in deciding that the testimony of

justification for excluding unlawfully obtained evidence where the officers were acting in good faith,[137] or at very least, were not acting with "reckless disregard of constitutional requirements."[138] In the Court's words, "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[139]

Ironically, considering the Court's view that exclusion is all about preventing future violations, each limitation to the rule's application has an anti-deterrent effect, or even worse, provides police with an incentive to violate the Fourth Amendment.[140] Moreover, there is no way to empirically measure the deterrent effect of the exclusionary rule, or perhaps even the "cost" to society against which the deterrent value of the rule is measured.[141] This second point is worth consideration; if it were to be decided that, even in the case of flagrant violations, the threat of exclusion does not actually deter such misconduct, then the Court (or Congress) could abolish the rule altogether, as long as the rule is considered to be a preventative measure rather than a personal constitutional right belonging to the one aggrieved by the unlawful search or seizure. In fact, the Court has noted that, when officers are not acting in the interests of apprehending criminals and gathering evidence for prosecution, but are instead motivated by racial animus and the desire to harass minority citizens, the knowledge that any evidence they

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a live witness discovered as a result of a Fourth Amendment violation was admissible, the Court noted that the officer who casually picked up and examined the contents of an envelope on a shop counter likely had no intent of finding a witness, and, thus, "[a]pplication of the exclusionary rule in this situation could not have the slightest deterrent effect on the behavior of [such] an officer." United States v. Ceccolini, 435 U.S. 268, 280 (1978).

137. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (holding the exclusionary rule does not apply when an officer, in good faith, relies on an invalid warrant); *see also* Arizona v. Evans, 514 U.S. 1, 15-16 (1995) (holding that an officer's reasonable good-faith reliance on an erroneous police record indicating an outstanding arrest warrant did not require exclusion, when the error in the record was that of court employees).

138. Herring v. United States, 555 U.S. 135, 147 (2009). In *Herring*, the Court extended the holding of *Evans* to include record-keeping errors committed by the police that are not sufficiently culpable as to warrant the costs of exclusion. *Id.* *See Evans*, 514 U.S. at 16.

139. *Herring*, 555 U.S. at 144.

140. The reader has already seen this incentive at work, as demonstrated by the Government's conduct in *Payner I*, 434, F. Supp. 113, 132-33 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980). *See supra* note 35 and accompanying text. *See also* Murray v. United States, 487 U.S. 533, 546 (1988) (Marshall, J., dissenting) ("Under the circumstances of these cases, the admission of the evidence 'reseized' during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches.") The *Murray* Court held that the independent source doctrine applies to tangible evidence rediscovered during a lawful search, even if originally discovered through unlawful means, as long as the second discovery stems from a source that is truly independent of the first, unlawful, search. *Id.* at 542-43 (majority opinion).

141. *See* Grant, *supra* note 94, at 186-87.

may find will not be admitted to trial is not likely to affect their behavior, and thus, in this context, the exclusionary rule, having no deterrent value, is not deemed appropriate.[142] It is critical, then, to reinvigorate the original understanding of exclusion as a due process right against the Government's use of unlawfully seized evidence to obtain a conviction. This Article seeks further support for this view by examining the structure and function of the Fourth Amendment, concluding that the Amendment is itself a due process clause, albeit one addressing the specific context of searches and seizures.[143]

B. Fourth Amendment Values and a Due Process Model of Criminal Procedure

This Section begins by briefly discussing the values underlying the criminal process generally, in order to place the Fourth Amendment in its larger criminal procedure context. Professor Peter Arenella identifies three broad objectives of criminal procedure.[144] The first is to provide a process that effectuates and defends the goals of substantive criminal law by determining questions of guilt or innocence accurately, decisively, and with regard to sentencing purposes.[145] Thus, once a defendant's guilt is established, the process should aim to achieve the goals of punishment to promote legislative intent.[146] Second, our adversarial system must allocate power and resources efficiently and in a way that reflects "the system's judgments about which state officials, institutions, and community representatives are best suited to investigate, apprehend, charge, adjudicate, and sentence."[147] Finally, the criminal process can also serve to legitimize the State's

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142. *See* Terry v. Ohio, 392 U.S. 1, 14-15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."). *See also* Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."). For a strong critique of the Court's refusal to use the exclusionary rule as a tool to prevent officer harassment of minority citizens, see Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 405-06 (2001).

143. U.S. CONST. amend. IV.

144. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 188 (1983).

145. *Id.*

146. *Id.* at 199.

147. *Id.* Note that this understanding of the criminal process does not conflict with the unitary model of government discussed above, *see* text accompanying *supra* notes 107-10 and accompanying text, in which a criminal prosecution constitutes one larger transaction involving a variety of governmental actors at different stages.

exclusive and vast power to punish its citizens by articulating and adopting norms that enhance fairness and reliability or, at the very least, the *appearance* thereof.[148]

It is important to note that fairness and reliability are two distinct values.[149] If one goal of the criminal justice system is to validate the coercive power of the State over the individual, then the articulation and use of "fair process norms" are crucial.[150] After all, a system that results in groundless or arbitrary punishment loses all moral legitimacy and directly frustrates the deterrent goals of substantive criminal law.[151] However, some of these fair process norms also serve functions having little to do with the accuracy of the results and, in fact, "impair procedure's guilt-determination function."[152] These result-independent norms seek to recognize and respect the dignity of the individual, especially in light of the tremendous imbalance of power between the individual and the State.[153]

Identifying the main goals of the criminal process—promotion of substantive criminal law values, efficient and proper allocation of power between institutional actors, and respect for the dignity of the accused—is only the first step.[154] Deciding on a model of procedure that best achieves these goals is the next, and more difficult, task. Adding to the complexity of this endeavor, these goals are not necessarily independent of one another. For example, the reliability of the outcome of a trial implicates both substantive law goals and dignitary interests.[155] The promotion of reliability, as a primary objective, will also entail deciding which actors can best determine facts (police, judges, or juries).[156] If, instead, the primary focus is on fairness of process and mitigating the imbalance between the individual and the State, this interest also legitimizes substantive criminal law to the community, puts a premium on individual dignity, and influences the choice of which actor can best determine innocence or guilt. This is especially pertinent when one takes into account a full conception of guilt that includes a moral judgment.[157]

Many factors will influence the Court's choice of model, including the Court's normative understanding of each of these goals, as well as its assessment

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148. Arenella, *supra* note 144, at 202.

149. *Id.*

150. *Id.* at 188, 202.

151. *See id.* at 202-03. One goal of punishment is to deter undesirable social behavior, and the threat of punishment encourages obedience of criminal laws. For that threat to be effective, however, the justice system must administer punishment only when the individual has, in fact, acted in a manner contrary to the law, as the individual must be able to confidently assume that compliance with the law will prevent her from being punished.

152. *Id.* at 202.

153. *Id.* at 201-02.

154. *Id.* at 188.

155. *Id.* at 202-03.

156. *Id.* at 213-15.

157. *See id.* at 214.

of their relative importance.[158] For example, the Court that places a higher value on the promotion of substantive criminal law goals than it does on furthering the dignity of the accused may favor a procedural model that looks quite different from one that might be derived from the opposite calculus.[159] Political ideology and current social concerns, such as the ongoing War on Terror, will also influence the Court's model selection.[160]

The Article next turns to Professor Herbert Packer's seminal and highly influential work, *The Limits of the Criminal Sanction*,[161] in which he identifies two normative models of criminal procedure—the Crime Control and the Due Process Models.[162] Professor Packer perceives these models as polar opposites[163] with respect to the value choices being made, although there is general agreement under both models that some limitations on police power are necessary and proper.[164] Plainly stated, the Crime Control Model's central mission is "the repression of criminal conduct."[165] The surest way to maximize such repression is by inflicting punishment on those individuals who are factually guilty.[166] Further, preventing criminal conduct most effectively requires a process that results in "a high rate of apprehension and conviction" and puts "a premium on speed and finality."[167] Further, a system that needs to dispose of a great many criminal cases with limited resources at its disposal should also aim to limit challenges. Such a system would naturally exhibit a preference for extra-judicial identification of facts, such as occurs in the interrogation room, and would also favor extra-judicial determinations of guilt, such as police and prosecutors make when deciding whom to continue investigating and whom to prosecute.[168] Under the Crime Control Model, police and prosecutors act to screen suspects and whittle down the numbers at each successive stage prior to trial, similar to "an assembly-line conveyor belt . . . ."[169] Thus, by the time the suspect has become a defendant, this Model embraces a presumption of guilt based on the assumption that the "conveyor belt" operated smoothly.[170]

If the Crime Control Model is an "assembly-line conveyor belt," due process

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158. This Article focuses on the Supreme Court's choice of models, although the Court is certainly not the only institutional actor that influences which model or models dominate the process.

