

Seven Theses in Grudging Defense of the Exclusionary Rule

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Much has been written about the rule that prevents the use of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable search and seizure; as one leading commentator wrote, without fear of exaggeration, "[t]here is a vast literature on this subject."¹ Yet, the quantity of the literature threatens to obscure important areas of emerging agreement.

The discussion that follows presents seven theses. The first four enjoy widespread support, with considerable justification: 1) the exclusionary rule is not constitutionally required; 2) history does not resolve the propriety of the exclusionary rule; 3) the Fourth Amendment requires an effective deterrent to unreasonable search and seizure; and 4) the exclusionary rule offers some meaningful deterrence of unreasonable search and seizure because of the political costs of exclusion. Although the remaining theses are somewhat more controversial, the general acceptance of the first four and, in particular, the recognition that exclusion imposes political rather than economic costs, I will contend, powerfully suggests the soundness of the final three: 5) exclusion of evidence obtained in violation of the Fourth Amendment is not invariably required to preserve its deterrent efficacy; 6) exclusion is sometimes required to achieve constitutionally sufficient deterrence even in the absence of culpable misconduct; and 7) alternatives to exclusion are of uncertain efficacy because they rest on problematic theories of deterrence. Collectively, the seven theses amount to a grudging defense of the exclusionary rule. The exclusionary rule has many defects, but there are great difficulties identifying a superior alternative.

I. THESIS ONE: THE EXCLUSIONARY RULE IS NOT CONSTITUTIONALLY REQUIRED

As a matter of contemporary doctrine, Thesis One is uncontroversial. It is thought to follow from the Fourth Amendment's text:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

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¹ Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119, 119 n.1 (2003).

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²

As the Supreme Court has observed, “[t]he Amendment says nothing about suppressing evidence obtained in violation of this command.”³ Indeed, “[t]he wrong condemned by the Amendment is ‘fully accomplished’ by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”⁴ Rather, “[t]he rule’s sole purpose . . . is to deter future Fourth Amendment violations.”⁵ The Court accordingly characterizes the exclusionary rule as “a ‘prudential’ doctrine, created by this Court to ‘compel respect for the constitutional guaranty.’”⁶

It is difficult to argue with this view. Compare the Fifth Amendment’s prohibition on compelled self-incrimination: “No person . . . shall be compelled in any criminal case to be a witness against himself.”⁷ This is a prohibition on the use of particular evidence—the testimony of witnesses compelled to incriminate themselves. Thus, as Justice Thomas has written, “the Self-Incrimination Clause contains its own exclusionary rule.”⁸ Similarly, the Sixth Amendment also addresses the receipt of evidence by requiring that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him,”⁹ a command that the Court has also characterized as an “exclusionary rule.”¹⁰ The Fourth Amendment, in contrast, does not address the receipt of evidence. It concerns conduct undertaken outside of the courtroom—search and seizure—and the requisites for a valid warrant.¹¹

² U.S. CONST. amend. IV.

³ *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011). *Accord, e.g.*, *Arizona v. Evans*, 514 U.S. 1, 10 (1995).

⁴ *United States v. Leon*, 468 U.S. 897, 906 (1984) (citations omitted) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)). *Accord, e.g.*, *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998); *Evans*, 514 U.S. at 10.

⁵ *Davis*, 131 S. Ct. at 2426. *Accord, e.g.*, *Herring v. United States*, 555 U.S. 135, 139–40 (2009); *Illinois v. Krull*, 480 U.S. 340, 347 (1987); *Stone*, 428 U.S. at 486; *United States v. Calandra*, 414 U.S. 338, 347 (1974).

⁶ *Davis*, 131 S. Ct. at 2426 (citations omitted) (quoting *Scott*, 524 U.S. at 363, and *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

⁷ U.S. CONST. amend. V.

⁸ *United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality opinion); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 498 (1971) (Black, J., concurring and dissenting) (“The Self-Incrimination Clause in and of itself directly and explicitly commands its own exclusionary rule.”).

⁹ U.S. CONST. amend. VI.

¹⁰ *Davis v. Washington*, 547 U.S. 813, 826 (2006).

¹¹ For helpful arguments along similar lines, *see Donald Dripps, Living with Leon*, 95 YALE L.J. 906, 918–22 (1986); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909–11 (1989).

At one time, however, the Court seemed to regard the exclusionary rule as constitutionally compelled. For example, when it first adopted the exclusionary rule for federal prosecutions in *Weeks v. United States*,¹² the Court reasoned that exclusion was required to give the prohibition on unreasonable search and seizure substance: “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.”¹³ The Court later wrote that if the government can utilize the fruits of an unreasonable search or seizure, it “reduces the Fourth Amendment to a form of words.”¹⁴ This line of argument, however, fails to justify the exclusionary rule. While the Fourth Amendment may demand some remedy for unreasonable search and seizure to make that prohibition meaningful, it does not follow that the requisite remedy is exclusion.

A few scholars have argued that exclusion is constitutionally required to restore the government and the individual to the positions they occupied prior to a Fourth Amendment violation.¹⁵ Yet, the advocates of this view do not claim that the Fourth Amendment demands that the status quo ante always be restored; they agree, for example, contraband obtained through unreasonable search and seizure need not be returned.¹⁶ Presumably they would agree as well that the Fourth Amendment does not require the return of stolen property to a thief—or the body of a victim to a murderer—if recovered through unreasonable search or seizure. As one advocate of this rationale for exclusion acknowledged, “[t]he proper approach is one that vindicates the exclusionary principle but takes other factors into account as well.”¹⁷ The concession is warranted—the law of remedies, for example, has never invariably required injunctive relief to halt every violation of law, but instead requires a balancing of the equities and consideration of the public’s interests.¹⁸ If an assessment of the propriety of a remedy should take into account the problems that inhere in returning contraband to an offender, however, then it is entirely unclear why it cannot also consider the problems that inhere in preventing the prosecution from utilizing probative evidence of guilt. The exclusionary rule’s tendency to free the guilty, after all, is at the heart of the case

¹² 232 U.S. 383 (1914).

¹³ *Id.* at 393.

¹⁴ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

¹⁵ See, e.g., William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 840–44 (2000); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 285–94 (1998); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 652–60 (1983).

¹⁶ See, e.g., Heffernan, *supra* note 15, at 844–45; Norton, *supra* note 15, at 292–93; Schroeder, *supra* note 15, at 673 n.285.

¹⁷ Heffernan, *supra* note 15, at 845.

¹⁸ See, e.g., *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–13 (1982).

against it.¹⁹ There is, of course, a famous objection to a rule that provides “[t]he criminal is to go free because the constable has blundered.”²⁰ Given the interest in utilizing probative evidence of guilt, one could conclude that even if the acquisition of evidence involved an unreasonable search and seizure, its retention for use at a criminal trial is nevertheless reasonable within the meaning of the Fourth Amendment.

To be sure, it is well settled that even a seizure lawful at its inception can become unreasonable because of its duration.²¹ It is equally settled that an unreasonable search cannot be justified by what is found.²² These rules, however, address the manner in which the authorities obtain evidence of wrongdoing, not its retention for use in a criminal prosecution. Even if the manner in which the authorities obtain evidence is constitutionally unreasonable, it does not follow its retention for evidentiary use in a criminal prosecution must also be regarded as unreasonable.²³

To this, one can respond that the government’s retention of property that has been seized in violation of the Fourth Amendment is itself an unreasonable seizure because it represents unlawful interference with the owner’s rights in the seized property.²⁴ Indeed, when it first articulated the exclusionary rule in *Weeks*, the Court invoked the right of the owner of property wrongfully seized to demand its return in the course of embracing exclusion.²⁵ As the Court later observed, “[t]he remedial structure . . . of *Weeks v. United States* was arguably explainable in property terms.”²⁶ Yet, this justification for exclusion as vindicating property

¹⁹ See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 25–26 (1997); Harry M. Caldwell & Carol M. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun’s Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50–52 (1994); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 51–53 (1981); Patrick Tinsley, N. Stephan Kinsella & Walter Block, *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 68–71 (2004); John Barker Waite, *Judges and the Crime Burden*, 54 MICH. L. REV. 169 (1955); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valued Evidence?*, 62 JUDICATURE 214, 220–22 (1978).

²⁰ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

²¹ See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

²² See, e.g., *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (per curiam); *Sibron v. New York*, 392 U.S. 40, 62–63 (1968); *Byars v. United States*, 273 U.S. 28, 29–30 (1927).

²³ This observation also answers a related argument for exclusion contending that the Due Process Clause forbids the use of evidence obtained in violation of the Constitution. See, e.g., Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 148–50 (1978). If the government’s retention of unlawfully obtained evidence for use in a prosecution is not regarded as consistent with the Fourth Amendment, then it is difficult to understand why its retention for use at trial becomes somehow inconsistent with due process.

²⁴ See, e.g., William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1216–19; Heffernan, *supra* note 15, at 832–36.

²⁵ See *Weeks v. United States*, 232 U.S. 383, 393 (1914).

²⁶ *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (citation omitted). For additional discussion of this understanding, see Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 587–92 (1996); Heffernan,

rights is ultimately incoherent since the law of property does not demand exclusion to vindicate property rights.

In the seminal case of *Boyd v. United States*,²⁷ even as it relied on the property rights of the owner to hold that the compulsory production of business records amounted to a constitutionally unreasonable search and seizure,²⁸ the Court acknowledged that a “search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof” would be unobjectionable because “[i]n the one case, the government is entitled to the possession of the property; in the other it is not.”²⁹ The Court added that when search and seizure is undertaken in order to inspect property subject to tax or tax records that must be made available for inspection, to locate contraband or identify property subject to seizure to satisfy a judgment, or to recover stolen goods, the government or the creditor are intruding on no property rights.³⁰ Thus, as *Boyd* acknowledged, a property-based justification for exclusion cannot support exclusion of items in which the defendant has no recognized property interest, such as contraband, stolen or forfeitable goods, or required records. Similarly, the property-based rationale cannot justify exclusion where there has been no infringement on recognized property interests, such as nontrespassory wiretapping, which the Court held was outside the protection of the Fourth Amendment during the era in which constitutional protection was tied to property rights.³¹ Beyond this, an argument for exclusion that rests on property law entitlements is unavailing if applicable property law does not demand the return of unlawfully seized property. If, putting the Fourth Amendment aside, applicable property law gives the authorities the right to retain even unlawfully seized property for use as evidence, then the owner’s property law rights provide no basis for the owner to demand the property’s return, much less exclusion.³²

supra note 24, at 1220–29; and Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 166–74 (2012).

²⁷ 116 U.S. 616 (1886).

²⁸ *Id.* at 622–32.

²⁹ *Id.* at 623.

³⁰ *Id.* at 624.

³¹ See *Olmstead v. United States*, 277 U.S. 438, 465–66 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

³² A related argument for exclusion rests on the Fifth Amendment’s prohibition on compelled self-incrimination. In *Boyd*, the Court wrote: “[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.” 116 U.S. at 633. Although this observation was limited to the use of written statements of a defendant, the Court subsequently required suppression of even contraband on the theory that requiring the defendant to assert a property interest in contraband would amount to compelled self-incrimination. See *Agnello v. United States*, 269 U.S. 20, 33–34 (1925). This rationale was undermined, however, when the Court later held that a defendant’s statements supporting a motion to suppress evidence cannot be used to establish guilt. See *Simmons v. United States*, 390 U.S. 377, 389–94 (1968). Moreover, when the authorities obtain evidence through search and seizure, the defendant is not being compelled to assist the prosecution as a “witness” or otherwise, as the Court later held. See *Andresen v. Maryland*, 427 U.S. 463, 472–75 (1976). For additional trenchant criticism of the Fifth Amendment rationale, see AMAR, *supra* note

Another argument for exclusion rests on the view that the use of unconstitutionally obtained evidence is an impermissible judicial legitimation of unconstitutional conduct. In *Weeks*, the Court reasoned:

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.³³

Justice Holmes later added: “If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed.”³⁴

Doctrinally, this rationale has not fared well. When the Court applied the exclusionary rule to the states in *Mapp v. Ohio*,³⁵ the Court wrote that “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.’”³⁶ Only in passing did the Court mention “the imperative of judicial integrity.”³⁷ Since then, the Court has denied that concerns about judicial integrity are separate from the deterrence justification for exclusion.³⁸ Nevertheless, some still argue that the admission of unconstitutionally obtained evidence amounts to impermissible legitimation of unconstitutional conduct,³⁹ or an abrogation of the judicial duty to enforce the Constitution.⁴⁰ Indeed, there is

19, at 22–25; TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT’S EXCLUSIONARY RULE* 9–10, 92–93 (2013); and Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 425–27 (1999).

³³ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

³⁴ *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting). For a more elaborate exploration of this view, see 3 ANTONY DUFF ET AL., *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 236–41 (2007).

³⁵ 367 U.S. 643 (1961).

³⁶ *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

³⁷ *Id.* at 659 (quoting *Elkins*, 364 U.S. at 222).

³⁸ See, e.g., *United States v. Leon*, 468 U.S. 897, 921 n.22 (1984); *Stone v. Powell*, 428 U.S. 465, 485–86 (1976); *United States v. Janis*, 428 U.S. 433, 458 n.35 (1976).

³⁹ See, e.g., *Herring v. United States*, 555 U.S. 135, 152–53 (2009) (Ginsburg, J., dissenting); Heffernan, *supra* note 15, at 832–42; Timothy Lynch, *In Defense of the Exclusionary Rule*, 23 HARV. J.L. & PUB. POL’Y 711, 737–41 (2000); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 48–51 (1998); Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 75–76 (2010).

⁴⁰ See, e.g., Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL’Y 173, 196–200 (1991); Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 590–97 (1983); Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 295–302 (1974);

surely something attractive about the view that a judiciary sworn to uphold the Constitution cannot ignore constitutional violations that produce an advantage to a party in litigation.⁴¹ Yet, it puts the cart before the horse to claim that exclusion is required to enforce the Constitution; as we have seen, the Fourth Amendment's text is silent on the evidentiary use of unconstitutionally obtained evidence. Moreover, like the status quo ante argument considered above, it is difficult to explain why the judicial integrity rationale for exclusion does not yield to countervailing considerations.

