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Beyond the Judicial Fourth Amendment: The Prosecutor's Role

Russell M. Gold[*]

Scholarly discussion of the Fourth Amendment focuses narrowly on judicial enforcement and the exclusionary rule. This Article takes a different approach: recognizing that prosecutors have a co-equal responsibility to enforce the Fourth Amendment. More specifically, prosecutors have a constitutional and ethical duty not to use evidence that they conclude was unconstitutionally obtained even if that evidence is admissible—the duty of administrative suppression. Instead of analyzing whether evidence would likely be deemed admissible *by a court, prosecutors should instead analyze whether the evidence in their cases was gathered* unconstitutionally *and act accordingly.*

Scholars have ignored that as the Supreme Court has constricted the scope of the exclusionary rule over the past 40 years it has narrowed only the scope of the judicial remedy and not the Fourth Amendment right. Drawing on the theory of constitutional underenforcement most prominently developed by Larry Sager, this Article argues that when the Court constricted the judicial remedy it left prosecutors and the rest of the executive branch solely responsible for enforcing the full breadth of the constitutional norm. The full breadth of the Fourth Amendment norm continues to prohibit the executive branch from using unconstitutionally-obtained evidence even though judicial suppression is not always appropriate. The prosecutor's duty of administrative suppression also prevents Fourth Amendment rights from being marginalized in an

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administrative system of criminal justice in which most cases end in guilty pleas before suppression motions are filed.

Prosecutors' ethical responsibilities provide an additional basis for prosecutors' duty of administrative suppression. Refusing to countenance constitutional violations by the police will protect citizens' constitutional rights and promote crime control. That administrative suppression would promote crime control relies on the procedural justice notion that citizens' perception of their government officials' legitimacy plays the most significant role in their willingness to comply with the law and cooperate with law enforcement. For prosecutors to refuse to use the fruits of a constitutional violation and instead condemn the violation through administrative suppression will promote government legitimacy. Ultimately, prosecutors—not just courts and police—are constitutional actors with Fourth Amendment obligations.

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INTRODUCTION

Academic scholarship discusses the Fourth Amendment within the narrow confines of judicial enforcement and the exclusionary rule.[1] Scholars have not explored prosecutors' constitutional and ethical duties to comply with the Fourth Amendment.[2] This Article ventures into that void.

Outside the Fourth Amendment context, scholars have persuasively argued that some constitutional rights are underenforced by the judiciary, meaning that the judiciary enforces less than the full breadth of the constitutional norm because of the judiciary's institutional role or capacity.[3] When a right is institutionally underenforced, the political branches must enforce the full breadth of the constitutional norm and not merely its judicially-enforced shadow.[4]

Beginning in the 1970s, the Supreme Court severed questions of Fourth Amendment constitutionality from judicial admissibility. Most prominently, the Court held that unconstitutionally-obtained evidence need not be suppressed when it is obtained by police relying in good faith on a warrant issued by a detached and neutral magistrate that is not so facially deficient as to preclude a reasonable officer from relying

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[1] *See, e.g.*, TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 337-44 (2013); 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, 59 (2010); Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 3 (2012); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1189-90 (2012). *But see* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 193-98 (2013) (addressing Fourth Amendment responsibilities of Immigration and Customs Enforcement prosecutors). "Exclusionary rule" in this Article refers only to the Fourth Amendment judicial exclusionary rule.

[2] One article discusses an "executive exclusionary rule," Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 138 (2008) [hereinafter *Black Box*], but its analysis is descriptive rather than normative and focuses on admissibility rather than constitutionality. *See* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.1(b) n.34.1 (3d ed. Supp. 2012) (describing Miller & Wright's "executive exclusionary rule" with reference to likelihood of judicial suppression).

[3] Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220-21 (1978).