159. Arenella, *supra* note 144, at 200.

160. *Id.*

161. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

162. *Id.* at 153.

163. *Id.* at 154.

164. *Id.* at 155-57.

165. *Id.* at 158.

166. *See id.* at 158-59.

167. *Id.* at 159.

168. *Id.* at 158-59.

169. *Id.* at 159-60.

170. *Id.* at 159-61.

places an "obstacle course" in that assembly line.[171] The presumption of innocence requires that officials, in their interactions with the defendant, ignore the likelihood that the defendant may very well be factually guilty.[172] The central mission of the Due Process Model is to assert the preeminence of the individual while simultaneously affirming the need to limit official power.[173] This Model espouses a preference for formal adjudication of guilt, rather than the informal *ex officio* procedures preferred by the Crime Control Model.[174] Thus, factual guilt that has been determined by proper legal process defines legal guilt.[175] While the Due Process Model demands maximum security against erroneous convictions, it also seeks to limit official power over *all* defendants, factually innocent and guilty alike.[176] Unlike the Crime Control Model, the Due Process Model does not value finality for the sake of finality, but expresses a preference for formal, judicial process that not only adjudicates guilt and innocence, but also serves to correct (and punish) the system's own abuses.[177] The Due Process Model is concerned not only with reliability, but with individual dignity.[178] Under this Model, we not only care about the result, but we care *how* the Government went about achieving that result.[179]

A common claim among scholars is that the Warren Court's ideologies trended towards the Due Process Model this Article has just described, while the Burger Court (and subsequent Courts), favored the Crime Control Model.[180] As Professor Arenella claims, this may be oversimplified, and although the Court may gravitate towards one or the other of these models, depending on its particular makeup, the Court, at any given time, is essentially engaged in an effort to resolve the tension between individual rights and the power of the State.[181] Rather than conceiving of these two models as mutually exclusive polar opposites, the Court may develop a jurisprudence primarily adhering to one model while accommodating some of the values espoused in the other.[182] For example, a Crime Control Model can express a preference for efficiency, finality, and the use of informal fact-finding that, nevertheless, puts a premium on

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171. *Id.* at 159, 163.

172. *Id.* at 166-67.

173. *Id.* at 165.

174. *Id.*

175. *Id.* at 166.

176. Arenella, *supra* note 144, at 213 (offering a reconstruction of Packer's models).

177. PACKER, *supra* note 161, at 171-72. Professor Arenella highlights how the Crime Control Model seeks to push factually guilty defendants quickly through the system: "In contrast, the [C]rime [C]ontrol [M]odel secures the conviction of the 'factually guilty' by encouraging defendants to forfeit their factual guilt defeating claims in exchange for some sentencing concession." Arenella, *supra* note 144, at 213 (footnote omitted).

178. Arenella, *supra* note 144, at 210, 236.

179. *Id.* at 210.

180. *See id.* at 209-13.

181. *See id.* at 195.

182. *Id.* at 226-28.

reliability and dignity by placing adequate procedural controls on the various stages of the assembly-line.[183]

Turning to the criminal procedure provisions of the Bill of Rights, the Framers endeavored to strike a balance between individual rights and the power of the State.[184] The Supreme Court continues the Framers' work by interpreting and applying these provisions centuries after they were written. Although the Bill of Rights provisions are stated in terms of curbing the power of the State, many of the provisions may also be read to validate the exercise of the State's power over the individual. For example, by prohibiting *unreasonable* searches and seizures, the Fourth Amendment implicitly recognizes the power of the State to search and seize, subject to certain restrictions and requirements—i.e., probable cause and a warrant.[185] Thus, neither an individual's right to prevent the Government's entry into her home or to avoid a forcible arrest, nor the Government's power to search for and seize evidence or persons suspected of crime is absolute.[186] Similarly, implicit in the Due Process Clause is the Government's power to deprive individuals of life, liberty, and property, subject to due process of law. One already can begin to see the parallel between these two constitutional provisions.

When interpreting the various constitutional criminal procedure provisions, the Court's preference for a particular model should adequately reflect the different functions of those provisions in relation to the general goals of the criminal process outlined above.[187] To that end, this Article will examine the Fourth Amendment and its rather unique role among the criminal procedure rights. In particular, the Article will focus on the Fourth Amendment's relationship with (1) the goals of substantive criminal law; (2) the efficiency and reliability of the truth-seeking process; and (3) the aim of limiting official power over the individual. The Article endorses a Due Process Model of criminal procedure and will illustrate that the Fourth Amendment is in and of itself a due process provision, which will further support the original understanding that exclusion of evidence obtained in violation of the Fourth Amendment is a constitutionally required right.

The criminal procedure rights are mostly reposed in the Fourth, Fifth, and Sixth Amendments, as incorporated against the states in the Fourteenth Amendment. The Supreme Court, however, has differentiated between the Fourth Amendment and its criminal procedure counterparts in order to justify differing treatment of these provisions with respect to the availability of exclusion.[188] The Court's disposition towards the Fourth Amendment has led

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183. *Id.* at 226.

184. *See* 16A AM. JUR. 2D *Constitutional Law* § 404 (2013).

185. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199-201 (1993) [hereinafter Maclin, *Central Meaning*].

186. *Id.*

187. Arenella, *supra* note 144, at 198-99.

188. *See* United States v. Leon, 468 U.S. 897, 906 (1984) ("The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . . .").

Professor Tracey Maclin to ask, "Why is the Fourth Amendment considered a second-class right?"[189] The Court's explanation of its disparity in treatment finds support among scholars as well.[190] The Fifth Amendment privilege against compelled self-incrimination and the rights arising under the Sixth Amendment are procedural—or trial—rights, while the Fourth Amendment's guarantees are substantive.[191] This Article questions the continuing validity and force of this distinction and the resulting conclusion with respect to exclusion, in Part II.D.

This author, however, agrees that the Fourth Amendment, both normatively and descriptively, promotes quite different, and sometimes opposing, values from those of the so-called trial rights.[192] The Fourth Amendment is not exclusively a substantive right, but is rather both substantive and procedural—much like the Due Process Clause. Before the Article develops the analogy between the Fourth Amendment and the Due Process Clause, it briefly will reflect on the relationship of the Fourth Amendment to the criminal procedure goals identified above, comparing and contrasting with the Fifth and Sixth Amendment provisions where helpful.

If the primary goal of substantive criminal law is to identify and prosecute (and, thus, also prevent) undesirable conduct, then the Fifth and Sixth Amendment trial rights thwart the prosecution and punishment aspect of that goal, but only to the extent that the securing of convictions is seen as a win, regardless of accuracy.[193] To the extent that these provisions actually promote reliability and protect innocence, they are meant to thwart erroneous convictions. Thus, they are not purposely antagonistic to the goals of criminal procedure even though, through their enforcement, the factually guilty will sometimes escape punishment.[194]

The Fourth Amendment, on the other hand, impedes prosecution and

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See *infra* Part II.D for further discussion of this distinction.

189. Maclin, *Central Meaning*, *supra* note 185, at 238. Professor Maclin answers that question by speculating "that the Court sees the typical Fourth Amendment claimant as a second-class citizen, and sees the typical police officer as being overwhelmed with the responsibilities and duties of maintaining law and order in our crime-prone society." *Id.* Professor Maclin's argument is consistent with the Supreme Court's tendency towards a Crime Control Model, in which defendants are presumed to be factually guilty. *See supra* text accompanying note 170.