Consider *Walder v. United States*,⁴² in which the Court held that unconstitutionally obtained evidence could be used to impeach a defendant's testimony to prevent "a perversion of the Fourth Amendment" because it saw no "justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."⁴³ The point is powerful. It is a strange notion of judicial integrity that enables a criminal defendant to obtain a wrongful acquittal through perjured testimony that the prosecution is not permitted to rebut. Similarly, as we have seen, few argue that the judiciary must always restore the status quo ante by, for example, ordering the return of contraband if unlawfully seized. Yet, once it is agreed that the judiciary need not set all unlawful search and seizure at naught when the consequences of such a remedy are deemed unacceptable, it becomes unclear why the judiciary must facilitate the acquittal of the guilty through exclusion.⁴⁴ One might also argue that a rule that requires jurors to decide cases without the benefit of probative evidence is a serious distortion of the judicial function.⁴⁵ And, if victims of unreasonable search and seizure are offered an effective alternative remedy, then it becomes quite difficult to characterize the judiciary as effectively complicit

Rohith V. Srinivas, *The Exclusionary Rule as Fourth Amendment Judicial Review*, 49 AM. CRIM. L. REV. 179, 210–24 (2012).

⁴¹ Cf. Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMP. LEG. STUD. 149, 154–65 (2012) (reporting experimental findings indicating that subjects more often supported exclusion on an integrity rather than a deterrence rationale).

⁴² 347 U.S. 62 (1954).

⁴³ *Id.* at 65 (footnote omitted).

⁴⁴ The problems that inhere in permitting the guilty to escape punishment similarly answer Justice Brandeis' famous argument for exclusion:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (dissenting). The rhetoric is stirring, but this position rests on an unsupported empirical claim about the effects of government misconduct. More important, a regime that requires acquittals of the guilty might also produce "contempt for law." For a more elaborate critique of Justice Brandeis' position, see Eugene Milhizer, *The Exclusionary Rule Lottery Revisited*, 59 CATH. U. L. REV. 747, 763–72 (2010).

⁴⁵ See Todd C. Pettys, *Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule*, 37 FORDHAM URB. L.J. 837, 843–54 (2010).

in a constitutional violation, or abdicating its obligation to assess the constitutionality of official action, merely because it rejects exclusion.⁴⁶

As we have seen, contemporary doctrine rejects any claim that the Fourth Amendment requires use of the exclusionary rule. At least doctrinally, Thesis One has become conventional wisdom.

II. THESIS TWO: HISTORY DOES NOT RESOLVE THE PROPRIETY OF THE EXCLUSIONARY RULE

Justice Holmes once wrote, “a page of history is worth a volume of logic.”⁴⁷ Indeed, when interpreting the Fourth Amendment, the Court has written, “we are guided by ‘the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing’”⁴⁸ Thus, historical evidence could shed considerable light on the soundness of the exclusionary rule.

Yet, only rarely is history invoked in the exclusionary rule debate. Opponents of exclusion sometimes mention that the remedy was not utilized in the framing-era, but without placing significant weight on this claim.⁴⁹ A notable exception is Akhil Amar, who premises much of his opposition to exclusion on the fact that in the framing era, the remedy for a wrongful search and seizure was an award of damages in tort.⁵⁰ Roger Roots has taken a different view of framing-era practice, assembling a handful of precedents that suggest that something resembling an exclusionary remedy was recognized.⁵¹ The existence of a few precedents for exclusion, however, hardly establishes that it was a routine practice.⁵² As

⁴⁶ For additional critiques of the judicial-integrity rationale for exclusion, see Donald R. Dripps, *The “New” Exclusionary Rule Debate: From “Still Preoccupied with 1985” to “Virtual Deterrence”*, 37 *FORDHAM URB. L.J.* 743, 783–90 (2010); Milhizer, *supra* note 44, at 772–81; and Slobogin, *supra* note 32, at 433–37.

⁴⁷ *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

⁴⁸ *Atwater v. Lago Vista*, 532 U.S. 318, 326 (2001) (internal quotations omitted). To similar effect, see, for example, *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

⁴⁹ See, e.g., Tinsley, Kinsella & Block, *supra* note 19, at 64–65; John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 *A.B.A. J.* 479, 479–80 (1922); Matt J. O’Loughlin, Comment, *Exigent Circumstances: Circumscribing the Exclusionary Rule in Response to 9/11*, 70 *UMKC L. Rev.* 707, 708–09 (2002).

⁵⁰ See AMAR, *supra* note 19, at 20–22. For a similar argument centered on framing-era understandings, see William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 *DRAKE L. REV.* 33, 39–46, 125–29 (1984–85).

⁵¹ See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 *GONZ. L. REV.* 1, 14–20 (2009–10).

⁵² Most of the framing-era precedents involve release from custody as a remedy for wrongful arrest. See *id.* at 20–30. This, of course, is a very different remedy than the exclusion of wrongfully-obtained evidence. Indeed, the exclusionary rule has never been understood to authorize this remedy. See, e.g., *United States v. Crews*, 445 U.S. 463, 474 (1980); *Ex parte Johnson*, 167 U.S. 120, 125–27 (1897). Roots also relies on the framing-era rule prohibiting the seizure of “mere evidence,” while acknowledging that it was based on framing-era conceptions of property rights as well as the

Professor Amar observed, no less an authority than Justice Story once wrote that “evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means.”⁵³ One should exercise some skepticism when twenty-first century lawyers claim insight into the law of another era not shared by the greatest legal minds of the day. If we confine ourselves to framing-era practice, Professor Amar likely has the better of the argument. By far the greater problem with the historical case against exclusion, however, is its inattention to historical context.

In England, until roughly the time of the American Revolution, the only thing resembling a police officer was a constable, an official charged with executing warrants and who also had authority to appoint beadles responsible for clearing the streets of beggars and vagrants by day and keeping the community safe at night.⁵⁴ This system emerged in the colonies and remained in place in the framing era, with the investigative process largely confined to the execution of warrants. The remaining law enforcement duties of constables, sheriffs, and their employees consisted of responding to breaches of the peace, offenses committed in their presence, and pursuing offenders when summoned in the wake of a crime.⁵⁵ As one study of law enforcement in Boston explained:

The formal agencies of control, the justices of the peace, sheriffs, constables, and watchmen, were all derived from the English, pre-urban past. Their effectiveness, in Massachusetts, depended upon the same conditions which made the town meeting workable. Through the eighteenth century the use of legal force was ordinarily a direct response to the demands of private citizens for help. The victim of robbery or assault called a watchman, if available, and afterward applied to a justice for a warrant and a constable to make or aid in the arrest. The business of detection was largely a private matter, with initiative encouraged through a system of rewards and fines paid to informers. Neither state nor

prohibition on compelled self-incrimination. See *Roots*, *supra* note 51, at 37–45. As we have seen, however, both the property-based and self-incrimination arguments in support of the exclusionary rule are deeply problematic.

⁵³ AMAR, *supra* note 19, at 21 (quoting *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 844 (C.C.D. Mass. 1822) (No. 15,551)).

⁵⁴ See ELAINE A. REYNOLDS, *BEFORE THE BOBBIES: THE NIGHT WATCH AND POLICE REFORM IN METROPOLITAN LONDON, 1720–1830*, 7–44 (1998).

⁵⁵ See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 28–29, 68 (1993); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 *WAKE FOREST L. REV.* 239, 419–32 (2002); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 *NOTRE DAME L. REV.* 1451, 1468–72 (2005).

town made any provision for the identification or pursuit of the unknown offender, except through the coroner's inquest.⁵⁶

Thus, as George Thomas put it, what framing-era officers “did *not* do was investigate crime.”⁵⁷ Even their authority to make arrests absent judicial authorization was sharply limited. For misdemeanor offenses, a warrantless arrest was considered justifiable only if the offense occurred in the presence of the person making the arrest and the arrestee was in fact guilty, meaning that the acquittal of the arrestee exposed the individual making the arrest to liability for trespass.⁵⁸ For felonies, a warrantless arrest was justified only if a felony had in fact been committed and there was “probable cause of suspicion” to believe that the arrestee had committed the offense.⁵⁹ Beyond their limited authority, framing-era law enforcement officials had to be wary of undertaking search and seizure because of the threat of tort liability. Framing-era officers acting without a warrant faced personal liability in tort if they undertook search and seizure under circumstances that a jury might later deem inadequate.⁶⁰ Officers executing a valid warrant, in contrast, were immune from liability,⁶¹ although there is evidence that officers faced liability for seeking a warrant that did not produce contraband or evidence of a crime.⁶²

An approach to law enforcement that so enfeebled the law-enforcement function, however, proved deeply problematic as the nation grew.⁶³ As Carol Steiker observed in a response to Professor Amar's reliance on framing-era

⁵⁶ ROGER LANE, *POLICING THE CITY: BOSTON 1822–1885*, 6–7 (1967). For a similar description of framing-era policing in New York City, see JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, 3–22 (1970).

⁵⁷ George C. Thomas III, *Stumbling Toward History: The Framers' Search and Seizure World*, 43 *TEX. TECH L. REV.* 199, 201 (2010) (footnote omitted).

⁵⁸ See Davies, *supra* note 55, at 323–24.

⁵⁹ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 *MICH. L. REV.* 547, 621–22, 624–25, 631–33 (1999).

⁶⁰ See, e.g., AMAR, *supra* note 19, at 11–17, 20–21; WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791, 593–96, 760–61 (2009); Davies, *supra* note 59, at 621–22, 624–25, 665–66; Thomas, *supra* note 57, at 225–28. If a search produced incriminating evidence, the evidence provided a defense to tort liability, see AMAR, *supra* note 19, at 6–7, although there is some debate about whether this defense was the case for a trespass to a house. Compare Davies, *supra* note 59, at 647–49 (denying the existence of immunity), with Fabio Arcila, Jr., *The Death of Suspicion*, 51 *WM. & MARY L. REV.* 1275, 1316–24 (2010) (marshaling evidence to support immunity).

⁶¹ See, e.g., AMAR, *supra* note 19, at 12–13, 15–16; Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion and Probable Cause*, 50 *B.C. L. REV.* 363, 373–74 (2009); Roots, *supra* note 51, at 8 n.39.

⁶² See Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” is Only a Modern, Destructive, Judicial Myth*, 43 *TEX. TECH L. REV.* 51, 91–93 (2010).

⁶³ See, e.g., FRIEDMAN, *supra* note 55, at 27–28, 68; Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 *MISS. L.J.* 1085, 1097–1101 (2012).

practice: “[T]he colonial institutions of the constabulary and the watch were extremely ineffectual in combatting any serious threats to public security.”⁶⁴ Thus, in the nineteenth century, large cities began establishing police forces in response to growing urban lawlessness and instability.⁶⁵ The emergence of modern police departments with investigative responsibilities was a gradual process; through the nineteenth century, the ratio of police to population remained low, and officers often discharged their duties in a perfunctory, corrupt, or brutal fashion.⁶⁶ It was not until the Progressive Era around the turn of the century that a wave of reform produced something resembling professional police departments.⁶⁷

As framing-era limitations on the authority of officers proved inadequate to address the needs of the nation and modern police forces with investigative responsibilities emerged, legal arrangements changed to accommodate the perceived need for law-enforcement officials with more robust investigative and crime-prevention responsibilities. For example, in 1925, in *Carroll v. United States*,⁶⁸ the Supreme Court first held that the Fourth Amendment permitted a warrantless search and seizure for evidence on probable cause even absent authority to make an arrest, a development with little framing-era support aside from customs searches of ships.⁶⁹ In 1968, in *Terry v. Ohio*,⁷⁰ the Court first held that the police had authority to engage in investigative detention and a protective frisk for weapons even absent probable cause to arrest, a development with equally dubious framing-era support.⁷¹ The threat of tort liability facing officers engaged in investigative and crime-prevention functions also contracted. For one thing, indemnification became common. Even in the early years of the Republic, Congress began to indemnify public officials for judgments against them arising from the performance of their duties;⁷² today, public employers routinely offer

⁶⁴ Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 831–32 (1994).

⁶⁵ See, e.g., FRIEDMAN, *supra* note 55, at 68–71; DAVID R. JOHNSON, *POLICING THE URBAN UNDERWORLD: THE IMPACT OF CRIME ON THE DEVELOPMENT OF THE AMERICAN POLICE, 1800–1887*, 12–40 (1979); THOMAS A. REPPETTO, *THE BLUE PARADE* 2–23 (1978); JAMES F. RICHARDSON, *URBAN POLICE IN THE UNITED STATES* 6–15, 19–32 (1974); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 49–51 (1st ed. 1980).

⁶⁶ See, e.g., ROBERT M. FOGELSON, *BIG-CITY POLICE* 22–35 (1977); SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 15–18, 20–21 (1977).

⁶⁷ See, e.g., FOGELSON, *supra* note 66, at 41–53; WALKER, *supra* note 66, at 56–68.

⁶⁸ 267 U.S. 132 (1925).

⁶⁹ See Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 54–56 (Summer 2010).

⁷⁰ 392 U.S. 1 (1968).

⁷¹ See Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 330–37 (2010); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1804–05 (2000); Thomas, *supra* note 55, at 1514–16.

⁷² See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1865–70 (2010).

indemnification to their employees.⁷³ For another, a doctrine of official immunity from tort liability gradually emerged.⁷⁴ As currently understood, it grants officers a qualified immunity for unconstitutional conduct that does not violate clearly established law.⁷⁵ Qualified immunity is justified by the potential for over-deterrence if public employees were strictly liable for their constitutional torts.⁷⁶

One of the most potent charges against the use of framing-era practice to interpret the Constitution is that it “depends on using history without historicism, the use of evidence from the past without paying attention to historical context.”⁷⁷ For an illustration, consider *Tennessee v. Garner*,⁷⁸ in which the Court invalidated a statute codifying the framing-era rule that deadly force may be used to stop a fleeing felon by reasoning that considerations justifying the framing-era rule had been rendered obsolete.⁷⁹ The framing-era rule, the Court observed, was adopted when “virtually all felonies were punishable by death” and justified by “the relative dangerousness of felons,” but since then, most felonies have become noncapital and many nondangerous offenses have become classified as felonies.⁸⁰ Moreover, arrests were inherently dangerous affairs in the framing era before the advent of modern weaponry.⁸¹ Now that the arrest of suspected felons cannot always be regarded as involving sufficient danger to warrant use of deadly force, “changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied.”⁸²

There are similar perils in embracing the framing-era regime of damages liability as a remedy for unreasonable search and seizure outside of its historical context. In the framing era, when any search and seizure undertaken without a warrant presented a serious risk of personal liability, the use of tort damages to enforce the limitations on search-and-seizure authority could be expected to work quite nicely. Although tort liability did not attach to the execution of valid

⁷³ See, e.g., Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 587, 590–96 (2000); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 812–13 & n.51, 819–20 (2007); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1216–23 (2001).

⁷⁴ See Kian, *supra* note 26, at 150–58.