[4] *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 91-92, 116 (2004).

on it.[5] Since then, the Court has expanded the good-faith exception outside the warrant context to all merely negligent violations.[6]

It has gone unnoticed that when the Supreme Court severed constitutionality from admissibility by holding that *judicial* suppression was not a necessary consequence of a Fourth Amendment violation,[7] it left the Fourth Amendment right institutionally underenforced. In so doing, the Court repositioned itself institutionally as a deferential, secondary check on Fourth Amendment enforcement and refused to afford a remedy for some executive branch violations. But because the Court severed constitutionality from admissibility (right from remedy), its admissibility holdings no longer addressed the broader question of constitutionality. Therefore, as the Court has continued to pare back the exclusionary rule,[8] it has not altered the scope of the Fourth Amendment but only the scope of its judicial enforcement.[9]

For that reason, the Fourth Amendment norm remains largely as the Court interpreted it in the first half of the twentieth century. The bar against government use of illegally-obtained evidence was[10]—and remains—a core component of the Fourth Amendment right necessary to prevent the Fourth Amendment from becoming "'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[11] Although *courts* do not exclude all unconstitutionally-obtained evidence, *prosecutors* as executive officers should refrain from introducing evidence that they conclude was

[5] United States v. Leon, 468 U.S. 897, 922 (1984).

[6] *See* Herring v. United States, 555 U.S. 135, 145 (2009).

[7] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 354-55 (1974) (holding that courts need not suppress evidence from use before a grand jury even though it was obtained in violation of the Fourth Amendment).

[8] *See, e.g.*, Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 341 (2013) [hereinafter *Is It on Its Way Out?*] (explaining that the Court has "nibbled away at the exclusionary rule").

[9] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469-70, 2504-32 (1996) (arguing that although the Court has largely accepted the Warren Court's substantive criminal procedural holdings, it has altered the consequences of unconstitutional conduct by creating "inclusionary rules"); *infra* Part II.

[10] *See, e.g.*, Weeks v. United States, 232 U.S. 383, 392-93 (1914) (holding that Fourth Amendment limits courts in their exercise of authority and that Fourth Amendment "might as well be stricken from the Constitution" if it allowed the government to introduce into evidence the fruits of an unconstitutional search).

[11] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

unconstitutionally obtained without regard to judicial admissibility—a duty of administrative suppression.[12]

Moreover, this Article contends that prosecutors' existing ethical responsibilities provide good reason to administratively suppress evidence.[13] Unlike with ordinary rules of evidence, introducing search and seizure evidence generates blowback from prosecutors' actions in the courtroom to police actions on the street. Because much of the evidence that police obtain in violation of the Fourth Amendment is admissible due to exceptions to the exclusionary rule, prosecutors who use admissibility as their benchmark signal to police that constitutional violations are typically costless. That signal contravenes prosecutors' responsibility to encourage police to comply with the law and undermines the constitutional rights of prosecutors' constituents.[14] Administrative suppression, in contrast, would send the opposite signal: Fourth Amendment violations have consequences.

Signaling to the public that the government takes seriously police violations of their rights promotes crime control based on Steve Schulhofer, Tom Tyler, and Aziz Huq's procedural justice model of policing.[15] The procedural justice model of policing relies on empirical evidence demonstrating that citizens comply with the law and cooperate with police primarily because of desire to obey legitimate authority rather than fear of consequences.[16] Citizens' perception of legitimacy is based primarily on whether they believe that they are treated fairly and with respect.[17] When prosecutors sanction constitutional violations and signal to the public that Fourth Amendment violations will neither be tolerated nor exploited in court,

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[12] *See infra* Part II.

[13] *See infra* Part III.

[14] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.3(b) (2008).

[15] *See generally* Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011).

[16] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161 (2006) (concluding based on empirical study "that legitimacy plays an important role in promoting compliance" with the law); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 529 (2003) (finding that perceptions of police legitimacy had stronger correlation to citizen cooperation with police than did citizens' evaluation of risk).

[17] *See, e.g.*, TYLER, *supra* note 16, at 162 (explaining that views about legitimacy of authority "are strongly connected to judgments of the fairness of the procedures through which authorities make decisions"); Sunshine & Tyler, *supra* note 16, at 526 (reporting results of study concluding that procedural justice had a much stronger impact on police legitimacy than did performance evaluations or distributive justice judgments and was not based at all on citizens' estimates of risk of punishment).

they demonstrate respect for the rights of the citizenry and commitment to the rule of law. That action promotes the perception of fairness in criminal law enforcement. Indeed, a sanction from prosecutors would promote the perception of fairness better than the judicial exclusionary rule. For these reasons, administrative suppression is likely to promote the perceived legitimacy of criminal law enforcement, which will in turn advance crime control efforts.