190. Maclin, *Central Meaning*, *supra* note 185, at 202.

191. *See* discussion *infra* Part II.D; *see also, e.g.*, Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909 (1989) [hereinafter Loewy, *Police-Obtained Evidence and the Constitution*] ("First and foremost, [F]ourth [A]mendment rights are substantive as opposed to procedural rights."). Professor Loewy argues that "[p]rocedural rights are supposed to exclude evidence. Substantive rights need not." *Id.* at 910. Although Professor Loewy does not classify substantive rights as any less important and, indeed, believes "it makes good sense from a utilitarian perspective to engraft an exclusionary rule onto the [F]ourth [A]mendment." *Id.* at 911.

192. *See* Loewy, *Police-Obtained Evidence and the Constitution*, *supra* note 191, at 911.

193. *See* Arenella, *supra* note 144, at 232-35.

194. *See id.* at 190.

conviction by making criminal conduct more difficult to detect.[195] In this way, the Fourth Amendment directly frustrates the goals of substantive criminal law.[196] While the aim of the Fifth and Sixth Amendment guarantees are not to set the guilty free, but to ensure that the innocent are not convicted, one cannot make the same normative claim quite as forcefully in the case of the Fourth Amendment.[197] After all, the Fourth Amendment is not designed to make searches easier,[198] just as due process is not designed to make convictions easier.[199]

Since the Fourth Amendment makes discovering crime more difficult, the Amendment has a unique relationship with substantive criminal law. The Fourth Amendment may act as a direct check on the legislature since, as a practical matter, the legislature may refrain from criminalizing conduct that would be difficult to detect absent a Fourth Amendment violation.[200] For example, how do police go about developing probable cause that a married couple is using contraception in its bedroom, and that a search of the bedroom will yield evidence of such offense? In *Griswold v. Connecticut*,[201] the Court, in striking down Connecticut's birth control law, which forbade the use of contraception, described a "zone of privacy created by several fundamental constitutional guarantees[,]" including the Fourth Amendment.[202] To demonstrate how antagonistic the birth control law was to privacy, Justice Douglas, writing for the Court, asked, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[203]

Reaching back to the colonial-era grievances that gave birth to the Fourth Amendment, the Framers sought to limit the power of the Government to detect (and thus punish and prevent) the offense of smuggling[204] and also were

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195. Tracey Maclin, *Constructing Fourth Amendment Principles From the Government Perspective: Whose Amendment Is It, Anyway?*," 25 AM. CRIM. L. REV. 669, 671 (1987-1988) [hereinafter Maclin, *Constructing Fourth Amendment Principles*].

196. *Id.*

197. *See* Arenella, *supra* note 144, at 232-33.

198. Maclin, *Constructing Fourth Amendment Principles*, *supra* note 195.

199. In fact, such a high burden of proof may thwart accuracy of the verdict, but the possibility that a factually guilty defendant will be found legally not guilty is an error that the system is willing to tolerate and, indeed, prefers over the alternative—that a factually innocent defendant be convicted. *See* Arenella, *supra* note 144, at 190, 196.

200. *See* Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413 (2002).

201. 381 U.S. 479 (1965).

202. *Id.* at 485.

203. *Id.* at 485-86.

204. *See* Boyd v. United States, 116 U.S. 616, 625 (1886) (discussing the opposition to the writs of assistance issued to revenue officers, "empowering them, in their discretion, to search suspected places for smuggled goods"), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967). There were other offenses in colonial America, including those that sought to regulate such areas as trade, debauchery, vagrancy, and observance of the Sabbath for purposes of "political

influenced by the unlawful use of general warrants in England to root out perpetrators of seditious libel.[205] The writs and warrants used to aid the enforcement of these offenses were tools of an oppressive regime, antithetical to the development of a fledgling democratic republic.[206]

Thus, while a generously construed Fourth Amendment may serve to limit the conduct that the legislature should or may criminalize, a narrow construction may have the opposite effect.[207] To illustrate, police are permitted to perform full warrantless searches of the person incident to lawful arrests.[208] Police may examine containers and packages located on the arrestee without any reason to believe they contain evidence of a crime or a weapon.[209] If the recent occupant of an automobile is arrested, police also may search the entire passenger compartment of the car "if the arrestee is within reaching distance of the [vehicle]" or if officers have reason to believe the car may contain evidence of the crime of arrest.[210]

In addition, the police may choose to effectuate a full custodial arrest of the driver of a vehicle simply for having committed one of a myriad of traffic offenses, no matter how minor,[211] regardless of the arresting officer's true motivation for arresting.[212] And, upon incarceration, even for a minor offense, the Fourth Amendment does not forbid an invasive strip search.[213] Thus, a legislature that wishes to make searching and seizing easier (and more frequent) can simply create more traffic offenses, and police can vigorously enforce them.

Having seen that the Fourth Amendment has a direct relationship with substantive criminal law, the Article turns to the next goal of the criminal process: reliability. Again, the Fourth Amendment is unique. The so-called trial rights

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and religious control," that were enforced by general searches, either without warrant or pursuant to a general warrant. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939-41 (1997) [hereinafter Maclin, *The Complexity of the Fourth Amendment*] (quoting William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791, at 379 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (published by Oxford University Press in 2009)) (internal quotation marks omitted) (discussing colonial-era general search practices).

205. *Boyd*, 116 U.S. at 626 (praising *Entick v. Carrington*, (1765) 19 How. St. Tr. 1029, *reprinted in* (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint), as a decision that was "welcomed and applauded by the lovers of liberty in the colonies" and a "monument of English freedom" with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar").

206. *See* Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 941.

207. Brown, *supra* note 200, at 1413 n.17.

208. Chimel v. California, 395 U.S. 752, 762-63 (1969), *abrogated by* Davis v. United States, 131 S. Ct. 2419 (2011).

209. United States v. Robinson, 414 U.S. 218, 236 (1973).

210. Arizona v. Gant, 556 U.S. 332, 351 (2009).

211. Atwater v. City of Lago Vista, 532 U.S. 318, 353-54 & nn.23-24 (2001).

212. Whren v. United States, 517 U.S. 806, 813 (1996).

213. Florence v. Bd. of Chosen Freeholders, 135 S. Ct. 1510, 1522-23 (2012).

promote the reliability of the criminal trial.[214] For example, one justification for excluding coerced confessions under the Due Process Clause was their inherent unreliability.[215] Similarly, the use of counsel at trial presumably will result in a more fair and accurate result than likely would be achieved if the defendant were forced to answer the Government's charges on her own.[216] On the other hand, excluding evidence found and seized in violation of the Fourth Amendment frustrates the accuracy of the trial by withholding perfectly reliable evidence from the fact-finder.[217]

This is not to say that the Fifth and Sixth Amendments are exclusively aimed at ensuring the reliability of the final verdict. These Amendments also promote values of fair play independent of reliability.[218] For example, while exclusion of coerced confessions may have been originally founded on reliability concerns, over time, concern with the Government's methods of obtaining confessions attained primary significance.[219] In *Colorado v. Connelly*,[220] the Court upheld the inclusion of a dubiously reliable confession of a man suffering from chronic schizophrenia because the police had done nothing improper to elicit the confession.[221] Thus, even if the confessor is suffering from mental illness, the use of the confession at trial does not violate due process unless the officers knew or had reason to know of the illness and exploited it to obtain the confession.[222] In other words, *Connelly* rejected reliability altogether as relevant to the due process inquiry.[223]

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214. *See* Arenella, *supra* note 144, at 188.

215. *See* Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 937-38 (1995).

216. *See* Arenella, *supra* note 144, at 200.

217. *See id.* at 201.

218. *Id.* at 200-01.

219. *See* Spano v. New York 360 U.S. 315, 320-21 (1959) ("The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .").

220. 479 U.S. 157 (1986).