⁷⁵ See, e.g., *Saucier v. Katz*, 533 U.S. 194, 203–07 (2001); *Anderson v. Creighton*, 483 U.S. 635, 643–44 (1987).

⁷⁶ See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 407–08 (1997); *Wyatt v. Cole*, 504 U.S. 158, 167–68 (1992); *Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985).

⁷⁷ Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188 (2008). I have written elsewhere at greater length about the difficulties of relying on framing-era practices and understandings in contemporary constitutional adjudication. See Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1190–209 (2012).

⁷⁸ 471 U.S. 1 (1985).

⁷⁹ *Id.* at 13.

⁸⁰ *Id.* at 13–14.

⁸¹ *Id.* at 14–15.

⁸² *Id.* at 15.

warrants, the Fourth Amendment's Warrant Clause constrained the power of courts to issue warrants. As William Cuddihy, author of what is likely the most complete account of the origins of the Fourth Amendment ever written, concluded: "Having uprooted the paramount cause of the incidents of unreasonable search and seizure with which they were familiar, the generation of the Fourth Amendment had little reason to foresee that devices other than the general warrant would someday imperil the right they sought to protect."⁸³ The principal problem with the framing-era reliance on tort liability was the risk of over-deterrence created by the powerful threat of personal liability; but if officials are not expected to perform much in the way of investigative activity, over-deterrence is not of much concern. In contrast, in a world in which the police are expected to proactively investigate crime, over-deterrence becomes a greater concern. And, in a world in which tort immunities have expanded to prevent over-deterrence, there is little reason to believe that damages liability can constrain unreasonable search and seizure as in the framing era.

Professor Amar and the other advocates of the use of framing-era practice to guide contemporary constitutional interpretation have never attempted a response to the historicist critique of their reliance on framing-era practice to guide contemporary search-and-seizure law. Nor does Professor Amar claim that the Fourth Amendment forbids any evolution from framing-era procedure; to the contrary, he agrees that the Fourth Amendment is not "some set of specific rules, frozen in 1791 or 1868 amber."⁸⁴ Yet, if that is the case, it is entirely unclear why we must hew to the framing-era embrace of damages liability if it no longer offers an adequate remedy for abuse of official authority. Beyond that, since, as Thesis One explains, the text of the Fourth Amendment tells us nothing about what remedy should be employed for an unreasonable search and seizure, it is wholly untenable to read the Fourth Amendment as a codification of the framing-era remedial regime.

Thesis Two tells us that historical practice cannot resolve the exclusionary rule debate. This does not mean that the exclusionary rule must be embraced, but it does mean that judgments about how to enforce the Fourth Amendment must be made on the basis of the conditions that prevail in today's world, not that of the Framers.

⁸³ CUDDIHY, *supra* note 60, at 772. For a similar view, see Kamisar, *supra* note 40, at 571–79.

⁸⁴ AMAR, *supra* note 19, at 44. For a more general argument that framing-era practices must be adapted or "translated" in light of contemporary circumstances, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174–211 (1992). On this basis, Professor Lessig defends the exclusionary rule, arguing that the framing-era reliance on damages liability is based on a number of premises that have been rendered obsolete. *See id.* at 1228–33. More recently, Stephen Schulhofer has taken a similar view. *See* STEPHEN J. SCHULHOFER, MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY 41, 67–70 (2012).

III. THESIS THREE: THE FOURTH AMENDMENT REQUIRES AN EFFECTIVE DETERRENT TO UNREASONABLE SEARCH AND SEIZURE

Thesis Three is the logical consequence of the preceding theses. As we have seen in our consideration of Thesis One, there must be some meaningful remedy for unreasonable search and seizure if the Fourth Amendment is to be more than “a form of words.”⁸⁵ As we have seen in our consideration of Thesis Two, the original understanding of the Fourth Amendment also suggests that the Framers likely presumed that there would be an effective remedy for Fourth Amendment violations; the framing-era damages liability regime quite effectively constrained unreasonable search and seizure.

Beyond this, Thesis Three follows from the special importance of deterrence suggested by the constitutional text. The Fourth Amendment recognizes a “right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁸⁶ The term “secure” is often ignored in discussions of the Fourth Amendment, but it merits particular attention. If the word “secure” were simply understood as a synonym for a “right” to be free from unreasonable search and seizure, it would be redundant of the “right” found earlier in the same clause. The “right” to be “secure” must mean something more.

In the framing era, as Thomas Clancy has demonstrated, the term “secure” meant pretty much what it means today: “being safe or free from danger.”⁸⁷ This implies effective *ex ante* protection of the right against unreasonable search and seizure—that is, deterrence of unreasonable search and seizure. This suggestion is strengthened by the fact that the right is not described in individualistic terms, but instead as a collective right of “the people.” If, as Jed Rubenfeld has argued, the law leaves “the people” in undue fear that they will be subjected to unreasonable search and seizure, the Fourth Amendment right to be “secure” is not honored.⁸⁸

Thus, the Fourth Amendment contemplates *ex ante* protection for the right it enumerates in a fashion found nowhere else in the Constitution. Absent a remedial scheme that offers reasonably effective deterrence, the right to be “secure” against unreasonable search and seizure is breached. Security may not require perfect deterrence, but surely demands at least reasonable deterrent efficacy. Accordingly, Thesis Three submits that there must be some remedy for Fourth Amendment violations that offers sufficient deterrence to comport with the textual guarantee that the people be “secure” against unreasonable search and seizure. No Member of the Court has ever offered a different view, nor, to my knowledge, has any reputable scholar. Indeed, Thesis Three nicely tracks the Court’s current understanding of the function of exclusion; as we have seen, contemporary

⁸⁵ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

⁸⁶ U.S. CONST. amend. IV (emphasis supplied).

⁸⁷ THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* § 3.1.2.1, at 47 (2008).

⁸⁸ See Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 119–32 (2008).

doctrine regards the exclusionary rule as a prudential doctrine that endeavors to give substance to the commands of the Fourth Amendment.⁸⁹

To be sure, like the first two theses, Thesis Three does not demand use of the exclusionary rule. It does, however, require some reasonably effective deterrent. Selecting the appropriate deterrent, in turn, is a classic instance of what Henry Monaghan dubbed “constitutional common law,” using the exclusionary rule as a primary example.⁹⁰ The first three theses tell us that the Fourth Amendment commands use of an adequate deterrent, but beyond that, its text and history is of no help.

IV. THESIS FOUR: THE EXCLUSIONARY RULE OFFERS SOME MEANINGFUL DETERRENCE OF UNREASONABLE SEARCH AND SEIZURE BECAUSE OF THE POLITICAL COSTS OF EXCLUSION

One might be reluctant to accept Thesis Four given the powerful attacks that have been launched at the deterrent efficacy of exclusion. For example, critics of exclusion note that it cannot deter searches undertaken for reasons other than obtaining evidence for a criminal prosecution and, accordingly, cannot deter abusive tactics with other objectives, such as harassment.⁹¹ Moreover, given the complexity of Fourth Amendment doctrine, critics argue that there is reason to doubt whether officers understand it sufficiently to be capable of being deterred.⁹² The deterrent efficacy of exclusion is also blunted, critics argue, because it is utilized in judicial proceedings as a defense to a criminal prosecution rather than as a sanction directly imposed on the wrongdoer.⁹³ Indeed, conventional deterrence theory suggests that exclusion is, at best, a weak deterrent; whenever the likelihood that a search will produce admissible evidence is more than negligible, exclusion

⁸⁹ See *supra* text accompanying notes 3–6.

⁹⁰ See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3–10 (1975).

⁹¹ See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 233–36 (1977); STEVEN R. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* 56–57 (1977); Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 37–40; Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937 (1983); Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 602–07 (2011); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720–24 (1970); Slobogin, *supra* note 32, at 374–75.

⁹² See, e.g., Jacobi, *supra* note 91, at 600–01; Oaks, *supra* note 91, at 731; L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule—A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 676 (1998).

⁹³ See, e.g., HOROWITZ, *supra* note 91, at 223–24; SCHLESINGER, *supra* note 91, at 57–58; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 220 (2011); Barnett, *supra* note 91, at 957; Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U.L. REV. 1609, 1625–26 (2012); Caldwell & Chase, *supra* note 19, at 54–56; William T. Pizzi, *The Need to Overrule Mapp v. Ohio*, 82 U. COLO. L. REV. 679, 709–11 (2011); Slobogin, *supra* note 32, at 376–79.

fails to eliminate whatever incentive otherwise exists to undertake search and seizure because it imposes no penalty on an officer for conducting an illegal search.⁹⁴

The deterrent efficacy of the exclusionary rule is ultimately an empirical and not theoretical question, but the available empirical evidence is anything but clear. Some studies performed not long after *Mapp* endeavored to measure its effects and claimed that exclusion had produced deterrence,⁹⁵ although others doubted its deterrent efficacy.⁹⁶ One even found that deterrence varied by city, perhaps because of local variations in police culture and response to *Mapp*.⁹⁷

Some additional insight can be gleaned from data on compliance with the Fourth Amendment. The available data on search warrants, for example, show that

⁹⁴ See, e.g., Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 469–70 (2010); Jacobi, *supra* note 91, at 615–17; Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1450–57 (2000).

⁹⁵ See, e.g., Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 703–10 (1973) (finding reductions in arrests with increased use of warrants in selected cities following adoption of exclusionary rule); Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina: The Model, the Study and Implications*, 45 N.C. L. REV. 119, 134 (1966) (survey of police, lawyers, and judges concluding that exclusion deters); Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29–30 (1980) (interview with New York police); Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 283–86 (1965) (same); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 85–88, 123–30 (1992) [hereinafter Orfield, *Deterrence, Perjury, and the Heater Factor*] (survey of judges, lawyers, and police finding that exclusion deters); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 92 (1968) (study of arrests concluding that exclusion deters); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1054–55 (1987) [hereinafter Orfield, *The Exclusionary Rule and Deterrence*] (survey of police finding that exclusion deters). *But see generally* Perrin et al., *supra* note 92, at 679–94, 698–701 (criticizing studies finding deterrence).

⁹⁶ See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 224–25, 228 (1966) (observational study of officers); Perrin et al., *supra* note 92, at 727–30 (surveys of officers showing they frequently cannot correctly apply Fourth Amendment rules); Oaks, *supra* note 91, at 706–09 (studying statistics on arrest, conviction, recovery of stolen property and contraband and motions to suppress evidence in selected cities); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 276–77 (1973) (studying motions to suppress evidence in Chicago). *Cf.* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 356–59 (1991) (finding exclusion is only a weak deterrent based on surveys of officers showing they frequently cannot correctly apply Fourth Amendment rules). *But see generally* Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740, 744–64 (1975) (questioning the methodology of studies doubting the deterrent effect of exclusion).

⁹⁷ See Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57, 74–77 (1977).

they lead to the recovery of evidence in a vast majority of cases.⁹⁸ If anything, this suggests that the threat of exclusion over-deters; after all, the Supreme Court tells us that the standard of probable cause required for issuance of a warrant means only “a fair probability that contraband or evidence of a crime will be found,” and “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”⁹⁹ But data involving searches authorized by warrants are likely misleading. There are costs involved in seeking and then executing warrants, which may discourage police from their use even apart from the threat of exclusion.¹⁰⁰ This is suggested by data showing that the success rates for warrants that involve particularly significant costs to obtain and execute—warrants authorizing wiretaps—are unusually high.¹⁰¹

For searches without warrants based on probable cause, the data is relatively sparse, but at least a handful of surveys of searches of automobiles and their passengers suggest that the search success rate sometimes dips below 40%.¹⁰² This might suggest, at most, modest under-deterrence. Perhaps greater under-deterrence is suggested by the data relating to stop-and-frisk, which comports with the Fourth Amendment “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous,”¹⁰³ a standard less rigorous than probable cause.¹⁰⁴ The best data available comes from the New York Attorney General’s study of forms documenting investigative detentions filed by New York City police officers, which found through a sampling procedure that 15.4% of all forms failed to articulate facts sufficient to justify the stop and 23.5% of all forms did not provide sufficient information to make a determination about whether the stop was justified.¹⁰⁵ The sampling procedure also found that forms that articulated facts amounting to reasonable suspicion were four times more likely to produce an arrest.¹⁰⁶ Yet, it is difficult to know what to make of these data; it may well be that

⁹⁸ See, e.g., Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 225–26 (2010); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 922–23 (2008).

⁹⁹ *Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13 (1983).

¹⁰⁰ See, e.g., Dripps, *supra* note 11, at 926–27.

¹⁰¹ See Minzner, *supra* note 98, at 926–28.

¹⁰² See *id.* at 925 (describing studies showing a 35.1% success rate in San Antonio, 52.5% success rate in searches by the Maryland State Police, and 38.2% success rate for searches by the Florida State Highway Patrol).

¹⁰³ *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

¹⁰⁴ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000); *Alabama v. White*, 496 U.S. 325, 330–31 (1990); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Hensley*, 469 U.S. 221, 227–29 (1985).

¹⁰⁵ ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 158–64 (1999) [hereinafter “STOP AND FRISK REPORT”].

¹⁰⁶ *Id.* at 164.

officers were less thorough in filling out forms when they knew there would be no criminal case arising from the encounter. Reliance on these reports to assess compliance with the Fourth Amendment is especially perilous because the reports are not made for that purpose but rather as a source of investigative leads.¹⁰⁷ To be sure, only about one in nine stops led to an arrest, but as the study cautioned,

the fact that a large number of “stops” did not result in an arrest is *not* evidence of poor policing . . . [A]n officer need only have reasonable suspicion to “stop” an individual; it is not surprising that, given this lower threshold, many such “stops” should fail to result in an actual arrest.¹⁰⁸

The difficulties in gathering evidence on compliance with the Fourth Amendment are illustrated as well by a study of another city involving observation of officers on patrol that found 46% of pat-down searches were unconstitutional.¹⁰⁹ Yet, the study also found, in contrast to the New York data, that “unconstitutional searches were statistically no more likely to generate contraband than were constitutional searches.”¹¹⁰ If the presence of reasonable suspicion did not increase the likelihood of finding contraband, the problem may lie in the observers’ understanding of the reasonable suspicion standard; otherwise, it is difficult to understand how the presence of reasonable suspicion could have no effect on the likelihood that a search will produce contraband.¹¹¹

All of this might make one hesitant to reach any conclusions at all about the deterrent efficacy of exclusion. In its most thorough exploration of this issue to date, the Supreme Court despaired of identifying reliable evidence on the deterrent effects of exclusion in light of the many methodological problems that face those who seek to study the effects of exclusion on police behavior.¹¹² Yet, one can indulge all of the doubt that this tangle of data engenders and still accept Thesis Four. That is because the empirical debate centers on the magnitude of the exclusion’s deterrent effects; there is little debate about whether exclusion has some deterrent effect. After all, no one believes that police departments could

¹⁰⁷ See James J. Fyfe, *Stops, Frisks, Searches, and the Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 379, 392–94 (2004).