Moreover, to prevent the consequence of lost evidence, police would be incentivized to consult prosecutors for their Fourth Amendment expertise, which would allow prosecutors to serve their intended role as an intra-executive-branch check.[18] Police would more frequently ask prosecutors to approve warrant applications—as ethical standards already recommend[19]—and prosecutors would have reason to make that review as stringent as possible. For these reasons, administrative suppression would help eviscerate the Fourth Amendment right-remedy distinction within the executive branch that has no place outside the judiciary.

Prosecutors serve as ministers of justice, which requires them to fight cleanly.[20] Although prosecutors should seek convictions, they cannot do so at all costs.[21] Indeed, prosecutors sometimes win when they "lose" a case.[22] They must ensure that the rights of criminal defendants are respected, both inside and outside the courtroom. In the courtroom, existing ethical standards recognize that prosecutors should not seek to introduce relevant evidence in pursuit of a conviction if they lack a "reasonable basis" for its admissibility.[23] Introducing tangible evidence only when prosecutors have a reasonable basis for admissibility respects the rules of evidence and their duty not to strike foul blows.[24]

Prosecutors mistakenly treat Fourth Amendment admissibility similarly. As part of their case-screening process, they analyze

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[18] *See* United States v. Guerrerio, 675 F. Supp. 1430, 1435 (S.D.N.Y. 1987); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1 cmt. (1993); *infra* text accompanying notes 287-292.

[19] *See* NAT'L PROSECUTION STANDARDS § 3-2.1 & cmt. (Nat'l Dist. Att'ys Ass'n 2009). There will of course be exigencies in which police do not have time to seek a prosecutor's advice.

[20] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[21] *See id.*

[22] Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done.").

[23] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6.

[24] *See id.* § 3-5.6(d); *see also Berger*, 295 U.S. at 88.

evidence for admissibility under the judicial exclusionary rule.[25] But the Fourth Amendment is not an ordinary rule of evidence,[26] and prosecutors' responsibility therefor must account for the scope of the constitutional right beyond merely its judicially-enforced component. Prosecutors must account for the fact that quite unlike other forms of questionably-admissible evidence, introducing evidence obtained in violation of the Fourth Amendment allows police to play fast and loose with constitutional requirements without consequence, which in turn undermines crime control efforts. Prosecutors should not screen and charge cases based on whether evidence is likely admissible but whether it was obtained constitutionally. For instance, a prosecutor who concludes that evidence was obtained unconstitutionally but that it is likely admissible nonetheless because of the good-faith exception to the exclusionary rule should refrain from using that evidence.[27]

Administrative suppression can be viewed as incorporating Fourth Amendment analysis into a form of "hard screening"[28] within our "administrative system of criminal justice."[29] As now-Judge Gerard Lynch explained, our criminal justice system is largely administrative because prosecutors make the important decisions subject to limited judicial review.[30] But some important decisions, including decisions regarding constitutionality of searches and seizures, remain largely

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[25] *See* Miller & Wright, *Black Box*, *supra* note 2, at 135 & n.20, 138 (explaining that prosecutors declined some cases for "evidentiary flaws" including "unlawful search no warrant" or "no probable cause for arrest" and tying these bases to anticipation of judicial suppression).

[26] Malloy v. Hogan, 378 U.S. 1, 9 (1964).

[27] There is reason to think that immigration prosecutors in North Carolina and perhaps criminal prosecutors in Manhattan have considered constitutionality rather than admissibility. *See infra* notes 297-299 and accompanying text.

[28] *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32-33 (2002) [hereinafter *Screening/Bargaining Tradeoff*]. Wright and Miller do not embrace administrative suppression as part of the prosecutor's screening decision, but their call for greater emphasis on the screening decision nonetheless squares well with this proposal.