221. *Id.* at 165-67 (holding that a due process violation requires "coercive police activity"). *Id.* at 167.

222. *Id.* at 165-67.

223. *Id.* at 167 ("'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" (quoting Lisenba v. California, 314 U.S. 219, 236 (1941))). A sole focus on police misconduct as determinative of a due process violation illustrates a fragmentary conception of due process as exclusively addressing the executive branch. *See* text accompanying *supra* notes 107-10. Justice Brennan, in dissent, urged a unitary model, under which the court receiving an unreliable confession into evidence was also a state actor, for purposes of due process. *Connelly*, 479 U.S. at 180 (Brennan, J., dissenting) ("Police conduct constitutes but one form of state action. 'The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system.'" (quoting Harris v. New York, 401 U.S. 222, 231 (1971) (Brennan, J., dissenting))).

Similarly, courts have also interpreted the Sixth Amendment to promote values of fairness in process independent of reliability.[224] For example, the Sixth Amendment right to counsel attaches once formal process against the defendant has begun, whether through an indictment, arraignment, or even upon an initial court appearance.[225] At that point, if the Government sends an undercover agent or an informant to "deliberately elicit[ ]"[226] a confession from the defendant, outside the presence of a lawyer, any statements made by the defendant will be excluded, not because they are unreliable, but because fairness demands this result once the relationship between citizen and State has become truly adversarial (if it was not before), and the Government's purpose has shifted from investigation to accusation.[227] Reliability is not the Court's concern here because there would be no principled reason to treat virtually identical statements differently based solely on whether the statements elicited were uttered by a defendant or a suspect.[228]

It seems self-evident that the Fourth Amendment is meant to limit state power over its citizens,[229] and the reader is no doubt familiar with the maxim equating one's home with one's castle.[230] Thus, before the Government can intrude upon our houses, persons, papers, and effects, it must show justification.[231] The Framers' primary concern was not with preventing searches of the innocent, but with preventing arbitrary searches.[232] The Fourth Amendment, born out of

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224. *See* Arenella, *supra* note 144, at 201.

225. Rothgery v. Gillespie Cnty., Tex., 554 U.S. 191, 198 (2008).

226. Massiah v. United States, 377 U.S. 201, 206 (1964).

227. *Id.* at 205 (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932), for the proposition that defendants are entitled to the assistance of counsel prior to trial, in what the Court described as "perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important" (alteration in original) (internal quotation marks omitted)).

228. Justice White criticizes the rule because it "would exclude all admissions made to the police, no matter how voluntary and reliable," and urges that the admissibility of the uncounseled statements should be based on their voluntariness. *Id.* at 209-10 (White, J., dissenting).

229. *See* Arenella, *supra* note 144, at 201.

230. William Pitt powerfully expressed this ideal to Parliament: "'The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement.'" Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (Da Capo Press 1970) (1937) (quoting THOMAS M. CORDLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (8th ed. 1927)).

231. Maclin, *Central Meaning*, *supra* note 185, at 210.

232. Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 970-74. *But see* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1272 (1983) ("The [F]ourth [A]mendment is designed to protect innocent people, *i.e.*, people who have not committed a crime or who do not possess sought-after evidence.").

colonial-era abuses of general searches,[233] places a direct limitation on all branches of the government.[234] Naturally, the Fourth Amendment restricts the police power by its requirement that searches and seizures be reasonable and—unless an exception applies—based on probable cause and accompanied by a warrant that meets its specifications. However, both Congress and the judiciary are also constrained by the Amendment: Congress cannot authorize non-specific warrants, and should it try, no judge may issue them.[235] The Fourth Amendment additionally addresses the judiciary with respect to the use of evidence obtained in violation of the Fourth Amendment.[236]

Whether the Government is training its investigatory eye on the citizen, or pointing its accusatory finger, the gap in power between the individual and the State is vast, greater perhaps than the Framers ever could have anticipated.[237] Under current Fourth Amendment doctrine, police may fly over and peer into our yards,[238] employ or entice informants and snitches to win our confidences,[239] discover the telephone numbers we dial,[240] and rifle through our curbside garbage.[241] Police, often bearing weapons, may board and take control of buses to move slowly through the aisle and ask passengers for consent to search their personal belongings.[242] These surveillance activities are not even considered searches or seizures and, thus, are not subject to any Fourth Amendment restraints. A vast number of citizens may be seized at nighttime vehicle checkpoints[243] and, in certain circumstances, the Government may extract blood

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233. *See supra* note 204-05 and accompanying text.

234. *See* Brown, *supra* note 200.

235. *See* Maclin, *The Complexity of the Fourth Amendment*, *supra* note 204, at 971-74.

236. *See supra* Part II.A.

237. *See* Maclin, *Central Meaning*, *supra* note 185, at 238.

238. Florida v. Riley, 488 U.S. 445, 450-52 (1989) (finding no reasonable expectation of privacy from police observation of defendant's greenhouse from a helicopter flying at 400 feet); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (finding no reasonable expectation of privacy from police observation of defendant's cartilage from an airplane flying at 1000 feet, within navigable airspace).

239. United States v. White, 401 U.S. 745, 749-50 (1971) (finding no reasonable expectation of privacy in conversations between defendant and an informant, even when such conversations are simultaneously transmitted to police).

240. Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding that the use of a pen register, installed by the phone company to monitor the phone numbers dialed from defendant's home, did not constitute a Fourth Amendment search).

241. California v. Greenwood, 486 U.S. 35, 40-42 (1988) (holding that one does not have a reasonable expectation of privacy in garbage left at the curb for collection).

242. Florida v. Bostick, 501 U.S. 429, 438-40 (1991) (rejecting a per se rule that a Fourth Amendment seizure occurs when police approach an individual on a bus and holding that such encounters must be analyzed under the totality of circumstances to determine whether the individual felt free to "terminate the encounter") .

243. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that a sobriety checkpoint constituted a reasonable seizure).

and urine samples from its citizens without any suspicion at all.[244] These intrusions, while at least triggering the Fourth Amendment, are deemed reasonable. The balance between individual and State has been decidedly struck in favor of the State.

A Due Process Model account of the Fourth Amendment, however, would strike a different balance: one that puts preeminence on process and the dignity of the individual. This Article also argues that the Fourth Amendment, because of its unique nature among the criminal procedure provisions, is better suited to such a model. That Amendment, unlike other criminal procedure provisions, does not aim to promote reliability at trial, in fact making the discovery and prosecution of crime more difficult to achieve.[245] The Fourth Amendment, instead, enjoys a more direct relationship with substantive criminal law, in that it functions to check the power of the legislature to criminalize, which can be conceived as a specific application of substantive due process.[246] Also, if the Fourth Amendment is to achieve its goal of restricting governmental power over the individual in a meaningful way, it must be broadly construed and understood to forbid the use of evidence derived in violation of that right as a function of procedural due process.[247]

C. The Fourth Amendment as a Due Process Clause

The preceding section sets the stage for engaging a parallel between the Fourth Amendment and the Due Process Clause by demonstrating that, in light of that Amendment's role within the broader criminal procedure universe, the Fourth Amendment takes on the functions of both substantive and procedural due process. Developing this thread even further, this Section demonstrates that the internal structure of the Fourth Amendment mirrors that of the Due Process Clause. In other words, the Fourth Amendment is itself a due process clause.[248]

Let us remember that the Due Process Clause of the Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without

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244. *E.g.*, Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 633-34 (1989) (upholding as reasonable suspicionless drug testing of the blood and urine of railroad employees in the wake of major accidents).

245. *See supra* text accompanying note 195.

246. *See* Brown, *supra* note 204 and accompanying text.

247. Professor Donald Dripps also proposes "that the Warren Court criminal procedure landmarks can be recharacterized as procedural due process cases." Dripps, *supra* note 33, at 618. Of course, *Mapp v. Ohio*, 367 U.S. 643 (1961), is one of those landmarks.