¹⁰⁸ STOP AND FRISK REPORT, *supra* note 105, at 111. A study of stops in 2006 found that approximately 10% resulted in an arrest or summons. See GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES 43 (2007). For a more extensive discussion of the New York data and the difficulties that inhere in efforts to use it to assess constitutional compliance, see Rosenthal, *supra* note 71, at 347–53.

¹⁰⁹ See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 333 (2004).

¹¹⁰ *Id.* at 347.

¹¹¹ For an additional critical discussion of this study, see Fyfe, *supra* note 107, at 384–91.

¹¹² See *United States v. Janis*, 428 U.S. 433, 449–52 (1976). For a more recent but equally skeptical account of the deterrent efficacy of exclusion, see Eugene R. Milhizer, *Debunking Five Great Myths about the Exclusionary Rule*, 211 MIL. L. REV. 211, 227–32 (2012).

ignore the requirements of the Fourth Amendment in the face of the exclusionary rule; the political consequences of seeing case after case of criminals going free because the police do not concern themselves with the Fourth Amendment would surely be unacceptable.

Consider what the superintendent of the New York Police Department at the time of *Mapp* wrote:

I can think of no decision in recent times . . . which had such a dramatic and traumatic effect As the then commissioner of the largest police force in this country I was immediately caught up in the entire problem of reevaluating our procedures . . . and creating new policies and new instructions for the implementation of *Mapp*.¹¹³

There are many similar anecdotes; for example, the adoption of the exclusionary rule in California immediately provoked police departments to place unprecedented emphasis on Fourth Amendment compliance.¹¹⁴ When the Supreme Court repudiated its earlier holdings that had permitted the search of an arrestee's house incident to arrest in *Chimel v. California*,¹¹⁵ police policy on search incident to arrest throughout the country transformed dramatically.¹¹⁶ After the Court prohibited random stops of motorists to check their licenses and registration in *Delaware v. Prouse*,¹¹⁷ the District of Columbia Police Department almost immediately overhauled its policies to comply with the new ruling.¹¹⁸ More recently, after the Court held that the installation and subsequent use of a GPS device to monitor a vehicle's movements was a "search" within the meaning of the Fourth Amendment in *United States v. Jones*,¹¹⁹ the FBI's general counsel reported that the decision caused the agency to turn off nearly 3,000 monitoring devices.¹²⁰

The explanation for this pattern is not mysterious. The exclusionary rule requires the authorities to concern themselves with Fourth Amendment requirements if they are to successfully prosecute wrongdoers. Few doubt, in turn, that when police policy encourages compliance with the Fourth Amendment, rates

¹¹³ Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement—The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

¹¹⁴ See Edward L. Barrett, Jr., *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 587–88 (1955).

¹¹⁵ 395 U.S. 752 (1969).

¹¹⁶ See Canon, *supra* note 95, at 716–17.

¹¹⁷ 440 U.S. 648 (1979).

¹¹⁸ See William J. Mertens & Silas Wasserstrom, *Foreword: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 399–401 (1981).

¹¹⁹ 132 S. Ct. 945 (2012).

¹²⁰ See Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS, Mar. 7, 2012, <http://abcnews.go.com/blogs/politics/2012/03/supreme-court-ruling-prompts-fbi-to-turn-off-3000-tracking-devices>.

of compliance rise. For example, the few empirical studies of the question have found that training improves police compliance with the Fourth Amendment.¹²¹ Conversely, absent exclusion, the incentive of the police to comply with the Fourth Amendment would be reduced. As David Sklansky observed, after the exclusionary rule was abolished in California as a remedy for violations of the California Constitution's analogue to the Fourth Amendment, police officers in that state were trained to ignore state constitutional restrictions on search and seizure not also embodied in Fourth Amendment law.¹²²

Anthony Amsterdam authored what may be the classic argument about the effect of exclusion on police incentives:

[T]he exclusionary rule is designed to operate in the manner of the procedure now being used in some appliance stores with the encouragement of police authorities: branding the social security number of the purchaser into the chassis of new television sets in order to make them less attracti[v]e as objects of larceny by diminishing their resale value in the hands of anyone but the true owner. Of course a branded television set may nonetheless be stolen But at least the effort to depreciate its worth makes it less of an incitement than it might be. A criminal court system functioning without an exclusionary rule . . . is the equivalent of a government purchasing agent paying premium prices for evidence branded with the stamp of unconstitutionality.¹²³

Yet, claiming only that the exclusionary rule reduces the incentive the authorities would otherwise have to engage in unreasonable search and seizure misses something important. Exclusion imposes a cost, albeit political in character, on law-enforcement agencies that ignore Fourth Amendment requirements. Because exclusion means that the criminal may well go free when the constable blunders, exclusion makes it politically costly for the authorities to breach Fourth Amendment rules.¹²⁴ Indeed, Daryl Levinson has argued that the political costs imposed when exclusion frees the guilty is an important virtue because the government is likely to be highly responsive to political costs and

¹²¹ See, e.g., Heffernan & Lovely, *supra* note 96, at 337–38; Perrin et al., *supra* note 92, at 730–32.

¹²² See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580–81 (2008).

¹²³ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431–32 (1974).

¹²⁴ For an elaboration along these lines, see Mertens & Wasserstrom, *supra* note 118, at 396–406.

benefits.¹²⁵ For their part, even opponents of exclusion acknowledge that it is likely to produce some measure of deterrence.¹²⁶

Thesis Four does not demand that we embrace the exclusionary rule. There may well be alternatives to exclusion that are equally or more effective deterrents and have fewer adverse consequences. Thesis Four, however, establishes that there is no real dispute about whether exclusion has a deterrent effect. As long as government remains politically accountable for its performance, it cannot afford to allow criminals to go free by permitting constables to blunder.

The first four theses are relatively uncontroversial, not so the remaining three. Yet, the soundness of these four strongly suggests the remaining three. Consider first the exceptions to the exclusionary rule.

V. THESIS FIVE: EXCLUSION OF EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT IS NOT INVARIABLY REQUIRED TO PRESERVE ITS DETERRENT EFFICACY

The Supreme Court has carved out a number of exceptions to exclusion in contexts in which the Court has judged the deterrent value of the rule to be exceeded by its costs in terms of the loss of probative evidence.¹²⁷ Viewed in terms of conventional deterrence, these exceptions to exclusion are deeply problematic. As we have seen, the exclusionary rule imposes no direct cost on an officer undertaking a search and seizure, and if there is some expected benefit to unlawful search and seizure because it may fall into one of the exceptions to exclusion, then it would seem that an officer would have an incentive to search even in the face of a likely Fourth Amendment violation. Indeed, some commentators have complained that the Court's willingness to recognize exceptions to exclusion has unduly compromised its deterrent efficacy.¹²⁸ In this

¹²⁵ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 417 (2000).

¹²⁶ See, e.g., SCHLESINGER, *supra* note 91, at 56 ("There can be no doubt that a certain number of illegal acts are deterred by the rule, for many law officials must be reluctant to gather evidence which will be of no value in court."); Oaks, *supra* note 91, at 708 ("The exclusionary rule has contributed to an increased awareness of constitutional requirements by the police."); Perrin et al., *supra* note 92, at 710–11 ("*Mapp* has probably made officers more aware of the Fourth Amendment, and has increased the number of warrants they obtain . . .").

¹²⁷ See, e.g., *Davis v. United States*, 131 S. Ct. 2419 (2011) (reasonable reliance on existing law); *Herring v. United States*, 555 U.S. 135 (2009) (reasonable reliance on report of outstanding warrant); *Hudson v. Michigan*, 547 U.S. 586 (2006) (failure to comply with knock-and-announce requirement); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (parole revocation proceedings); *Illinois v. Krull*, 480 U.S. 340 (1987) (reasonable reliance on statute); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation proceedings); *United States v. Leon*, 468 U.S. 897 (1984) (reasonable reliance on warrant); *Stone v. Powell*, 428 U.S. 465 (1976) (collateral attack on convictions); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceedings).

¹²⁸ See, e.g., MACLIN, *supra* note 32, at 342–47; Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 1030–34 (2010); David J.R. Frakt, *Fruitless*

vein, when, in *Herring v. United States*,¹²⁹ the Court concluded that exclusion should be triggered only by “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,”¹³⁰ Justice Ginsburg, in dissent, objected that this “suggestion runs counter to a foundational premise of tort law—that liability for negligence, i.e., lack of due care, creates an incentive to act with greater care.”¹³¹

This type of argument, however, overlooks the differences between the mechanism by which tort law and the exclusionary rule achieve deterrence. Negligence liability is thought to deter tortious conduct by creating an economic incentive to make cost-justified investments in safety.¹³² Police officers lack similar incentives; as Donald Dripps has observed, “[i]ndividual officers do not internalize either the benefits or the costs of Fourth Amendment activity.”¹³³ Instead, officers experience only indirect costs and benefits to the extent that their superiors reward or punish search and seizure activity. The exclusionary rule, in turn, influences this distribution of costs and benefits by exacting a political cost on Fourth Amendment violations, as we have seen in our consideration of Thesis Four. Thus, as Professor Dripps explained, the exclusionary rule “influences street-level behavior primarily by giving police administrators incentives to train and discipline the force to comply with constitutional requirements.”¹³⁴

Accordingly, exclusion achieves deterrence by altering political rather than economic incentives. It follows that even if there are limitations on the scope of the exclusionary rule, as long as it remains sufficiently robust so that the political consequences of permitting officers to ignore Fourth Amendment constraints are unacceptable, the rule achieves deterrence. Thus, it is likely that the exclusionary rule could tolerate a regime of considerably less than automatic exclusion; indeed, one scholar has even argued that exclusion could be required in only a random sample of cases involving Fourth Amendment violations without unduly compromising deterrence.¹³⁵

Poisonous Trees in a Parallel Universe: Hudson v. Michigan, Knock-and-Announce, and the Exclusionary Rule, 34 FLA. ST. U. L. REV. 659, 715–30 (2007); David Gray, Meagan Cooper & David McAloon, *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 46–47 (2012); Lloyd L. Weinreb, *The Exclusionary Rule Redux—Again*, 37 FORDHAM URB. L.J. 873, 886–87 (2010).

¹²⁹ 555 U.S. 135 (2009).

¹³⁰ *Id.* at 144.

¹³¹ *Id.* at 153 (Ginsburg, J., dissenting). For a particularly helpful discussion of the implications of *Herring*, see Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

¹³² See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135–73 (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1 (4th ed. 1992); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 5–32 (1987).

¹³³ Dripps, *supra* note 46, at 763.

¹³⁴ *Id.* at 764.

¹³⁵ See Eugene Milhizer, *The Exclusionary Rule Lottery*, 39 U. TOL. L. REV. 755, 761–63 (2008).

Some have suggested that a Fourth Amendment violation should produce a reduction in the defendant's sentence rather than complete exclusion of the evidence that might prevent conviction.¹³⁶ This approach, however, might undermine deterrence overmuch. As William Stuntz once argued, the power of the exclusionary rule as a deterrent is that it "shines a spotlight on a few of the robbers and drug dealers who go free."¹³⁷ If a Fourth Amendment violation failed to result in such a dramatic consequence, the political incentive to comply with the Fourth Amendment might be seriously compromised. Other proposals to trim back exclusion are even more likely to unacceptably undermine deterrence. Consider, for example, proposals that seek to reduce the social costs of exclusion by rendering it inapplicable to what are regarded as the most serious crimes.¹³⁸ These proposals are notable for their failure to consider the political mechanism by which exclusion achieves deterrence. It is the threat of the criminal going free in the most serious cases that has the greatest political salience; this is where the deterrent punch of the exclusionary rule primarily resides.¹³⁹

Thus, Thesis Five submits that exclusion need not be automatic or universal, though it must be sufficiently robust to preserve the political incentive that exclusion creates to comply with Fourth Amendment requirements.¹⁴⁰

¹³⁶ See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 115–17 (2003); Caldwell & Chase, *supra* note 19, at 72–76.

¹³⁷ William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 447 (1997).

¹³⁸ See, e.g., James Duke Cameron & Richard Lustiger, *The Exclusionary Rule: A Cost-Benefit Analysis*, 101 F.R.D. 109, 144–45 (1984); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046–49 (1974).

¹³⁹ For additional discussion of the problems with making the exclusionary rule inapplicable to particular categories of search and seizure, see Yale Kamisar, "Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule, 86 MICH. L. REV. 1, 19–32 (1987), and Milhizer, *supra* note 135, at 760–62.

¹⁴⁰ Cf. *James v. Illinois*, 493 U.S. 307, 313–19 (1990) (requiring exclusion of evidence impeaching the testimony of defense witnesses to avoid unduly undermining the deterrent function of the exclusionary rule). One could use Thesis Five to object to the holding that the exclusionary rule is inapplicable to knock-and-announce violations in *Hudson v. Michigan*, 547 U.S. 586 (2006), on the ground that it eviscerates the rule's deterrent effect for this category of Fourth Amendment violations. For an argument along these lines, see James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1868–71 (2008). Yet, given that the police can dispense with knock-and-announce when they reasonably suspect that it would be dangerous, futile, or inhibit their investigation, see *Richards v. Wisconsin*, 520 U.S. 385, 394–95 (1997), the incentive to violate the requirement may not be great, especially since compliance enhances officers' safety by reducing the risk that officers will be mistaken for intruders. See, e.g., *Miller v. United States*, 357 U.S. 301, 313 n.12 (1958). Thus, there may be little deterrent benefit to exclusion, as the Court suggested. See *Hudson*, 547 U.S. at 596.

VI. THESIS SIX: EXCLUSION IS SOMETIMES REQUIRED TO ACHIEVE
CONSTITUTIONALLY SUFFICIENT DETERRENCE EVEN IN THE ABSENCE OF
CULPABLE MISCONDUCT

As we have seen in our consideration of Thesis Five, the holding in *Herring* that exclusion ordinarily requires culpable misconduct can be reconciled with Thesis Three's requirement that there be a remedy with adequate deterrent efficacy for Fourth Amendment violations. On this basis, *Davis v. United States*¹⁴¹ seems unobjectionable as well. In that case, the Court held that exclusion is not required when a search is undertaken in reliance on then-existing law, even though it was subsequently repudiated by an intervening decision of the Court.¹⁴² After all, the search in *Davis* was consistent with existing law, and there is no reason to deter officers from undertaking search and seizure in reasonable reliance on existing law. This reasoning suggests, in turn, that even when the law is unsettled at the time of a search and seizure, as long as the officer could reasonably believe that the search and seizure is lawful, suppression is inappropriate.¹⁴³ Accordingly, this view precludes suppression of evidence obtained in any search undertaken in reasonable reliance on existing law even when a motion to suppress evidence endeavors to clarify or alter existing law.