[29] Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

[30] *Id.* at 2117, 2121, 2129; *accord* Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1409 (2003) (embracing Lynch's description); *see also, e.g.*, Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 273-74 (2013); Miller & Wright, *Black Box*, *supra* note 2, at 137 (arguing that "quality control functions" such as assessing evidence now occur within prosecutor's office); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1714-15 (2000) [hereinafter *Neutral Prosecutor*] (arguing that prosecutors have gradually displaced courts as "arbiter[s] of a just resolution").

exogenous to the current administrative model, which undermines their practical import.[31] Incorporating Fourth Amendment analysis into the administrative model of criminal justice prevents Fourth Amendment rights from being marginalized even though most cases end in guilty pleas, many of which precede judicial review of a search or seizure.[32]

Ultimately, this Article contends that prosecutors have a constitutional and ethical responsibility to independently analyze whether each piece of evidence in their cases was constitutionally obtained and refrain from using evidence that they conclude was obtained in violation of the Fourth Amendment regardless of judicial admissibility.[33]

This Article proceeds in three parts. Part I explains the concept of constitutional underenforcement and its implications for the constitutional duties of the executive branch vis-à-vis the judiciary. Part II examines the doctrinal development of the judicial exclusionary rule. Part II.A analyzes this exclusionary rule case law to conclude that the right-remedy divide limits only Fourth Amendment *judicial* enforcement. Part II.B relies on that case law to conclude that the full breadth of the Fourth Amendment norm imposes on prosecutors a constitutional duty of administrative suppression. Part III then analyzes why prosecutors' ethical responsibilities also provide a basis for a duty of administrative suppression.

I. UNDERENFORCED CONSTITUTIONAL NORMS

Scholarly work on underenforced constitutional norms most prominently developed by Larry Sager provides a helpful lens to see why the Fourth Amendment requires prosecutors to refrain from using unconstitutionally-obtained evidence even when it does not obligate the judiciary to suppress that evidence. Sager distinguishes between "analytical" and "institutional" judicial limitations on a constitutional norm.[34] Analytical limitations are those based on an understanding of the underlying constitutional concept.[35] Institutional

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[31] Other criminal procedure rights are also exogenous to the administrative model. Perhaps they too should be incorporated into the prosecutor's analysis in embrace of the administrative model, but that query is beyond the scope of this Article.

[32] *See infra* text accompanying notes 215-227.

[33] Exhaustively analyzing enforceability of this duty is beyond the scope of this Article.

[34] Sager, *supra* note 3, at 1217-18.

[35] *Id.*

limitations, however, are those "based upon questions of propriety or capacity" of the judiciary.[36] Because institutional judicial limitations do not limit the scope of the constitutional norm itself, they result in underenforcement.

Sager points to equal protection and due process challenges to economic regulations as examples of institutional underenforcement.[37] The Court reviews such claims under the highly-deferential rational basis standard.[38] But it does not do so, Sager contends, because the Equal Protection and Due Process Clauses prohibit economic regulations only when they are irrational.[39] Rather, the Court defers to prevent unelected judges from displacing elected officials' judgments or because legislators are more competent than judges to assess the means necessary to achieve particular ends.[40]

There are many other familiar contexts in which courts refuse to afford a remedy for constitutional violations by a state or co-equal branch of the federal government because of the Court's desire to preserve its institutional role. Sovereign immunity often prevents courts from redressing constitutional violations in civil suits against governments.[41] Suits against executive officers are dismissed because of qualified immunity even when courts find that the plaintiff's rights were violated unless the right was clearly established.[42] Qualified immunity is a judicial creation meant to provide breathing room for executive officials to do their jobs without intense scrutiny from courts.[43] Similarly, the political question doctrine prompts courts to turn a blind eye to possible constitutional violations by the political

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[36] *Id.*

[37] *Id.* at 1215-16 (equal protection); *id.* at 1220 & n.24 (due process).

[38] SAGER, *supra* note 4, at 115-16; Sager, *supra* note 3, at 1215-16, 1220 & n.24.

[39] Sager, *supra* note 3, at 1216-17.

[40] *Id.*

[41] *See* THE FEDERALIST NO. 81 (Alexander Hamilton) (stating that it is inherent in a constitutional scheme that sovereigns are not amenable to judicial suit); *see also* Alden v. Maine, 527 U.S. 706, 713 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.").