248. Professor Dripps also proposes that the Fourth Amendment protects a due process interest in avoiding punishment without proper adjudication, as he equates "detention and home invasion *without cause*" to "punishment without a trial." Dripps, *supra* note 33, at 621 (emphasis added). Thus, he argues that "[i]f the [F]ourth [A]mendment had never been written, the [F]ourteenth [A]mendment due process clause would justify something very similar to the Warren Court restrictions on searches and seizures." *Id.* at 620.

due process of law."[249] The Fourth Amendment can be fairly said to vindicate three primary interests as well: liberty, property, and privacy. The Court, in fashioning its remedial approach to Fourth Amendment violations, has treated violations of privacy as incapable of being truly remedied, leading to the argument that exclusion of evidence does not repair the damage already done by the unlawful search.[250]

If a property interest has been violated, then the correct remedy is the return of property. In fact, this remedial model provides one justification for the exclusionary rule announced in *Weeks v. United States*.[251] Unfortunately, under current standing doctrine, as stated most explicitly in *Rawlings v. Kentucky*,[252] the Court no longer recognizes this ground as the basis of a right-remedy relationship.[253] Likewise, when a liberty interest is impermissibly violated, the correct remedy is to return that liberty.[254] Thus, if one is illegally seized, the direct repair to that violation is the restoration of liberty. However, privacy, the Court tells us, unlike property or liberty, cannot be restored once it has been breached. Thus, the restitution of property or liberty return the aggrieved individual back to the state she enjoyed prior to the violation, while it is impossible, when privacy is at stake, for the victim to regain what was lost. Or so the Court tells us.

What, then, is a breach of privacy? If a police officer, or anyone for that matter, breaks into my home, that officer or person will see the paintings I enjoy, the books I read, the movies I watch, and the music I love. A brief look at my home office will reveal my profession, and the stacks of bills on my desk will reveal what I buy and how much I owe. What the intruder has received, without my consent, is *information*. While we generally think of privacy as some intangible state of being, privacy is simply the right to exclude others from one's information. By this account, privacy begins to look very much like property. The *Katz* Court understood this as well, by holding that a conversation, which is simply information consensually relayed from one person to another, can, for

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249. U.S. CONST. amend. V.

250. *See supra* text accompanying notes 124-30 (discussing United States v. Calandra, 414 U.S. 338 (1974)). Professor Heffernan concedes that privacy wrongs are irreversible but urges a constitutional requirement of exclusion based on a theory of disgorgement of the wrongdoer's gains. Heffernan, *supra* note 94, at 848-51.

251. 232 U.S. 383, 398 (1914). The Court refers to the Fourth Amendment's protection of property rights and refers to the accused as having "made timely application to the court for an order for the return of these letters, as well [as] other property." *Id.* at 393.

252. 448 U.S. 98, 105-06 (1980).

253. *See* Rakas v. Illinois, 439 U.S. 128, 148-49 (1978); *see also supra* note 14 and accompanying text.

254. *See* Sheehan v. Beyer, 51 F.3d 1170, 1176 (3d Cir. 1995) ("[T]here is little difference between depriving a person of liberty without due process of law, on the one hand, and failing to restore someone's liberty after any legal justification for its deprivation has been eliminated, on the other hand." (quoting Childs v. Pellegrin, 822 F.2d 1382, 1388 (6th Cir. 1987))).

purposes of the Fourth Amendment, be seized.[255] Thus, *Katz* gave conversations the same protection as papers, and phone booths the same protection as houses, because information is worthy of Fourth Amendment protection.

In addition, the distinction between privacy on the one hand, and liberty and property on the other, may not be so clear; restoring liberty and returning property are not in themselves truly complete remedies. After all, there is no way to restore the time spent without one's property or liberty, other than seeking damages as a proxy for the harm. If privacy is viewed as informational property, then returning the information restores at least some control over its use to its rightful owner, and in the case of exclusion, prevents, at least to one extent, its further dissemination. Nonetheless, returning the property cannot erase the acquired information from the intruder's mind, nor can the intruder be prevented from revealing to others what she has learned about me from her entry into my home.[256] However, the exclusionary rule can limit the use of that information in a way that perhaps matters most, certainly for criminal defendants: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[257]

Although this Article presents the case for recognizing the exclusionary rule as a first-party remedy, and raises the possibility of a conception of privacy that can be restored, at least to some extent, once breached, this Article urges a conception of exclusion that goes beyond remedy and achieves the status of constitutional right. This Article has already made the case that one may equate the taking of information with the taking of property. Alternatively, the argument can be made that a violation of privacy impinges on a liberty interest. The Supreme Court has, in a variety of contexts, lodged the protection of privacy in the liberty interest of substantive due process.[258] If our liberty and property

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255. Katz v. United States, 389 U.S. 347, 353, 358-59 (1967) (holding that the Government's conduct of listening through an electronic device attached to the outside of a public phone booth to the defendant's phone conversation, without a warrant, constituted an unreasonable search and seizure). Justice Black dissented from the opinion, urging fidelity to the text of the Fourth Amendment and reasoning that "a conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized." *Id.* at 365 (Black, J., dissenting).

256. *See* Heffernan, *supra* note 94, at 845 (challenging the argument that exclusion has "a fully restorative effect with respect to the informational privacy interest infringed by an illegal search" because the "*condition* of informational privacy" cannot be restored once violated). Professor Heffernan maintains that there is a "stark" contrast between "property and liberty interests on the one hand and privacy interests on the other." *Id.*

257. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

258. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965), discussed *supra* text accompanying notes 201-03; *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down a Texas law criminalizing sodomy: "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to

interests are violated through an unlawful search, then the Government potentially deprives us of those interests without due process. What does due process require in this context? Obedience to the requirements of the Fourth Amendment! Thus, an unlawful search violates due process *because* it violates the Fourth Amendment.

Further, the Fourth Amendment is, itself, a due process clause, sharing an identical structure. Under due process, a court cannot convict and sentence a defendant to punishment[259] without both cause and process.[260] *In re Winship*[261] tells us that due process requires the State to prove each element of its charge beyond a reasonable doubt.[262] While this level of proof provides the substantive justification for the deprivation of liberty, that alone is not sufficient to satisfy due process; the determination of guilt must be made in a constitutionally acceptable manner, at a trial before a neutral arbiter (guilty pleas notwithstanding).[263] In other words, a properly adjudicated determination of the cause must occur *prior* to the deprivation.

This Article posits that searches and seizures also constitute deprivations of liberty and property. While the deprivations contemplated by the Fourth Amendment are generally not as severe as the loss of liberty resulting from a conviction, neither is the necessary justification.[264] The Fourth Amendment generally requires "only" probable cause, rather than the proof beyond a reasonable doubt required to convict. The difference in standard aside, the structures of the Fourth Amendment and the Due Process Clause are the same: each urges judicial determination of cause or justification *prior* to the deprivation. In the case of the Fourth Amendment, a magistrate generally makes that determination, which is expressed in the form of a warrant.[265]

Each step in the criminal process requires more justification and more process

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engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992))).

259. Punishment, of course, often constitutes a deprivation of liberty through incarceration, or in the most extreme circumstances, a deprivation of life when the death penalty is imposed.

260. U.S. CONST. amend. V.

261. 397 U.S. 358 (1970).

262. *Id.* at 364, 368.

263. *Id.* at 367-68. Even in the context of a plea, where a defendant chooses not to exercise his right to a trial, a judge must still accept the plea and ensure that it has met constitutionally required standards. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

264. Dripps, *supra* note 33, at 620 ("Arrest and search differ obviously from punishment without trial, because arrest and search involve a lesser intrusion, and justifications for arrest and search are easier to prove. These differences are of degree, however, not of kind.").

265. Here, the Article is focusing on Fourth Amendment *searches*, and, referring to the view adhered to by earlier Courts, "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted).

as the severity of the liberty deprivation increases. In the federal system, and in many states, before the State imposes a liberty deprivation upon the would-be defendant by way of a formal charge, process demands input from the community: although the level of proof remains the same, an indictment can only be justified if a grand jury adds its assertion that there is cause to subject this individual to the further deprivation of a trial.[266] Thus, taking into account these varying levels of justification for each incremental increase in deprivation, if the Court permits the prosecution's use at trial of evidence seized in violation of the Fourth Amendment, the ultimate deprivation of liberty (the conviction and subsequent punishment) is itself predicated on a denial of due process and cannot be tolerated.