If exclusion could never be used to clarify or change Fourth Amendment law, however, the resulting remedial scheme would ossify the law of search and seizure. This, in turn, would create great tension with Thesis Three's insistence that there be an efficacious remedy for Fourth Amendment violations.

History teaches that Fourth Amendment jurisprudence necessarily evolves. For one thing, the Supreme Court is not infallible; sometimes the Court must correct its mistakes, as when the Court overruled an earlier decision permitting a search of an arrestee's house incident to arrest and instead concluded that the officer-safety rationale that supports a search incident to arrest extends only to the area within the arrestee's immediate control.¹⁴⁴ For another, sometimes the lower courts over-read the Court's decisions; this was the view the Court took when it changed the law on which the officers had relied in *Davis*, repudiating the view many lower courts had taken that that the Court's precedents permitted a search of the entire passenger compartment of a vehicle incident to an arrest of a recent occupant.¹⁴⁵ Beyond correcting judicial error, Fourth Amendment doctrine necessarily develops over time. Even relatively mature doctrine retains areas

¹⁴¹ 131 S. Ct. 2419 (2011).

¹⁴² *Id.* at 2428–29.

¹⁴³ *Id.* at 2439–40 (Breyer, J., dissenting). For arguments in support of this view, see, for example, WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 25–45 (1999), Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1329–34 (2000), and Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951–53 (1965).

¹⁴⁴ See *Chimel v. California*, 395 U.S. 752, 760–68 (1969).

¹⁴⁵ See *Arizona v. Gant*, 556 U.S. 332, 341–43 (2009).

where the law is unsettled; for example, the Court did not decide until 1980 that the Fourth Amendment requires a warrant in order to make a forcible entry to effect an otherwise valid arrest of an individual in his residence.¹⁴⁶ Even today, it remains unsettled whether a warrant is required to make a forcible entry into a home if a resident has already granted consent to an undercover informant who then observes contraband in plain view.¹⁴⁷ Doctrinal evolution is required as well by changed circumstances, such as technological advance. For example, in the framing era, only a physical trespass was thought to be an unlawful invasion of the privacy of the home, and for that reason, in its first encounter with electronic surveillance, the Court held that wiretapping unaccompanied by a physical trespass to the home was not a “search” within the meaning of the Fourth Amendment.¹⁴⁸ The Court subsequently repudiated this rule, holding that even nontrespassory wiretapping fell within the scope of the Fourth Amendment even if it involved no trespass to a home.¹⁴⁹ The Court later held that the use of a thermal imaging device that, although positioned on public property outside of a home, discloses “the relative heat of various rooms in the home,”¹⁵⁰ also amounts to a “search” within the meaning of the Fourth Amendment, rejecting the contrary view taken by lower courts by explaining that it could not “permit police technology to erode the privacy guaranteed by the Fourth Amendment.”¹⁵¹ More recently, the Court held that the installation and subsequent use of a GPS device to monitor a vehicle’s movements was a “search” within the meaning of the Fourth Amendment.¹⁵²

If, however, the exclusionary rule could no longer be used to change or develop Fourth Amendment law because exclusion is not permitted whenever officers reasonably rely on existing law, this limitation on exclusion would contravene Thesis Three’s insistence that the Fourth Amendment requires a remedy sufficient to protect the people’s right to security against unreasonable search and seizure. Instead, no remedy would be available for violations involving novel Fourth Amendment claims, and Fourth Amendment doctrine could not evolve.

To be sure, the exclusionary rule is not the only vehicle for the development of Fourth Amendment law. Actions can be brought seeking injunctive relief, but the plaintiff faces a high hurdle; the plaintiff must establish a credible and nonspeculative threat that he will be subjected in the future to an allegedly

¹⁴⁶ See *Payton v. New York*, 445 U.S. 573 (1980).

¹⁴⁷ See *Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009).

¹⁴⁸ *Olmstead v. United States*, 277 U.S. 438, 463–66 (1928).

¹⁴⁹ See *Katz v. United States*, 389 U.S. 347, 352–53 (1967).

¹⁵⁰ *Kyllo v. United States*, 533 U.S. 27, 35 n.2 (2001).

¹⁵¹ *Id.* at 34. For additional examples of the evolution of Fourth Amendment law, see Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 489–95 (2009). Orin Kerr has provided a contemporary example of evolution still underway, noting that it is at present unclear how Fourth Amendment standards apply to the search and seizure of email. See Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2010–2011 CATO SUP. CT. REV. 237, 256–57 (2011).

¹⁵² See *United States v. Jones*, 132 S. Ct. 945 (2012).

unreasonable search and seizure.¹⁵³ As for actions seeking damages, sovereign immunity bars suits seeking a remedy for an alleged constitutional violation against the federal government,¹⁵⁴ and the Court has held that Congress has not acted to abrogate the states' sovereign immunity against damages liability.¹⁵⁵ Suit can be brought against individual officers seeking damages for Fourth Amendment violations,¹⁵⁶ but, as we have seen, these suits face the defense of qualified immunity, which precludes liability except when an official has violated clearly established law.¹⁵⁷ Under this doctrine, whenever Fourth Amendment law is unsettled as applied to an official's conduct, damages are unavailable.¹⁵⁸

Accordingly, in any cases in which an officer reasonably relies on existing law, qualified immunity likely precludes damages liability.¹⁵⁹ Damages actions against municipalities, in contrast, do not face the defense of qualified immunity,¹⁶⁰ but municipalities can be held liable only for municipal custom, policy, or practice.¹⁶¹ This is a demanding standard; municipalities can be held liable only when municipal custom, policy, or practice is itself unconstitutional, or when municipal policymakers exhibit deliberate indifference to violations of constitutional rights by municipal employees.¹⁶² If municipal policymakers merely adopt a policy of undertaking search and seizure whenever there is reasonable support for its legality under then-existing law, it is far from clear that there is any basis for municipal liability. Even an injunctive action against a municipality requires proof of an actionable municipal custom, policy, or practice.¹⁶³

To be sure, in a civil action, a court could express a view on the merits on a Fourth Amendment issue even if it also concludes that the action is barred by qualified immunity, although it is not required to do so.¹⁶⁴ There is, however, reason to doubt whether courts will be willing to reach the merits of Fourth Amendment claims that can be quickly disposed of on other grounds, such as

¹⁵³ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–10 (1983).

¹⁵⁴ See *FDIC v. Meyer*, 510 U.S. 471, 477 (1994).

¹⁵⁵ See *Quern v. Jordan*, 440 U.S. 332, 338–45 (1979).

¹⁵⁶ See *Bivens v. Six Unknown Named Agents of Fed. Bur. Narcotics*, 403 U.S. 388, 395–97 (1971) (federal officers); *Monroe v. Pape*, 365 U.S. 167, 171–87 (1961) (officers acting under color of state law), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978).

¹⁵⁷ See *supra* text accompanying notes 74–76.

¹⁵⁸ See, e.g., *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–79 (2009); *Pearson v. Callahan*, 555 U.S. 223, 243–45 (2009).

¹⁵⁹ See Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 710–13 (2011).

¹⁶⁰ See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

¹⁶¹ See *Monell*, 436 U.S. at 690–91.

¹⁶² See, e.g., *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407–11 (1997); *City of Canton v. Harris*, 489 U.S. 378, 386–89 (1989).

¹⁶³ See *Cnty. of Los Angeles v. Humphries*, 131 S. Ct. 447, 452–54 (2011).

¹⁶⁴ See *Pearson v. Callahan*, 555 U.S. 223, 241–42 (2009). At one point, the Court seemingly required that the merits be addressed prior to reaching immunity, see *Saucier v. Katz*, 533 U.S. 194, 201 (2001), but it later changed course, leaving the matter entirely within judicial discretion. See *Pearson*, 555 U.S. at 236, 242.

qualified immunity or an exception to the exclusionary rule. The available empirical data suggests that since the Court left the matter to the discretion of the lower courts, their willingness to reach the merits has declined significantly, at least in precedential courts issuing decisions with binding effect.¹⁶⁵ Perhaps even more important, if pressing even a possibly meritorious Fourth Amendment claim can do nothing for a litigant, either because, in a criminal case, the claim involves a novel or unsettled area of the law in which exclusion would be inappropriate, or, in a civil case, the claim cannot produce a favorable judgment because of qualified immunity, we should not expect counsel to have an incentive to invest much in support of such claims. Although counsel might not be deterred from pursuing damages claims merely because the award is likely to be small because of the availability of attorney's fees for prevailing parties under the civil rights laws,¹⁶⁶ if a plaintiff can do no more than obtain a favorable statement while losing a case on grounds of qualified immunity, a plaintiff cannot recover attorney's fees because of the rule that fees are unavailable for obtaining "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff . . ."¹⁶⁷ To be sure, there are some clients and lawyers with primarily ideological agendas that may be willing to seek purely ideological victories (such as establishing precedents for future litigation), but the fact that counsel and client can obtain little tangible value when pursuing a claim likely barred by the exclusionary rule or qualified immunity—and are not even guaranteed a ruling on the merits—suggests that such a rule is likely to stunt the development of Fourth Amendment law.¹⁶⁸

¹⁶⁵ See Colin Rolfs, Comment, *Qualified Immunity after Pearson v. Callahan*, 59 UCLA L. REV. 468, 490–98 (2011).

¹⁶⁶ Cf. *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006) (noting the incentive to bring even cases involving small damages created by the recoverability of attorney's fees).

¹⁶⁷ *Hewitt v. Helms*, 482 U.S. 755, 763 (1987).

¹⁶⁸ One scholar has suggested that qualified immunity doctrine be reformed to permit a plaintiff to seek nominal damages without facing an immunity bar so that qualified immunity does not stunt the development of constitutional law. See James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1623–31 (2011). Although the proposal spares defendants exposure to substantial damages, it nevertheless undermines a core protection of qualified immunity by forcing defendants to bear the cost of defending litigation. The Court has rejected approaches to qualified immunity that fail to achieve this objective. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 525–30 (1985) (permitting defendants to appeal interlocutory rulings denying qualified immunity to spare them the burdens of litigating claims barred by immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982) (rejecting requirement that defendants establish good faith to receive immunity because it frequently prevents the termination of otherwise insubstantial claims prior to trial). Moreover, this proposal does not address the problem of incentive to litigate; nominal damages provide little of substance to the client and will not support an award of attorneys' fees. See *Farrar v. Hobby*, 506 U.S. 103, 114–16 (1992). But, even putting these problems aside, it is entirely unclear why the defendant would agree to bear the substantial costs of litigating such claims instead of merely agreeing to the entry of judgment against them for nominal damages. The proposal's advocate asserts that it would be politically unacceptable to take this course of action, see Pfander, *supra* at 1636–38, but it is rarely politically unacceptable to take a course of action that saves the taxpayers money, especially when this course of action would not produce a binding precedent inasmuch as decisions of district courts are not

Indeed, a number of scholars have expressed concern that absent a vigorous exclusionary remedy, the development of Fourth Amendment law is likely to be stunted.¹⁶⁹ Notably, one recent empirical study concluded that the vast majority of Fourth Amendment law is made in criminal and not civil cases.¹⁷⁰

As we have seen in our consideration of Thesis Three, the Fourth Amendment demands a remedy for unreasonable search and seizure with adequate deterrent efficacy. One method of achieving deterrence is when the remedy of exclusion becomes a vehicle for announcing or clarifying rules of Fourth Amendment law. As Albert Alschuler put it, exclusion “does not operate primarily by altering a short-term pleasure-pain calculus It works over the long term by allowing judges to give guidance to police officers who ultimately prove willing to receive it.”¹⁷¹ This view, moreover, is in no tension with *Davis*. Although there are advantages in terms of equity in applying a new rule of law to all cases pending at the time the new rule is announced,¹⁷² the prospective deterrent benefits of announcing the new rule are achieved merely by its promulgation; there is no additional deterrent value in applying the new rule to other pending cases to justify the windfall that such application would confer on lawbreakers. In contrast, when a litigant seeks alteration or clarification of existing law through a motion to suppress evidence and ultimately prevails, that victory produces deterrence by requiring the authorities to adhere to the new rule prospectively. Thus, permitting the first litigant to prevail on a novel claim by excluding evidence provides litigants with a powerful incentive to develop Fourth Amendment law, and in this fashion produces deterrence of Fourth Amendment violations. To be sure, limiting exclusion to the first litigant to prevail on a novel claim would reduce the benefits conferred on defendants by such claims, but given the incentive of defense counsel to vigorously defend their clients, the promise of exclusion in the first case to the post ought to be a sufficient incentive to bring such cases.

Davis does not reject the possibility of preserving exclusion in the first case to the post. It leaves open the possibility that “to prevent Fourth Amendment law from becoming ossified,” the first litigant to obtain “the overruling of one of this

regarded as binding precedents. See *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011). In contrast, choosing to litigate the merits through an appeal could produce such a precedent. Indeed, there is little reason to credit the speculation that governmental defendants feel obligated to litigate constitutional claims; to the contrary, there is substantial empirical evidence that governmental defendants are willing to settle even quite serious claims. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 *BUFF. L. REV.* 757, 766–74 (2004).

¹⁶⁹ See, e.g., Alschuler, *supra* note 151, at 495–511; John C. Jeffries, Jr., *Reversing The Order of Battle in Constitutional Torts*, 2009 *SUP. CT. REV.* 115, 131–33 (2009); Kerr, *supra* note 151, at 239–45, 253–56; Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 *ALA. L. REV.* 687, 717–33 (2011).

¹⁷⁰ See Nancy Leong, *Making Rights*, 92 *B.U. L. REV.* 405, 428 (2012).

¹⁷¹ Albert W. Alschuler, *The Exclusionary Rule and Causation: Hudson v. Michigan and Its Ancestors*, 93 *IOWA L. REV.* 1741, 1752 (2008) (footnotes omitted).

¹⁷² See *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987).

Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case."¹⁷³ Justice Sotomayor added that *Davis* "d[id] not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled."¹⁷⁴ There is great merit to preserving exclusion in such cases; such an approach is dictated by the constitutional requirement posited by Thesis Three of a remedy for Fourth Amendment violations with deterrent efficacy.

Nevertheless, like Thesis Three, Thesis Six supports exclusion only if there is no other remedy available with adequate deterrent efficacy. It is to the subject of alternate remedies that we finally turn.

VII. THESIS SEVEN: THE ALTERNATIVES TO EXCLUSION ARE OF UNCERTAIN EFFICACY BECAUSE THEY REST ON PROBLEMATIC THEORIES OF DETERRENCE

It is easy to understand the case against the exclusionary rule given the many attacks against it. Foremost among them, as we have seen, is the complaint that exclusion produces a windfall for the guilty.¹⁷⁵ There have been a number of efforts to assess the magnitude of this effect, with some doubting that the rule has a significant effect on prosecutions,¹⁷⁶ and others disagreeing.¹⁷⁷ The issue is enormously difficult to study; perhaps the exclusionary rule's principal costs include when officers refrain from undertaking search and seizure or from presenting a case for prosecution, or when prosecutors refuse to accept a case or agree to a lenient negotiated disposition in light of a probability of exclusion, but measuring these effects encompasses great difficulties. As Thomas Davies once concluded, "the measurement problems involved are such that we will not obtain anything like a precise count of its effects."¹⁷⁸

¹⁷³ *Davis v. United States*, 131 S. Ct. 2419, 2433 (2011).

¹⁷⁴ *Id.* at 2435 (Sotomayor, J., concurring in the judgment).

¹⁷⁵ See *supra* text accompanying notes 19–20.

¹⁷⁶ See, e.g., COMPROLLER GEN'L OF THE U.S., *IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS* 8–11 (1979); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need To Learn) about the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 678–80 (1983); Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 606–09 (1983); Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions To Suppress and "Lost Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1064–66 (1991).

¹⁷⁷ See, e.g., NAT'L INST. JUSTICE, U.S. DEP'T OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* 18 (1982); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 138–41 (2008); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1728 (2005).

¹⁷⁸ Davies, *supra* note 176, at 622. For a more recent summary of the difficulties, see Jacobi, *supra* note 91, at 595–99.

Many respected commentators take the position that losing probative evidence of guilt is a cost of the Fourth Amendment, which prohibits unreasonable search and seizure even if the prohibition results in a loss of probative evidence of guilt, rather than a cost of the exclusionary rule.¹⁷⁹ Others, however, point out that in many instances of unreasonable search and seizure, compliance with the Fourth Amendment would not have entailed the loss of probative evidence, but instead would merely have required the authorities to follow the proper procedures, such as obtaining a warrant or additional predication prior to undertaking a search.¹⁸⁰ Yet, this criticism of exclusion fails to come to grips with its deterrent function. As we have seen in our consideration of Thesis Three, the Fourth Amendment demands a remedy with sufficient deterrent efficacy to provide the constitutionally guaranteed “security” against unreasonable search and seizure. If exclusion were denied whenever one could speculate that the authorities would have obtained the incriminating evidence even had they complied with the Fourth Amendment, exclusion would be all too easy to avoid. As one leading scholar put it, the authorities can often claim, “if we hadn’t done it wrong, we would have done it right.”¹⁸¹ The result, of course, would be to drain the exclusionary rule of its deterrent efficacy. This, however, is precisely what Thesis Three forbids. Moreover, the fact that the authorities can often obtain incriminating evidence by complying with the Fourth Amendment is, in terms of deterrence, a virtue, since compliance with the Fourth Amendment can facilitate successful prosecution. For just this reason, exclusion creates a political incentive to comply with Fourth Amendment requirements.

There remains, however, the question whether an alternative to exclusion would offer adequate, if not greater deterrence while generating fewer costs. An alternative remedy with greater deterrent heft can be readily envisioned; as we saw in our consideration of Thesis Four, although the exclusionary rule surely has some deterrent effect, there is ample reason to doubt its magnitude. Indeed, given the many exceptions to exclusion and the lack of any direct sanction on wrongdoers, most scholars believe that the exclusionary rule is far more likely to under-, rather than over-deter.¹⁸² This is not the only attack on exclusion that has bite. Critics

¹⁷⁹ See, e.g., SCHULHOFER, *supra* note 84, at 68–69; Allen, *supra* note 91, at 34; Kamisar, *supra* note 139, at 31–32; Oaks, *supra* note 91, at 754; Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392–93 (1983).

¹⁸⁰ See, e.g., AMAR, *supra* note 19, at 26–29; Alschuler, *supra* note 171, at 1758–61; Dripps, *supra* note 11, at 919 n.85; Kaplan, *supra* note 138, at 1038; Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 267 n.98 (1988); Slobogin, *supra* note 32, at 432–33.

¹⁸¹ 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) 272 (4th ed. 2004) (quoting *State v. Topanotes*, 76 P.3d 1159, 1164 (Utah 2003)). For a more elaborate argument invoking the law of remedies, see Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 156–70 (2008).

¹⁸² See, e.g., Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2302 (1998) (reviewing AMAR, *supra* note 19); George

also complain that exclusion offers no remedy to the innocent,¹⁸³ and generates enormous litigation costs including the promotion of perjurious testimony by officers eager to avoid the loss of probative evidence.¹⁸⁴ One scholar has even theorized that the exclusionary rule leads to the conviction of the innocent by inducing juries to speculate that probative evidence has been withheld from them, causing jurors to become more prone to convict.¹⁸⁵ Another speculated that the exclusionary remedy might encourage defense counsel to focus on exclusion rather than pursuing defenses based on factual innocence.¹⁸⁶ One might also believe that exclusion leads to over-deterrence, as when officers unnecessarily gather evidence to support probable cause or seek a warrant.¹⁸⁷

Some of these criticisms are more easily answered than others. For example, the claim that exclusion offers nothing to the innocent overlooks the rule's deterrent function. As one scholar put it: "[T]he guilty defendant is freed to protect the rest of us from unlawful police invasions of our security . . ."¹⁸⁸ Thus, to the extent that exclusion deters Fourth Amendment violations, it offers quite a bit to the innocent. To be sure, when search or seizure is undertaken for purposes other than obtaining evidence, exclusion is unlikely to deter, but as we have seen in our consideration of Thesis Six, the exclusionary rule is supplemented by damages liability, at least in some circumstances.¹⁸⁹ Thus, the current regime offers something tangible to the innocent who experience compensable damages.

C. Thomas III, *Judges Are Not Economists and Other Reasons to Be Skeptical of Contingent Suppression Orders: A Response to Professor Dripps*, 38 AM. CRIM. L. REV. 47, 50–51 (2001).

¹⁸³ See, e.g., AMAR, *supra* note 19, at 27; SCHLESINGER, *supra* note 91, at 47–50; Jacobi, *supra* note 91, at 588; Oaks, *supra* note 91, at 736–37.

¹⁸⁴ See, e.g., HOROWITZ, *supra* note 91, at 234–35; SCHLESINGER, *supra* note 91, at 57; Barnett, *supra* note 91, at 958–59; Caldwell & Chase, *supra* note 19, at 52–53; Jacobi, *supra* note 91, at 608–11; Oaks, *supra* note 91, at 739–49; Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041–48 (1996). Cf. Melanie D. Wilson, *Improbable Cause: A Case for Judging Police by a More Majestic Standard*, 15 BERKELEY J. CRIM. L. 259, 286–95 (2010) (using empirical evidence from cases in the District of Kansas to argue that judges have a limited ability to detect police perjury). With respect to the magnitude of the problem of police perjury, there have been some efforts to gather empirical evidence that, perhaps unsurprisingly in light of the obvious difficulties in gathering reliable data, have produced disparate results. Compare, e.g., Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 95, at 95–98 (concluding the incidence of perjury is low), with SKOLNICK, *supra* note 96, at 228 (finding perjury common), Pizzi, *supra* note 93, at 715 (same), and Comment, *supra* note 95, at 94–96 (same).

¹⁸⁵ See Jacobi, *supra* note 91, at 617–46.

¹⁸⁶ See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4–5, 37–43 (1997). Professor Slobogin repeats this contention in this symposium. See Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 354–55 (2013).

¹⁸⁷ Cf. Hudson v. Michigan, 547 U.S. 586, 595–96 (2006) (speculating that utilizing the exclusionary rule to enforce the knock-and-announce requirement could cause officers to wait longer than required after announcing their authority).

¹⁸⁸ Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 331 (1973).

¹⁸⁹ See *supra* text accompanying notes 154–58.

Similarly, the claim that exclusion produces litigation costs—including police perjury—must be assessed in light of Thesis Three’s insistence on a remedy with adequate deterrent efficacy. Any remedy with sufficient bite to constitute an adequate deterrent would likely produce substantial litigation, with the attendant risk of perjury on the part of those who fear whatever regime of sanctions that would be employed in order to generate the requisite deterrence. The claim that exclusion produces over-deterrence has a similar answer. Although, as we have seen in our consideration of Thesis Four, there is little empirical evidence that the exclusionary rule over-deters,¹⁹⁰ again, any remedy with sufficient deterrent efficacy could over-deter as well. Only if a remedy is identified that is less likely to produce litigation costs or over-deterrence while generating sufficient “security” against unreasonable search and seizure is there reason to jettison exclusion.

The claim that the exclusionary rule produces wrongful convictions by causing jurors to assume probative evidence has been excluded, thus giving a “discount to the prosecutor’s burden of proof,”¹⁹¹ has little empirical support. Although there is evidence that jurors sometimes ignore instructions to disregard evidence, consider it for a limited purpose, or speculate about facts not in evidence, and are more likely to disregard instructions that they regard as illegitimate, there is no evidence that instructions about the prosecution’s burden of proof in criminal cases fall into any of these categories.¹⁹² It is rather a leap from evidence that jurors have difficulty ignoring or limiting their consideration of evidence that was presented, or following instructions that they regard as illegitimate, and even evidence that the exclusionary rule is unpopular,¹⁹³ to conclude that jurors will generally discount the prosecution’s burden of proof if they believe that otherwise probative evidence is sometimes excluded. If this effect exists, moreover, it might be counterbalanced by the equally plausible inference that jurors are familiar with the phenomenon of wrongful convictions and, when they must take personal responsibility for another’s liberty, are motivated to resist generalized speculation that additional incriminating evidence must exist in order to avoid convicting the innocent.

Most important, however, the available empirical evidence on wrongful convictions is inconsistent with this claim. If exclusion causes “jurors [to] systematically overestimate the existence of evidence of guilt against the innocent,”¹⁹⁴ we should expect wrongful convictions to fall in an essentially random pattern, or, at most, cluster in cases involving critical but missing evidence—such as “a murder trial without a murder weapon when neither side mentions a search of the defendant’s home”¹⁹⁵—which jurors may speculate has been suppressed. Yet, the ample research on wrongful convictions shows that the

¹⁹⁰ See *supra* text accompanying notes 95–111.

¹⁹¹ Jacobi, *supra* note 91, at 632.

¹⁹² See *id.* at 620–27.

¹⁹³ See *id.* at 629.

¹⁹⁴ *Id.* at 623.

¹⁹⁵ *Id.* at 622.

clear majority involves inaccurate witness identifications, and the remainder cluster in cases involving inaccurate forensic or informant testimony and false confessions.¹⁹⁶ Thus, the evidence suggests that wrongful convictions are not associated with juror's hypothesizing about missing evidence, but rather with the prosecution's use of highly incriminating evidence that proves inaccurate.

As for the theory that exclusion encourages defense counsel to forgo pursuit of defenses based on factual innocence, it is similarly unsupported by empirical evidence, and similarly accompanied by the musty scent of the academy. Having met more than a few defense attorneys in my years in practice, I can say with confidence that I never met one who would have regarded the notion of pursuing exclusion at the expense of factual innocence as anything but malpractice. Indeed, an attorney so incompetent to adopt such a course of action is unlikely to be capable of mounting a successful defense based on factual innocence irrespective of the supposed distracting effects of exclusion. As we have seen, wrongful convictions are most common in cases involving eyewitness, forensic, or informant testimony and confessions. A defense attorney who would let exclusion distract him from mounting a challenge to such testimony—assuming that the case even involved a search and seizure—has a lack of professional judgment that abolition of the exclusionary rule is not going to supply. To be sure, there are plenty of incompetent or overworked defense attorneys who fail to fully investigate potential defenses, but even the originator of this theory acknowledged that “[t]he dearth of factual investigation by appointed defense counsel is mostly the product of resource constraints. Even if Fourth and Fifth Amendment law were abolished, defense lawyers would find it impossible to do a thorough job of representing most of their clients.”¹⁹⁷

The charge that the exclusionary rule has insufficient deterrent heft is less easily answered. Deterrence would seem more likely to result from a regime that imposed a more direct sanction on violators, such as the threat of criminal prosecution or internal discipline. Indeed, there have been a number of proposals to replace the exclusionary rule with more aggressive systems of discipline.¹⁹⁸ Such a regime offers the additional benefit of obviating the need to exclude probative evidence of guilt.

¹⁹⁶ See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 8–10, 14–144 (2011); Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 841–58 (2010); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542–46 (2005).

¹⁹⁷ Stuntz, *supra* note 186, at 45.

¹⁹⁸ See, e.g., SCHLESINGER, *supra* note 91, at 72–75; Samuel Eistreich & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, 960–64 (2010); David A. Harris, *How Accountability-Based Policing Can Reinforce—or Replace—the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 165–73 (2009); Kaplan, *supra* note 138, at 1050–51.

There is, however, little evidence that criminal prosecution or internal discipline has had much efficacy in the past as a means of deterring police misconduct. Criminal prosecution of police officers for official misconduct has generally been rare and ineffective.¹⁹⁹ It may be that “in most cases involving police officers prosecutors will not prosecute and juries will not convict.”²⁰⁰ The record involving internal discipline, even when civilian oversight or auditors are involved, is also unencouraging.²⁰¹ Moreover, as long as the decision to initiate prosecution or discipline is left in the hands of politically accountable officials, we can only expect a level of enforcement that is consistent with prevailing political sentiment. After all, absent the exclusionary rule or some other regime that creates an incentive to comply with the Fourth Amendment, there is no incentive for public officials to weigh compliance with the constitutional prohibition on unreasonable search and seizure more heavily than competing policy objectives.²⁰² Yet, leaving decisions about whether to devote sufficient resources to securing compliance with the Fourth Amendment to politically accountable officials is irreconcilable with our understanding that constitutional rights, by their very nature, must not be left to the vagaries of ordinary politics. As Justice Jackson famously put it: “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”²⁰³

Perhaps, however, this is not an insurmountable problem with the use of criminal or disciplinary sanctions. One can imagine a system in which the decision to seek or impose sanctions is not left to politically accountable officials. For example, violations of the Fourth Amendment could be sanctioned through contempt proceedings initiated by judges.²⁰⁴ Still, a direct sanction on officers would create a far more powerful incentive to commit perjury than does exclusion. Even more serious is the risk of under- or over-deterrence. Paltry sanctions might fail to generate sufficient deterrence, but criminal or disciplinary sanctions could

¹⁹⁹ See SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 34–35 (2005).