[42] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Between 2001 and 2009, courts were required by the "order of battle" rule to decide whether a plaintiff's constitutional rights had been violated before deciding whether the law on point was clearly established. *See* Saucier v. Katz, 533 U.S. 194, 200-01 (2001), *overruled by* Pearson v. Callahan, 555 U.S. 223, 236 (2009). Under that now-optional framework, courts frequently held that rights were violated but no remedy should follow.

[43] *See Harlow*, 457 U.S. at 818-19.

branches or the states to protect separation of powers or federalism.[44] Lastly, although prosecutors who make charging and plea bargaining decisions arbitrarily or capriciously violate due process, due process challenges alleging selective prosecution contest matters so squarely within the purview of the executive branch that they are nonjusticiable unless based on membership in a suspect or quasi-suspect class.[45]

Recognizing institutional underenforcement is critical because institutional underenforcement means that the reach of executive responsibility and judicial enforcement of the same constitutional provision are not coextensive. Rather, the limits on *judicial* enforceability of the constitutional norm do not apply to the political branches.[46] The executive and legislative branches remain charged with enforcing the full breadth of an underenforced constitutional norm and not solely its judicially-enforceable component.[47] As David Strauss explains:

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[44] *See* Baker v. Carr, 369 U.S. 186, 209 (1962) (explaining that Republican Guaranty Clause provides constitutional right even though it is non-justiciable); SAGER, *supra* note 4, at 90-91 (describing political question doctrine as jurisprudential recognition of institutional underenforcement); Sager, *supra* note 3, at 1224-25 (same).

[45] *See* United States v. Redondo-Lemos, 955 F.2d 1296, 1298-301 (9th Cir. 1992), *overruled en banc on other grounds by* United States v. Armstrong, 48 F.3d 1508, 1510 (9th Cir. 1995); *see also* Wayte v. United States, 470 U.S. 598, 607-08 (1985) (noting that the "decision to prosecute is particularly ill-suited to judicial review" and justiciable only when alleging selective prosecution "'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification'" (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978))).

[46] SAGER, *supra* note 4, at 88, 93-94; Sager, *supra* note 3, at 1212-13; *see* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1224 (2006) ("[T]he fact that the courts have essentially no role in implementing certain provisions of the Constitution does not license the executive branch to ignore those provisions. Instead, executive officials have a duty to abide by their own best understanding of the provisions.").

[47] *See* SAGER, *supra* note 4, at 116 (where Court's decisions not intended to exhaust full meaning of constitutional norm, it is non-sequitur to limit political branches to "deference-drenched" doctrine); Morrison, *supra* note 46, at 1225 ("[W]hen institutional or other factors inhibit robust judicial enforcement of a particular constitutional provision, it falls to the executive (and legislative) branch to enforce the provision more fully."). One commentator explained that a footnote in *Heller v. District of Columbia* suggests a marked departure from the idea that underenforcement exists. H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 259-60 (2011). But Powell seems right to question whether all five members of the *Heller* majority genuinely accepted the full ramifications of what would constitute a jurisprudential sea change via tangential footnote. *Id.* at 260.

> Sometimes the executive branch should interpret the Constitution to impose stricter limits on its power than the Supreme Court's decisions themselves suggest. That is because in certain categories of cases, constitutional law as developed by the Supreme Court reflects great deference to judgments made by the executive branch. This is an aspect of the problem of underenforced constitutional norms.[48]

If the executive branch were to incorporate the Court's deference into its own obligations, that would constitute "circular buck-passing."[49] Underenforcement therefore helps explain why the executive branch's Fourth Amendment duties exceed the scope of judicial suppression.

II. RIGHT-REMEDY DIVIDE AND EXECUTIVE FOURTH AMENDMENT DUTIES

The previous section explained the concept of underenforced constitutional norms and its implications for the relative scope of executive and judicial constitutional duties. This section proceeds in two parts. Part A analyzes the nature of Fourth Amendment underenforcement[50]: the Court has expressly divided rights and remedies such that the judiciary does not provide a remedy in some instances even when it concludes that the executive branch violated the Fourth Amendment.[51] Part B then explains why the full breadth of

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[48] David S. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 128-29 (1993).

[49] *Id.* at 129.