While a robust due process model of exclusion would restrict introduction of all evidence derived from any Fourth Amendment violation, a slightly more moderate approach may be preferable—one based on an understanding of due process that takes into account the nature and severity of the government conduct in committing the violation. Professor Sunderland, in advocating for a due process approach to exclusion, traces an understanding of due process from its English roots[267] to its American usage,[268] sharing the common thread that due process is concerned with setting a standard of governmental behavior that avoids "arbitrary, flagrant or fundamental violations of an individual's rights."[269] The early English and American applications of due process "emphasize[d] the profound and non-trivial character of the protections associated with due process of law."[270]

Thus, in *Rochin v. California*, officers forcibly took the defendant to the hospital where, at the officers' direction, "a doctor forced an emetic solution through a tube into Rochin's stomach[,]" causing him to vomit the contents of his stomach, which included two morphine capsules.[271] The Court found that this conduct not only "offend[ed] some fastidious squeamishness" but also "shock[ed] the conscience."[272] According to Professor Sunderland, *Rochin* demonstrates "an interpretation of and historical authority for the view that due process of law requires the exclusionary rule but not in response to *all* police violations of

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266. The Fifth Amendment states, in relevant part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V.

267. Sunderland, *supra* note 94, at 150-51, 154 (tracing the history of due process to the "law of the land" provision enshrined in the Magna Carta).

268. *Id.* at 151 (discussing various formulations in American case law that shed light on the meaning of due process as protective of rights that are "profound and non-trivial").

269. *Id.* at 154 (internal quotation marks omitted).

270. *Id.* at 151.

271. 342 U.S. 165, 166 (1952).

272. *Id.* at 172. The Court also affirmed a characterization of due process as being violated when the methods used to obtain convictions "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." *Id.* at 169 (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

constitutional requirements."[273] As discussed above, the facts of *Mapp v. Ohio*[274] demonstrate flagrant abuse of police power as well, and the district court in *Payner I* described the Government's behavior as "outrageous," "purposeful[ly] criminal," "gross[ly] illegal," and exhibiting a "purposeful, bad faith hostility toward the Fourth Amendment rights."[275]

This understanding of due process as being implicated only by flagrant governmental misconduct would permit the use of evidence derived from non-egregious, or "insubstantial violations which do not offend those great purposes which give the concept of due process its fundamental justification."[276] Furthermore, this understanding of due process would leave intact the Court's denial of an exclusionary remedy for good-faith violations,[277] but based on due process, rather than deterrence, grounds.

D. Fourth Amendment Rights Versus Trial Rights: A Distinction Losing Legitimacy as a Basis for Denying Exclusion

Finally, before turning to exclusion and standing, the Article wishes to challenge the distinction that the Court has drawn, in forming its exclusionary rule doctrine, between the Fourth Amendment as a "substantive" right versus the "trial" rights embodied in the Fifth and Sixth Amendments. For example, the Court in *Kimmelman v. Morrison* declined to extend the limitations on federal habeas review of defendants' Fourth Amendment claims to ineffective assistance of counsel claims arising under the Sixth Amendment, stating,

> Although it is frequently invoked in criminal trials, the Fourth Amendment is not a trial right; the protection it affords against governmental intrusion into one's home and affairs pertains to all citizens. . . . The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process.[278]

As another example, in *Withrow v. Williams*,[279] the Court "explained that

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273. Sunderland, *supra* note 94, at 152.

274. Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding the exclusionary rule applicable to state prosecutions). *See supra* notes 111-17 and accompanying text.

275. *Payner I*, 434 F. Supp. 113, 125, 131-33 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980); see text accompanying *supra* notes 1-9 for a description of the facts of the case.

276. Sunderland, *supra* note 94, at 155; s*ee also Payner I*, 434 F. Supp. at 128-29 (discussing numerous cases in which the Court declined to exclude evidence based on due process grounds where governmental conduct was insufficiently egregious and concluding that "Due Process requires exclusion of reliable evidence only in those cases in which government officials obtain the challenged materials in a grossly improper fashion").

277. *See supra* notes 137-39 and accompanying text.

278. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

279. 507 U.S. 680, 696 (1993) (holding, in part, that the Fourth Amendment habeas restrictions of *Stone v. Powell*, 428 U.S. 465 (1976), do not apply to habeas claims based on

unlike the Fourth Amendment, which confers no 'trial right,' the Sixth confers a 'fundamental right' on criminal defendants, one that 'assures the fairness, and thus the legitimacy, of our adversary process.'"[280] The Court continued, turning to violations of *Miranda v. Arizona*,[281] by again comparing exclusion in the Fourth Amendment context to exclusion based on *Miranda*: "*Miranda* differs from *Mapp* in both respects. 'Prophylactic' though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental *trial* right.'"[282]

The Court has, however, blurred the lines between trial and substantive rights, expanding the protection of the Fifth and Sixth Amendments to the pre-trial context. The Fifth Amendment tells us that one cannot be compelled to be a witness against oneself "*in any criminal case*."[283] Taken literally, it seems to say that the prosecution cannot force a defendant to take the witness stand and answer questions. *Miranda*, however, removed any doubt as to the reach of the self-incrimination provision: it reaches all the way to the interrogation room.[284] If an unwarned statement acquired at the stationhouse is considered presumptively compelled,[285] then such compulsion took place long before and is far removed from the criminal trial. If the Fourth Amendment search is conducted with an eye towards procuring evidence for a trial,[286] then there seems to be practically little difference between the probing of one's house, person, or

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violations of *Miranda v. Arizona*, 384 U.S. 436 (1966)).

280. *Id.* at 688 (quoting *Kimmelman*, 477 U.S. at 374).

281. *Miranda*, 384 U.S. at 498-99 (holding that custodial interrogation in the absence of certain warnings required exclusion of those statements at a subsequent criminal trial).

282. *Withrow*, 507 U.S. at 691 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)). The Court classifies the Fifth Amendment privilege as one that "embodies principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle," and also notes that Fifth Amendment violations implicate reliability concerns, as a "system of criminal law enforcement which comes to depend on the confession will, in the long run, be less reliable." *Id.* at 691-92 (quoting *Verdugo-Urquidez*, 494 U.S. at 264; Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974); Bram v. United States, 168 U.S. 532, 544 (1897)) (internal quotation marks omitted).

283. U.S. CONST. amend. V (emphasis added).

284. *Miranda*, 384 U.S. at 457-58.

285. *Id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning.").

286. Law enforcement does not, of course, conduct all Fourth Amendment searches with the purpose of gathering evidence of crime. For example, detention center personnel conduct inventory searches of an arrestee's belongings upon jailing the arrestee for the purposes of protecting the arrestee's property, protecting the police from false claims of theft, and keeping the jail free of dangerous items and contraband. *See* Illinois v. Lafayette, 462 U.S. 640, 646 (1983). However, as the focus of this Article is standing to exclude evidence in criminal cases, the Article is primarily concerned with searches aimed at the discovery and subsequent prosecution of criminal activity.

papers during a search, and the probing of one's mind during an interrogation. This Article does not claim, as the Court in *Boyd* did, that the Fourth and Fifth Amendments "run almost into each other[,]"[287] but proposes that the Fourth Amendment itself governs the use of seized evidence.