²⁰⁰ Oaks, *supra* note 91, at 673.

²⁰¹ See WALKER, *supra* note 199, at 22–28. Professor Walker has somewhat greater enthusiasm for civilian oversight or auditing of law enforcement agencies, while adding that these are unlikely to be effective without the power to undertake enforcement actions. See *id.* at 164–65.

²⁰² For perhaps the classic argument along these lines, see Amsterdam, *supra* note 123, at 431–33.

²⁰³ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

²⁰⁴ See, e.g., Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241, 249–53 (2010); Wigmore, *supra* note 49, at 484. A hybrid, initiated by politically accountable officials but ultimately administered by the judiciary, involves suits by the United States Attorney General alleging a pattern or practice of constitutional violations, although the evidence to date suggests that this remedy has been of limited efficacy. See, e.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 52–57 (2009); Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 371–75 (2011).

easily over-deter. It would be devilishly difficult to ascertain the correct sanction that would provide sufficient, but not overmuch deterrence.²⁰⁵ And, we should take the threat of over-deterrence with particular seriousness. As we have seen, police officers do not internalize the benefits of aggressive and successful law enforcement, which are instead largely externalized to the public at large. Thus, a credible direct sanction on officers could quickly over-deter. Indeed, one study of police attitudes concluded that any system of direct Fourth Amendment sanctions would create a serious risk of over-deterrence.²⁰⁶

The law has long been wary of remedies that generate over-deterrence; as we have seen, the doctrine of qualified immunity is justified by the risk that public employees would be over-deterred if liable whenever their conduct violated the Constitution.²⁰⁷ Indeed, over-deterrence has serious consequences. As one scholar put it:

[W]e don't want police officers to be extremely cautious in stopping or arresting someone: we want police officers to intervene on the street and investigate as soon as they have "reasonable suspicion" and we want them to make an arrest just as soon as they have probable cause. This is especially true when the crime is serious.²⁰⁸

Elsewhere, I have argued that there is substantial evidence suggesting that New York City's program of aggressive stop-and-frisk of suspects in high-crime areas deserves significant credit for the large reductions in violent crime in that city over the past two decades.²⁰⁹ Like most debates in criminology, this one is dogged by methodological problems, and one cannot be confident of the reasons for this crime drop, but a number of highly respected scholars have concluded that there is

²⁰⁵ One attempt along these lines is a proposal by George Thomas to impose fines with a minimum set at one percent of an officer's annual salary or \$400 for an officer making \$40,000 a year, although Professor Thomas acknowledges that this proposal could generate over-deterrence. See Thomas, *supra* note 182, at 65–69. See also Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939, 955 (1982) (recommending a minimum award set at 1.5% of annual gross income set at the minimum wage). The potential for over-deterrence seems real when the minimum fine is not trivial given an officer's typically modest salary, especially because it could be imposed on multiple occasions, particularly on officers dedicated to aggressive enforcement; moreover, a system that includes a threat of larger fines could have quite a significant deterrent effect, especially when we recall that officers do not internalize the benefits of aggressive search-and-seizure. At the end of the day, however, it seems likely that one can form no reliable judgment about whether such an approach is likely to over- or under-deter; in any event, it would require an extraordinary bit of luck, if this approach somehow were able to produce something like optimal deterrence given the many imponderables in assessing how officers are likely to respond to threats of personal liability.

²⁰⁶ See Heffernan & Lovely, *supra* note 96, at 362–63.

²⁰⁷ See *supra* text accompanying note 76.

²⁰⁸ PIZZI, *supra* note 143, at 33–34.

²⁰⁹ See Rosenthal, *supra* note 71, at 315–30. For the similar view of an eminent criminologist, see FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 131–44 (2012).

a serious case to be made that aggressive stop-and-frisk in “hot spots” of crime saves lives.²¹⁰ If there is even a reasonable chance that this view is sound, we should be quite hesitant to adopt a remedial scheme that could create potent incentives for police to stay off the street and in the doughnut shop. Seen in this light, the limitations on the deterrent efficacy of exclusion begin to seem a virtue, not a vice.

Perhaps the most attractive alternative to exclusion involves the award of damages for Fourth Amendment violations. As we have seen in our consideration of Thesis Six, current law permits such awards, subject to significant defenses such as qualified immunity. Indeed, there is good reason to doubt the deterrent efficacy of the current regime of damages liability in the absence of exclusion. For example, there is empirical evidence that adoption of the exclusionary rule produced increases in crime rates.²¹¹ This suggests that exclusion’s abolition might induce elected officials to ignore the strictures of the Fourth Amendment, instead willingly paying damages in order to reap the political benefits of reduced crime. Indeed, under current law, damages are not available for conviction or imprisonment that is the result of a constitutional violation, at least until the conviction is vacated.²¹² Thus, if the exclusionary rule were abolished, elected officials could reap the political rewards associated with enhanced ability to convict the guilty and reduce crime, without having to pay damages reflecting the additional convictions that such a regime would make possible.

Current law also limits compensatory damages to amounts representing a jury’s assessment of actual injury, rather than the importance of the right at stake.²¹³ It may, accordingly, be doubted whether most violations of the Fourth Amendment will give rise to substantial damages awards. Even more fundamental, it is problematic to leave the potency of Fourth Amendment remedies to the sensibilities of juries. Juries can be expected to provide a remedy only as robust as the value that current community sensibilities place on Fourth Amendment rights. As we have seen, however, the Constitution requires that protection for rights not be left to the whims of majoritarian sentiment.²¹⁴ Finally, as we have also seen, public employees are typically indemnified for their legal

²¹⁰ See, e.g., COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 230–35 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds., 2005); COMM. TO REVIEW RESEARCH ON POLICE POL’Y & PRACTICES, NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 235–40 (Wesley Skogan & Kathleen Frydl eds., 2004).

²¹¹ See Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 159, 172–74 (2003). For a formal economic model that endeavors to demonstrate that a stronger exclusionary rule increases crime, see Hugo M. Mialon & Sue H. Mialon, *The Effects of the Fourth Amendment: An Economic Analysis*, 24 J.L. ECON. & ORG. 22, 25–35 (2008).

²¹² See *Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994).

²¹³ See, e.g., *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299, 306–10 (1986).

²¹⁴ See *supra* text accompanying note 203.

costs.²¹⁵ Indemnification means that damages awards, like exclusion, impose no direct costs on officers, and therefore are of uncertain deterrent efficacy. Indeed, in light of these problems, there has long been near-consensus among both supporters and opponents of exclusion that the existing regime of damages liability is inadequate to secure compliance with the Fourth Amendment.²¹⁶

None of this means that a robust damages remedy cannot have a sufficient deterrent effect; as one critic of exclusion, Christopher Slobogin, has observed, “[t]he single area in which most police departments have both rigorous training and systematic administrative rules is in the use of force, which happens to be one of the few domains where the police are successfully sued for large sums of money.”²¹⁷ Indeed, those who support replacing the exclusionary rule with a regime of damages awards argue that some provision must be made to ensure that damages are substantial.²¹⁸ Yet, merely guaranteeing that damages awards for Fourth Amendment violations will be substantial is an insufficient answer. As we have seen, officers do not internalize most, if not all, of the benefits of search and seizure; accordingly, if officers were personally liable for such awards, over-deterrence is the likely result.²¹⁹ What little empirical evidence on this subject exists suggests that the threat of over-deterrence is real; a survey of Chicago narcotics officers found that 95% believed that under a regime of damages liability “police would be afraid to conduct the searches they should make,”²²⁰ and a survey of Ventura County, California officers found that while 57% supported retention of the exclusionary rule, only 2% thought that the Fourth Amendment should be enforced through monetary fines, 11% supported discipline including potential termination, and 4% supported awards of damages after some form of hearing.²²¹

²¹⁵ See *supra* text accompanying note 73.

²¹⁶ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bur. Narcotics*, 403 U.S. 388, 422–23 (1971) (Burger, C.J., dissenting); 1 LAFAYE, *supra* note 181, at § 1.2(b); WALKER, *supra* note 199, at 32–33; Amsterdam, *supra* note 123, at 429–30; Bar-Gill & Friedman, *supra* note 93, at 1626–34; Calabresi, *supra* note 136, at 114–15; Harris, *supra* note 198, at 156–57; Jacobi, *supra* note 91, at 654–55; Jeffries, *supra* note 169, at 131–33; Maclin, *supra* note 39, at 61–65; Marceau, *supra* note 169, at 717–30; Meltzer, *supra* note 180, at 283–86; Oaks, *supra* note 91, at 718; Perrin et al., *supra* note 92, at 737–40; William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1386–89 (1981); Slobogin, *supra* note 32, at 385–86; William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899–905 (1991).

²¹⁷ Slobogin, *supra* note 32, at 396 (footnote omitted).

²¹⁸ See, e.g., *Bivens*, 403 U.S. at 421–22 & n.5 (Burger, C.J., dissenting); AMAR, *supra* note 19, at 41–42; SCHLESINGER, *supra* note 91, at 77–78; Barnett, *supra* note 91, at 977–80; Barrett, *supra* note 114, at 594–95; Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 23–27, 30–32 (2001); Estreicher & Weick, *supra* note 198, at 962–63; Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 512–13 (1955); Perrin et al., *supra* note 92, at 748–49; Slobogin, *supra* note 32, at 386–87, 397–400.

²¹⁹ See, e.g., Barrett, *supra* note 114, at 593; Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down That Wrong Road Again”*, 74 N.C. L. REV. 1559, 1620 (1996); Jacobi, *supra* note 91, at 654–55; Posner, *supra* note 19, at 65–66; Seidman, *supra* note 182, at 2300–02; Stuntz, *supra* note 137, at 445.

²²⁰ Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 95, at 1053.

²²¹ Perrin et al., *supra* note 92, at 733 tbl.7.

While one might appropriately be cynical about the motivations underlying these responses, they nevertheless provide insight into the likely reaction of officers to a regime of damages liability—especially one with bite. The problem becomes greater as the recoverable damages increase. Professor Slobogin, for example, advocates a regime of liquidated damages “somewhere between one percent and five percent” of an officer’s salary.²²² As we have seen, however, the personal liability, especially when potential damages are substantial, poses serious risks of over-deterrence.²²³ Although Professor Slobogin believes that political pressure and professional norms will prevent over-deterrence,²²⁴ this speculation is unsupported by empirical evidence; it is quite a gamble to believe that a regime that requires officers to internalize many of the costs and few of the benefits of search and seizure will generate enough but not too much deterrence. For this reason, and to ensure an incentive to bring damages claims by making a deep-pocket defendant available, most damages advocates take a different view, arguing that liability should either be directly imposed on public employers rather than individual officers, or that the public employer be required to indemnify its employees for judgments against them.²²⁵

One could wonder why any regime of damages liability—whether against the government or individual officials—is thought superior to exclusion. If damages liability is of less deterrent efficacy than the exclusionary rule, it would risk a breach of the constitutional requirement of adequate deterrence set out in Thesis Three. If, conversely, damages liability is of equal or greater deterrent efficacy, it should not, in the aggregate, make available more probative evidence of guilt than the exclusionary rule; it would present greater risks of over-deterrence, and would not reduce litigation costs or the incidence of police perjury. Indeed, the advocates of damages liability do not claim any advantages for that regime in terms of these asserted defects in the exclusionary rule. Instead, they contend that the exclusionary rule distorts constitutional adjudication because it means that courts cannot vindicate a Fourth Amendment claim without aiding a criminal to escape punishment, and for that reason exclusion reduces the scope of Fourth Amendment

²²² Slobogin, *supra* note 32, at 405–06.

²²³ See *supra* text accompanying notes 205–10.

²²⁴ See Slobogin, *supra* note 32, at 409–11.

²²⁵ See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bur. Narcotics*, 403 U.S. 388, 421–22 & n.5 (Burger, C.J., dissenting); AMAR, *supra* note 19, at 40–41; SCHLESINGER, *supra* note 91, at 77–78; Barnett, *supra* note 91, at 975; Barrett, *supra* note 114, at 594–95; Dripps, *supra* note 218, at 27–28; Foote, *supra* note 218, at 514–15; Perrin et al., *supra* note 92, at 748; Posner, *supra* note 19, at 66–68. Even Professor Slobogin believes that officers should be immune from liability based on negligence and indemnified for their legal costs. See Slobogin, *supra* note 32, at 411–12. Limiting individual liability to reckless or bad-faith conduct, however, could well make individual liability a rarity. If recklessness or bad faith is understood in a manner sufficiently broad to make personal liability a robust threat, in contrast, over-deterrence would be a significant problem.

protections.²²⁶ The claim has at least surface plausibility; as one scholar put it, the exclusionary rule “flaunts before us the costs we must pay for [F]ourth [A]mendment guarantees.”²²⁷

On inspection, however, the claim that the exclusionary rule circumscribes Fourth Amendment protection is problematic. It is, after all, an empirical claim that is supported by little in the way of empirical evidence.²²⁸ There is, for example, no evidence that Fourth Amendment protections are more often recognized in damages actions than under the exclusionary rule.²²⁹ It is doubtless difficult to document the effect of exclusion on judicial psychology, yet, the claim that judges will not rule for unattractive litigants presenting constitutional claims is inconsistent with what we know about other areas of constitutional law. After all, constitutional claims that effectively immunize bad people from sanctions are hardly unique to Fourth Amendment law.

Consider the First Amendment’s prohibition on laws “abridging the freedom of speech.”²³⁰ Unattractive litigants seeking immunity for unattractive conduct seem to fare quite well in First Amendment litigation. For example, the Court has ruled in favor of individuals who had unlawfully burned crosses on the property of others to intimidate racial minorities,²³¹ those who picketed military funerals to express the belief that God hates the United States for tolerating homosexuality,²³² a public employee who expressed approval of an attempt to assassinate the President,²³³ the publisher of a crude parody falsely stating that a religious figure was both a drunk and incestuous,²³⁴ an individual sentenced to death after evidence had been introduced of his membership in a white racist prison gang,²³⁵ an individual convicted for his role in an armed gathering of Ku Klux Klan members involving the liberal use of racial slurs and anti-Semitic sentiment,²³⁶ individuals

²²⁶ See, e.g., AMAR, *supra* note 19, at 30; Barnett, *supra* note 91, at 960–66; Caldwell & Chase, *supra* note 19, at 53–54; Dripps, *supra* note 218, at 22; Jacobi, *supra* note 91, at 656–60; Pizzi, *supra* note 93, at 715–16; Slobogin, *supra* note 32, at 401–05.