[50] Although Sager noted in 1978 that Fourth Amendment rights were not conducive to underenforcement analysis, Sager, *supra* note 3, at 1244 n.104, doctrinal changes since then undermine that conclusion. Perhaps tellingly, Sager does not repeat this claim in his 2004 book addressing underenforcement. *See generally* SAGER, *supra* note 4. While *United States v. Calandra* had already been decided in 1978, *Calandra* quite reasonably could have been viewed then as a narrow case about the grand jury, *see* 414 U.S. 338, 349-52 (1974), because the Court had not yet limited the exclusionary rule in criminal trials, *see* United States v. Leon, 468 U.S. 897, 925-26 (1984) (limiting exclusionary rule in criminal trial).

[51] Others have recognized a degree of Fourth Amendment underenforcement but for reasons different than those advanced here. Bill Stuntz explained that because Fourth Amendment suppression motions are brought by those caught engaged in criminal activity, judges' biases naturally distort the Fourth Amendment inquiry. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 883-84, 912-13 (1991); *see also* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 656-60 (2011) (describing underenforcement of Fourth Amendment because of exclusionary rule's lack of popularity and its rigidity). Louis Bilionis identifies Supreme Court Justices' ideology as a source for underenforcing non-accuracy-promoting criminal procedure rights. Louis D. Bilionis,

the Fourth Amendment norm requires administrative suppression. Both analyses rely on the Supreme Court's exclusionary rule jurisprudence.

Weeks v. United States[52] established the exclusionary rule not as a mere prophylactic or a mere remedy designed to deter police misconduct but as an integral component of the Fourth Amendment right.[53] *Weeks* unanimously held that if unconstitutionally-obtained evidence could 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."[54] *Silverthorne Lumber Co. v. United States*[55] then held, the notion "that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act . . . is not the law . . . [and] reduces the Fourth Amendment to a form of words."[56] Rather, "the essence" of the Fourth Amendment is that "evidence

On the Significance of Constitutional Spirit, 70 N.C. L. REV. 1803, 1819-21 (1992).

[52] Weeks v. United States, 232 U.S. 383 (1914). Although there were certainly precursors to *Weeks*'s adoption of the exclusionary rule, 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, 1389 (1983); *see* Boyd v. United States, 116 U.S. 616, 630-35 (1886), *abrogated by* Adams v. New York, 192 U.S. 585 (1904), this Article begins with *Weeks* because it provided the first clear holding establishing the exclusionary rule in a strictly Fourth Amendment criminal context.

[53] MACLIN, *supra* note 1, at xii, 13-17; William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 371-72 (1981) ("When the rule was conceived, it was not premised on deterrence at all, but on an amalgam of values, and was viewed as inextricably bound up with the fourth amendment itself. Thus, the Court originally saw the suppression of evidence as a necessary consequence of a fourth amendment violation."); *see Weeks*, 232 U.S. at 392-93; *see also* SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT 63 (2004); Bloom & Fentin, *supra* note 1, at 50; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 565 n.1 (1983); Maclin & Rader, *supra* note 1, at 1184; Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 282, 288 (1974). Because the exclusionary rule's origins have received detailed coverage in numerous books and articles, see, for example, MACLIN, *supra* note 1, this Article will delve into these early cases only insofar as necessary for this argument.

[54] *Weeks*, 232 U.S. at 393. Another reason animating exclusion in *Weeks* was the idea that it would compromise judicial integrity by involving the judiciary in the violation. *See* Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 5 (1964); Schrock & Welsh, *supra* note 53, at 282, 288.

[55] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[56] *Id.* at 391-92 (citation omitted).

[illegally] acquired . . . shall not be used at all."[57] Neither *Weeks* nor *Silverthorne Lumber* mentions "an exclusionary rule" because "[t]he legal prohibition on the use of unlawfully-obtained evidence came from the Fourth Amendment itself," which rendered another term superfluous.[58] From 1914 until the 1970s, exclusion remained a core component of the Fourth Amendment.[59] Because the Fourteenth Amendment was not interpreted to incorporate the full breadth of the Fourth Amendment,[60] however, state courts were not required to exclude unconstitutionally-obtained evidence.[61] In some of its cases addressing this disparity between the scopes of the Fourth and Fourteenth Amendments, the Court began to suggest that exclusion was a mere remedy designed to deter violations.[62] In the 1960s, judicial exclusion remained an essential component of the Fourth Amendment right, and the Court broadened the Fourteenth Amendment's protections to match the Fourth's.[63] *Mapp v. Ohio*[64]

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[57] *Id.*; *accord* Zap v. United States, 328 U.S. 624, 630 (1946) ("As explained in Silverthorne Lumber Co. . . . , the evidence so obtained is suppressed on the theory that the government may not profit from its own wrongdoing."), *vacated*, 330 U.S. 800 (1947).