Once the Court has taken the Fifth Amendment compulsion out of the trial, the argument for symmetrical treatment of the Fourth (by bringing the right into the trial) can be made. Similarly, the Sixth Amendment's right to assistance of counsel applies to "all criminal prosecutions,"[288] and yet, the right, once it has attached, has been extended to various pre-trial stages, such as interrogations[289] and pre-trial lineups.[290]

Exclusion of evidence can be a tough pill to swallow, and the Court has, therefore, tried to have its cake and eat it too. For example, the Court has distinguished between "mere" *Miranda* violations and actual violations of either the Due Process or Self Incrimination Clauses in holding that the physical "fruits" of *Miranda* violations are not fruit after all, or at least not fruit of any constitutional violation:

> It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial.[291]

It was not a large step for the Court to reason that "with respect to mere failures to warn, [there is] nothing to deter. . . . [and] therefore, no reason to apply the fruit of the poisonous tree doctrine."[292]

Similarly, in *Oregon v. Elstad*,[293] the Court differentiated between "technical" violations of *Miranda* and truly coerced confessions,

> conclud[ing] that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier

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287. Boyd v. United States, 116 U.S. 616, 630 (1886), *rejected by* Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

288. U.S. CONST. amend. VI.

289. *See* Massiah v. United States, 377 U.S. 201, 204-06 (1964); Spano v. New York, 360 U.S. 315, 326 (1959).

290. United States v. Wade, 388 U.S. 218, 227 (1967).

291. United States v. Patane, 542 U.S. 630, 641 (2004).

292. *Id.* at 642 (internal quotation marks omitted) (tracing the "fruit of the poisonous tree" doctrine to *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

293. 470 U.S. 298 (1985).

statement.[294]

Again, there was no poisonous tree bearing similarly poisonous fruit, as the Court found that the failure to provide warnings is not a constitutional violation: "Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm," through the exclusion of the unwarned statement itself.[295] Therefore, Elstad's fully warned statement, which followed on the heels of an initial statement given without benefit of *Miranda* warnings, was admissible.[296]

Due to the "prophylactic" nature of the *Miranda* rule, an unwarned statement is also admissible in certain situations because "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[297] Thus, in the context of *Miranda*, because the potential constitutional violation would only occur at trial (it is, after all, a trial right), and is for the most part avoided altogether because the unwarned statement itself (usually) is excluded,[298] all derivative evidence is admissible because the "fruit of the poisonous tree" doctrine simply does not apply. Once the Court conceives of *Miranda* as "prophylactic" or "preventive," and dismisses the need to deter violations, the decision not to exclude the fruit of *Miranda* violations begins to resemble the reasoning employed to limit the Fourth Amendment exclusionary rule: deterrence is simply not always worth the cost.[299]

While the Fifth Amendment violation does not occur until trial, if and when the unwarned statement at issue is actually introduced, the Sixth Amendment—on the other hand, and rather extraordinarily—is a trial right than can be violated prior to trial. In *Kansas v. Ventris*,[300] the Court held that statements taken in violation of the Sixth Amendment right to counsel and, more specifically, in violation of *Massiah v. United States*,[301] are admissible to impeach a defendant's trial testimony.[302] In so holding, the Court admitted that "[t]he core of the right to counsel is indeed a trial right,"[303] yet "conclude[d] that the *Massiah* right is a

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294. *Id.* at 314.

295. *Id.* at 307.

296. *Id.* at 317-18.

297. New York v. Quarles, 467 U.S. 649, 657 (1984).

298. In addition to public safety exception announced in *Quarles*, *id.*, statements taken in violation of *Miranda* are admissible to impeach the defendant's testimony. *See* Harris v. New York, 401 U.S. 222, 226 (1971).

299. *Quarles*, 467 U.S. at 656-58.

300. 556 U.S. 586 (2009).

301. 377 U.S. 201, 211-12 (1964).

302. *Ventris*, 556 U.S. at 593. The statements at issue were those made by the defendant, prior to trial, to an informant whom police had planted in the defendant's holding cell. *Id.* at 589. The State conceded that the statements were likely taken in violation of the Sixth Amendment and were thus inadmissible in the State's case in chief. *Id.*

303. *Id.* at 591.

right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the 'Assistance of Counsel' is denied."[304] The Court's ensuing discussion of the role of exclusion in this situation strikingly resembles its Fourth Amendment exclusionary rule discourse:

> This case does not involve, therefore, the prevention of a constitutional violation, but rather the scope of the remedy for a violation that has already occurred. Our precedents make clear that the *game* of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are "outweighed by the need to prevent perjury and to assure the integrity of the trial process. . . . On the other side of the scale, preventing impeachment use of statements taken in violation of *Massiah* would add little appreciable deterrence.[305]

Ventris, then, represents quite a paradox. The Court has distinguished the Fourth Amendment from the so-called trial rights, reasoning that the constitutional harm is fully accomplished at the time of an unlawful search, and, therefore, the exclusion of evidence, by not undoing that harm, is not a personal, constitutionally required remedy.[306] However, even in the context of a trial right, the Court has utilized the very same reasoning to limit the exclusion of statements taken in violation of the Sixth Amendment right to counsel by asserting that the constitutional harm was fully accomplished at the time the statement was made. Therefore, as in the Fourth Amendment context, excluding the statement would not remedy the harm already done. In the meantime, neither of the rights granted by *Massiah* or *Miranda* seems to be a "core" trial right. However, *Miranda* violations, on the one hand, do not bear fruit (pun intended) until and unless the unwarned statements are admitted at trial. Until that time, there is nothing to deter, and all evidence derived from these violations is admissible. On the other hand, *Massiah* violations contravene the Constitution at the time the statements are elicited, so derivative evidence is excluded only if deterrence is worth the price, and in the end, exclusion is just a "game."[307]

This Part has urged a return to the original understanding of the Fourth Amendment exclusionary rule as a personal, constitutional right rooted in due process. The Article has further supported this concept of exclusion by examining the structure of the Fourth Amendment and its function within the broader criminal procedure realm. The Article then concludes that a violation of the Fourth Amendment *is* a violation of due process, and that the Fourth Amendment is *itself* a due process provision. Thus, a conviction based on unlawfully obtained evidence causes compounded due process harm. Finally, the Article has shown that Courts have significantly eroded the distinction between substantive and trial rights, at least for purposes of exclusion. What remains,

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304. *Id.* at 592.

305. *Id.* at 593 (emphasis added) (quoting Stone v. Powell, 428 U.S. 465, 488 (1976)).

306. *See supra* text accompanying notes 126-29.

307. *See supra* text accompanying note 305.

then, once it is acknowledged that exclusion of evidence derived from a Fourth Amendment violation is constitutionally required, is to answer the question suggested by the title of this Article: "Does it matter *whose* Fourth Amendment right has been violated?"

III. REVIVING A TARGET THEORY OF STANDING: A DUE PROCESS RIGHT TO STANDING AND EXCLUSION

Returning to Mr. Payner, we can rephrase that question. Should he have been entitled to seek suppression of the evidence used against *him* but obtained by an egregious violation of his *banker's* Fourth Amendment right?[308] And, what of the countless passengers in vehicles that are stopped on the basis of one of many minor traffic violations, even if the violation is in reality a pretext available to the officer who simply wishes to investigate some other offense, and even if (as is the case, in some circuits) the lawful stop evolves into an unlawful, prolonged detention?[309] This Article proposes that both of these situations not only permit, but require, exclusion—or at least the opportunity to seek exclusion—based on the due process rights of those being prosecuted.

Just as this Article is willing to concede that due process does not necessarily require exclusion of evidence derived from *all* Fourth Amendment violations,[310] it also suggests that it is appropriate to recognize some limits to the expanded model of standing being proposed—both to make this theory more palatable, and also to avoid true "windfalls" to defendants.

Imagine the following scenario: police officers suspect that Mr. X is involved with a criminal organization, but they have not yet developed probable cause. The officers break into Mr. X's home, perhaps even in a "highhanded manner."[311] While the police are rummaging through Mr. X's home, Mr. X, hoping to divert attention from himself, blurts out that Mr. Y, his neighbor, is a drug dealer and furnishes evidence against him. If Mr. Y is later prosecuted, the broadest possible notion of due process standing would permit him to suppress the evidence, derived from the violation of Mr. X's rights, that the State seeks to use when prosecuting Mr. Y, simply because such evidence was unlawfully obtained. Intuitively, though, as much as the police acted improperly, excluding the evidence against Mr. Y seems somewhat fortuitous, especially since Mr. X played such an instrumental role in providing the evidence.