²²⁷ Kaplan, *supra* note 138, at 1037.

²²⁸ The best evidence on point is a survey of narcotics officers, lawyers, and judges in Chicago in which the clear majority of respondents believed that judges fail to suppress evidence even when the law requires it, Orfield, *Deterrence, Perjury and the Heater Factor*, *supra* note 95, at 119, but the clear majority also believed that exclusion has a deterrent effect and is a more effective restraint than a damages remedy, *id.* at 123–30.

²²⁹ See Leong, *supra* note 170, at 431. To be sure, current damages litigation may be infected by the knowledge that rulings recognizing expansive Fourth Amendment protections can trigger exclusion in criminal cases, and inhibited as well by the other limitations on damages liability canvassed in our consideration of Thesis Six.

²³⁰ U.S. CONST. amend. I.

²³¹ See *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

²³² See *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

²³³ See *Rankin v. McPherson*, 483 U.S. 378 (1987).

²³⁴ See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

²³⁵ See *Dawson v. Delaware*, 503 U.S. 159 (1992).

²³⁶ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

prosecuted for burning the flag of the United States,²³⁷ indulging in crude anti-Semitic rhetoric that had threatened to provoke violence,²³⁸ and falsely claiming to have received high military honors.²³⁹ The Court has even permitted litigants whose own conduct is constitutionally unprotected to challenge laws written with sufficient breadth to reach protected speech because of the chilling effect that such laws may have on the rights of third parties.²⁴⁰ The Court surely did not enjoy vindicating any of these claims, but it has understood that principled protection for free speech requires protecting even the most unattractive of litigants.

There is little reason to believe that judges are less willing to vindicate Fourth Amendment claims when faced with an unattractive litigant. For one thing, as we have seen, it is wrong to claim that exclusion offers nothing to the innocent; when Fourth Amendment violations are deterred by a reasonably robust exclusionary rule, the innocent are less likely to be subjected to unreasonable search and seizure. Indeed, the rationale for permitting litigants to challenge overbroad laws even when their own speech is unprotected bears a striking resemblance to the deterrent justification for exclusion. Moreover, if a damages remedy had comparable deterrent efficacy to the exclusionary rule, it would inhibit efforts to obtain probative evidence of wrongdoing no less than exclusion. Thus, if the judiciary is prepared to truncate Fourth Amendment protections in order to enhance the effectiveness of law enforcement, it would surely realize that robust Fourth Amendment protections will inhibit law enforcement whether enforced by the exclusionary rule or a damages regime. To be sure, the costs of exclusion may be more transparent, but, as we have seen, this feature is an important virtue of exclusion because it sensitizes the judiciary to the costs of expansive Fourth Amendment protections.²⁴¹ Accordingly, if a damages remedy made the extent to which a broad conception of Fourth Amendment rights inhibited effective law enforcement less apparent, the judiciary might be tempted to indulge an overly generous conception of what constitutes an unreasonable search and seizure without appropriately considering its costs, even though some effort to weigh privacy against law enforcement interests seems required by the Fourth Amendment's prohibition on "unreasonable" search and seizure.²⁴² If, on the other hand, damages are a less effective deterrent than exclusion, then a regime of

²³⁷ See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

²³⁸ See *Kunz v. New York*, 340 U.S. 290 (1951); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

²³⁹ See *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

²⁴⁰ See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 255 (2002); *City of Houston v. Hill*, 482 U.S. 451, 459–69 (1987); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574–76 (1987).

²⁴¹ See *supra* text accompanying notes 136–39.

²⁴² See, e.g., *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.’” (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967) (all but first brackets in original))).

damages liability is in considerable tension with Thesis Three's insistence that the Fourth Amendment requires a remedy with deterrent heft.

Moreover, it is far from clear that a regime of damages liability would have deterrent efficacy. As we have seen in our consideration of imposing direct sanctions or personal liability on officers, there are enormous difficulties in creating a regime of personal liability that would provide sufficient, but not overmuch deterrence. Yet, the advocates of governmental liability as an alternative to personal liability are strikingly vague about how to set damages at a sufficient level to achieve optimal deterrence. Randy Barnett offers a typical formulation: "[T]he damages must not be so low as to trivialize the right that was violated, nor so high as to overcompensate a victim of a rights violation (and also deter its imposition)."²⁴³ This calculus, of course, is less than crystal clear. As we have seen, among the exclusionary rule's virtues is that it reliably creates a political incentive to comply with the Fourth Amendment but is unlikely to over-deter. It is highly uncertain that damages liability can be calculated in a fashion that hits as sweet a spot.²⁴⁴ Moreover, the mechanism by which deterrence would operate is scarcely more direct than with exclusion. If damages are not paid by the offending officer to avoid the threat of over-deterrence, then they must be paid by whatever governmental entity controls the appropriation of public funds. This reintroduces the asserted defect of the exclusionary rule, which operates against the prosecutor rather than the investigator, since "one agency of government (the police) perpetrates the harm, another agency defends it in court (the law department), and a third agency writes the check (the treasurer)."²⁴⁵

In fact, the uncertain deterrent character of damages against the government has an even more fundamental cause than the division of responsibilities within the government. Professor Levinson has argued that because government is not a revenue or profit-maximizer, but instead responds to political costs and benefits, we cannot be confident that any regime of governmental damages liability will produce anything like an optimal level of deterrence because government lacks the incentive to minimize costs and maximize profits that exists in the private sector.²⁴⁶ The likelihood that the government will undertake efforts to reduce its exposure to liability is particularly remote, Levinson argued, when it comes to law enforcement efforts that could pay handsome political dividends.²⁴⁷ Accordingly, Levinson

²⁴³ Barnett, *supra* note 91, at 980.

²⁴⁴ Perhaps the most interesting proposal along these lines is that of Professor Dripps, who argues that courts should set damage awards high enough so that government is likely to prefer exclusion of the evidence, and then offer the prosecution the option of paying the award and using the evidence. See Dripps, *supra* note 218, at 30–32. In response, Professor Thomas observed that not only will it be difficult for judges to monetize the value of the evidence, but this process reintroduces whatever judicial temptation exists to structure the law in order to minimize exclusion. See Thomas, *supra* note 182, at 52–54.

²⁴⁵ WALKER, *supra* note 199, at 33.

²⁴⁶ See Levinson, *supra* note 125, at 348–57.

²⁴⁷ See *id.* at 370.

concluded that “any predictions about the incentive effects of . . . cost remedies . . . are highly suspect.”²⁴⁸

I am rather a skeptic when it comes to Professor Levinson’s assessment of damages liability. Although I share his view that government responds to political and not economic incentives, elsewhere I have argued at some length that there is ample reason to believe that government is sensitive to damages liability because it diverts scarce governmental resources from what policymakers are likely to regard as more politically advantageous uses.²⁴⁹ Still, the political costs of government damages liability, like the political benefits of liability-creating search and seizure, are not readily monetizable. For that reason, one cannot be confident of the magnitude of the deterrent effect of damages liability. More than a little skepticism is warranted as to the ability of judges or juries to set damages at an amount that will create an appropriate quantum of deterrence.

Professor Slobogin has argued that we should not worry overmuch about the risk of over-deterrence even in a more robust regime of damages liability given the political incentives to engage in aggressive law enforcement.²⁵⁰ I have similarly argued that damages liability is not likely to produce over-deterrence when it comes to governmental activities that generate political benefits, such as aggressive law enforcement.²⁵¹ If this is correct, however, it highlights yet another anomaly about using damages liability to secure compliance with the Fourth Amendment. As Walter Dellinger once argued, it is surely troubling to permit the government to buy its way out of compliance with the Fourth Amendment by effectively identifying a price at which the government may engage in unreasonable search and seizure.²⁵² Professor Slobogin’s acknowledgement of what are often regarded as the political benefits of aggressive search-and-seizure adds an important corollary—the deterrent efficacy of any regime of damages liability will depend at any given time on how much political support there is for an aggressive regime of policing likely to produce constitutional violations.

²⁴⁸ *Id.* at 386–87. One of the few efforts to gather pertinent empirical evidence regarding governmental sensitivity to police misconduct litigation found that while most police departments made some effort to track litigation, they do not systematically use information derived from litigation to make personnel or policy decisions. See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1041–75 (2010). It is hard to know what to make of this finding; the fact that most departments do not use particular litigation outcomes to make personnel or policy decisions does not mean that elected officials ultimately responsible for budgeting and policy are indifferent to liability. Moreover, this finding may be driven by the limited liability and damages available under current law, which the advocates of a more muscular regime of damages liability would alter. Indeed, as we have seen, there is evidence that police departments pay considerable attention to use-of-force policies, where exposure to liability is likely to be greatest. See *supra* text accompanying note 217.

²⁴⁹ See Rosenthal, *supra* note 73, at 831–41.

²⁵⁰ See Slobogin, *supra* note 32, at 407–09, 412–14.

²⁵¹ See Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 152–53 (2010).

²⁵² See Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1561–63 (1972).

Because government responds to political and not economic incentives, as political support for tough-on-crime policy builds, damages awards must proportionately increase if deterrent efficacy is to be maintained. Thus, when political support for aggressive search-and-seizure is high, judges or juries will have to set the “price” for violating the Fourth Amendment at a correspondingly high level to maintain deterrence. We should be more than a little skeptical that judges or juries would have the political acumen to monetize political incentives that would be necessary to maintain deterrence in a regime in which damages are paid by the government, either directly or through indemnification. Conversely, if damages awards are large enough to offset the political pressure that sometimes produces overly aggressive search-and-seizure, or are paid by the individual officers, then, as we have seen, there is a serious risk of over-deterrence.

The likely willingness of the government to engage in vigorous search and seizure despite exposure to substantial liability, moreover, not only raises questions about the deterrent efficacy of damages liability, but also exposes one final anomaly of the damages regime. To maintain adequate deterrence, a regime of damages liability will most likely require that the government (or individual officers) be exposed to substantial damages liability, at least when there is significant political support for the kind of aggressive law enforcement techniques likely to run afoul of the Fourth Amendment. At the same time, if damages do not lead to over-deterrence, there will still be Fourth Amendment violations when officers err on the side of search and seizure. Thus, Fourth Amendment violations are no more likely to disappear than any other form of misconduct that invites damages liability. The funds to pay damages, however, must come from somewhere.

Even in a regime of personal liability imposed on individual officers, we can expect that officers will demand indemnification or additional compensation to offset the risk of personal liability; if they do not receive such compensation, we can expect that the quality of officers willing to serve for effectively reduced compensation will decline, over-deter, or (probably) both. Indeed, the desire to avoid these by-products of liability-risk likely explains the prevalence of indemnification in public employment, which, as we have seen, is ubiquitous.²⁵³ Thus, one way or another, the government must pay the cost of a regime of damages liability (as well as the costs of defending damages litigation). Moreover, if we reasonably assume that at any given time, the voters’ willingness to provide revenue to the government through some combination of taxes and debt is essentially fixed, then damages and other legal costs must be paid by reallocating resources. Allocating public resources is, of course, an intensely political process. Governmental functions with the widest and most intense political support, such as policing, fire protection, and public education, are the least likely to be denied resources. The political consequences of denying police departments the resources that police executives regard as necessary to keep the public safe, in particular, are likely to be deemed unacceptable; damages judgments are unlikely to come out of

²⁵³ See *supra* text accompanying note 73.

the hide of policing. Thus, as Professor Thomas has observed, when budgeting for Fourth Amendment damages liability, “the incentives there are mostly perverse.”²⁵⁴ As I have argued elsewhere, the money to pay damages will likely come from programs serving constituencies with the most limited political influence—most likely the poor.²⁵⁵ Even if the funds allocated for the payment of damages come from elsewhere, there is sure to be some cost to social welfare if these funds are reallocated from an endeavor that produces widespread and important social benefits to the payment of Fourth Amendment damages and associated legal costs.²⁵⁶

Thus, given the political incentive to engage in vigorous law enforcement, a robust damages remedy is unlikely to come anywhere close to eliminating Fourth Amendment violations, and the bulk of the costs of such a regime will not be imposed on individual wrongdoers, or even law enforcement agencies, but instead will be externalized to the public at large—especially to those who are particularly dependent on the ability of the government to finance important services.

In contrast, the mechanism by which the exclusionary rule produces deterrence seems quite straightforward. Exclusion is unlikely to produce over-deterrence, but reliably generates a straightforward political incentive to encourage officers to comply with the Fourth Amendment that has little if any effect on other governmental functions. As we saw in our consideration of Thesis Four, the exclusionary rule reliably generates deterrence by creating a political incentive to which the government is likely to respond. The government, moreover, cannot buy its way out of compliance with the Fourth Amendment when enforced by exclusion. Damages liability, however, creates a political incentive to comply with the Fourth Amendment only indirectly, and even then, only if sufficient resources must be diverted to the payment of judgments to create a sufficiently potent political incentive to comply with the Fourth Amendment to outweigh countervailing political incentives. The resources that must be devoted to the payment of judgments, in turn, will be unavailable elsewhere, potentially causing serious hardships for innocent third parties. The mechanism by which damages liability generates deterrence—or at least a reformed regime of damages liability with adequate heft to produce a reliable deterrent—is largely untested, and full of the potential for unintended harms. The mechanism by which exclusion generates deterrence, in contrast, is familiar, and largely free of unintended consequences.

Seen in this light, the exclusionary rule begins to look, rather, much like the devil we know. Thesis Seven suggests that those who do not like to gamble will want to stick with the exclusionary rule. The problems with exclusion are well known, and many of the limitations on exclusion are likely appropriate; but the exclusionary rule ultimately may be justifiable in terms of something like those

²⁵⁴ Thomas, *supra* note 182, at 55.

²⁵⁵ See Rosenthal, *supra* note 251, at 135.

²⁵⁶ For a more extensive argument along these lines, see Rosenthal, *supra* note 73, at 845–47.

Churchill used to defend democracy: “the worst form of Government except for all other[s]. . . .”²⁵⁷

²⁵⁷ CHURCHILL BY HIMSELF 573 (Richard M. Langworth ed., 2008).