However, imagine instead that the police unlawfully entered Mr. X's home in order to find evidence against Mr. Y. Perhaps the police successfully encourage Mr. X to divulge information about Mr. Y. Again, by the current understanding, it was Mr. X's Fourth Amendment right that was violated by the search of his home; yet, it does not seem as objectionable to claim that the

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308. *Payner I*, 434 F. Supp. 113, 118-22 (N.D. Ohio 1977), *rev'd*, 447 U.S. 727 (1980); *see supra* Introduction.

309. *See supra* Part I.

310. *See supra* discussion preceding and accompanying notes 276-77.

311. *See* Mapp v. Ohio, 367 U.S. 643, 644 (1961).

prosecution's use of the evidence obtained in this example against Mr. Y violates his due process rights. This Article is proposing, therefore, the revival of a target theory of standing, although in a slightly modified version, to permit a defendant, as a due process right, to seek exclusion of evidence obtained in violation of another's Fourth Amendment rights.

The so-called target theory of standing sources from *Jones v. United States*,[312] in which the Court held that a defendant had standing to suppress evidence found pursuant to the search of the apartment he occupied as a guest.[313] The Court classified the "victim of a search or seizure" as "one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else."[314] Nearly twenty years later the *Rakas* Court would dismiss this language as dicta, while also obliterating one of the alternative avenues to standing announced in *Jones*: that the defendant was "legitimately on [the] premises where a search occurs."[315]

This Article proposes a target theory slightly broader than the one articulated in *Jones* and that would include defendants whom the police directly or indirectly target.[316] Under this proposal, a defendant would have standing to suppress evidence derived from an unlawful police search conducted with the intent of obtaining incriminating information or evidence against someone other than, or in addition to, the individual whose Fourth Amendment rights were directly violated. Thus, Mr. Payner would have standing to suppress because the Government, in searching the banker's briefcase, was trying to obtain information about the banker's clients. In the second hypothetical above, Mr. Y would have standing to suppress because the police were searching Mr. X's home to find evidence against Mr. Y.[317] And, finally, passengers in cars would have standing to contest the search of the automobile yielding evidence against them when police unlawfully search with the hope of finding evidence against the driver *and* others.

While there may be inherent difficulties in determining police officers'

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312. 362 U.S. 257 (1960).

313. *Id.* at 272-73.

314. *Id.* at 261.

315. Rakas v. Illinois, 439 U.S. 128, 134-35, 141-42 (1978) (quoting *Jones*, 362 U.S. at 267). *Jones* also conferred automatic standing to defendants seeking to suppress the possession of contraband, which is the basis of their criminal charge. *Jones*, 362 U.S. at 263-64. However, the Court, in *United States v. Salvucci*, 448 U.S. 83, 93-95 (1980), disposed of "the automatic standing rule[,]" which resulted in the current doctrine of standing. *See supra* notes 14-16 and accompanying text.

316. A broader target theory than the one announced in *Jones* is warranted because, while *Jones* sought to define the person who has suffered a *Fourth Amendment* harm, this Article is basing exclusion on due process and, thus, identifies the group of defendants who can claim a *due process* deprivation when evidence derived from violations of others' Fourth Amendment rights are admitted in trial.

317. This is consistent with the target theory advanced in *Jones*. *See Jones*, 362 U.S. at 267.

subjective states of mind when they conduct searches, objective facts and circumstances will often demonstrate officers' intent. Further, the rule announced in *Whren* does not preclude inquiry into the searching officer's subjective intent in these circumstances, where the search is unlawful, because such intent is not based on any objectively proper justification.[318] In *Whren*, the Court held that a seizure is reasonable if based on probable cause, regardless of the officer's "actual motivations" to effect the seizure.[319] Although susceptible to grave abuse, such a rule can at least be defended on the basis that the requisite level of proof (probable cause) that justifies Fourth Amendment intrusions has been met, so that, objectively speaking, the officer is justified in his action, and the victim of the intrusion (certainly in the case of a seizure of the person)[320] has demonstrated the requisite level of blameworthiness to justify the intrusion. When searches and seizures are not based on probable cause (or some other circumstances lawfully permitting these intrusions), however, the police are simply not justified in acting, objectively or otherwise, and the individual subject to such an intrusion has not (as far as the officer can know) in any way diminished her right to be free from such police interference. Therefore, *Whren* is simply inapplicable.

Moreover, in assessing whether governmental conduct violates due process, the Court has already considered the nature and flagrancy of official conduct. Recall that in *Rochin*, the Supreme Court excluded evidence of the contents of the defendant's stomach on due process grounds because the police methods used to obtain that evidence "shock[ed] the conscience."[321] On the other hand, in *Connelly*, the Court held that the admission of a mentally ill defendant's confession did not violate due process, despite its suspect reliability, because police were unaware of, and did not exploit, his illness.[322] Thus, when standing is a matter of due process, it is entirely appropriate to examine the subjective intent of the government actor.

Finally, the Court has recently become increasingly willing to consider police intent when defining the Fourth Amendment search. In 2000, the Court held that a border patrol agent's squeezing of the defendant's luggage constituted a search

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318. *See* Whren v. United States, 517 U.S. 806, 811-12 (1996). The *Whren* Court discussed prior rulings in which the Court had stated that inventory and administrative searches should not be conducted as a pretext for criminal investigation, noting that

> [i]n each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.

Id.

319. *Id.* at 813.

320. This statement is qualified because one can imagine a situation where police have probable cause to search the home or automobile, for example, of one not suspected of any wrongdoing.

321. Rochin v. California, 342 U.S. 165, 172 (1952).

322. Colorado v. Connelly, 479 U.S. 157, 167 (1986).

because he "fe[lt] the bag in an exploratory manner."[323] While this phrase may describe how strong, in a physical sense, the agent's handling of the bag was, the Court seems to equally (or perhaps even more so) suggest that what matters is the agent's purpose in squeezing the luggage (which will, of course, dictate how intensely he must prod in order to fulfill that purpose).[324]

Even more recently, the Court, in holding that the Government's attachment of a Global-Positioning-System ("GPS") on defendant's vehicle and its use to track his movements over an extended period constituted a Fourth Amendment search, used the following language to support its holding: "It is important to be clear about what occurred in this case: The Government physically occupied private property *for the purpose of obtaining information.*"[325] If the Court has made the officer's purpose (to obtain information) an element that defines the activity as a Fourth Amendment search, then it seems entirely proper to consider the officer's intent when making a standing determination. After all, the definition of a search and the definition of standing are one and the same.[326]

CONCLUSION

The current definition of Fourth Amendment standing simply leaves too many citizens vulnerable to arbitrary, or worse, racially motivated, police practices in the name of law enforcement. Passengers in multi-occupant vehicles are particularly susceptible to a doctrine that permits officers to violate one individual's constitutional rights through an unlawful search, with the knowledge that any evidence found may be used against those who, at least as narrowly defined, did not suffer a direct Fourth Amendment violation. Due process requires more. If the exclusion of evidence derived from an unlawful search is once again conceived of as a personal constitutional right grounded in due process, then even those defendants whose Fourth Amendment rights were not violated by the search in question may rightfully claim a due process right that their convictions should not be based on egregiously unconstitutional governmental conduct. This is particularly so when officers unlawfully search and seize with the intent to find evidence incriminating individuals other than, or in addition to, the direct victim of the violation. This due process approach to the exclusionary rule and to standing will once again ensure that the Fourth Amendment, rather than being "stricken from the Constitution,"[327] shall be venerated and honored as one of "those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[328]

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323. Bond v. United States, 529 U.S. 334, 338-39 (2000).

324. *See id.* at 339.

325. United States v. Jones, 132 S. Ct. 945, 949 (2012) (emphasis added).

326. *See supra* note 16 and accompanying text.

327. Weeks v. United States, 232 U.S. 383, 393 (1914).

328. *Id.*