[58] MACLIN, *supra* note 1, at 22.

[59] *See, e.g.*, United States v. Jeffers, 342 U.S. 48, 54 (1951) (holding that because property was seized in violation of Fourth Amendment defendant was necessarily entitled to its suppression); Agnello v. United States, 269 U.S. 20, 35 (1925) (rejecting argument that unconstitutionally-obtained evidence was properly used in rebuttal and explaining that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so aquired [sic] shall not be used before the court but that it shall not be used at all" (quoting *Silverthorne Lumber Co.*, 251 U.S. at 391-92)); *see also* United States v. Leon, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting) (describing admission of unconstitutionally-obtained evidence in criminal trial as "a result that had previously been thought to be foreclosed"); Elkins v. United States, 364 U.S. 206, 210 (1960) (describing "unquestioning adherence" to *Weeks* rule).

[60] *See* MACLIN, *supra* note 1, at 43-65 (explaining that although *Wolf v. Colorado* spoke of incorporating the Fourth Amendment, the Fourth Amendment protections applied through the Fourteenth in state courts were not as broad as the Fourth Amendment applied directly in federal courts).

[61] *See* Wolf v. Colorado, 338 U.S. 25, 28-31 (1949) (declining to incorporate the exclusionary rule against the states while "stoutly adher[ing]" to the federal exclusionary rule), *overruled by* Mapp v. Ohio, 367 U.S. 643, 649 (1961).

[62] MACLIN, *supra* note 1, at xii; *see also Elkins*, 364 U.S. at 217 (excluding from federal criminal trials evidence obtained by state law enforcement officials based on supervisory power of federal courts and noting that deterrence is purpose of exclusionary rule).

[63] *See* Mapp v. Ohio, 367 U.S. 643, 649 (1961) ("[T]he *Weeks* rule is of constitutional origin."); *see also, e.g.*, Stewart, *supra* note 52, at 1389 ("Thus, although I did not join in the Court's opinion in the *Mapp* case—because it decided an issue that was not before the Court—I agree with its conclusion that the exclusionary rule is

incorporated the exclusionary rule against the states because to do otherwise would render the Fourth Amendment "'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties."[65]

Since *Mapp*, the Court has departed from this more "majestic" conception of the exclusionary rule in which judicial exclusion is a component of the Fourth Amendment right.[66] The Court's first explicit rejection of the majestic conception came in *United States v. Calandra*,[67] where the Court held that evidence obtained in violation of the Fourth Amendment need not be judicially suppressed from the grand jury.[68] More broadly, however, *Calandra* explained that not every Fourth Amendment violation requires courts to exclude resulting evidence.[69] In so doing, the Court divorced the Fourth Amendment remedy from the right.

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necessary to keep the right of privacy secured by the fourth amendment from 'remaining an empty promise.'" (footnotes omitted)); Stuntz, *supra* note 51, at 883-84, 910-11 (exclusionary rule is restitutionary, forcing officers to give up gains from their misconduct). The justification for the exclusionary rule in *Mapp* is admittedly more opaque than in *Weeks* or *Silverthorne Lumber*. *But see* Kamisar, *supra* note 53, at 623 ("[T]he message—in light of the totality of Clark's opinion [in *Mapp*]—is fairly clear: We reaffirm the 'original understanding' of the exclusionary rule, as explained in *Weeks* and its progeny, that (anything to the contrary in *Wolf* notwithstanding) it is a constitutionally-required rule, although not explicitly provided for in the text of the fourth amendment—and moreover (again, anything to the contrary in *Wolf* notwithstanding), it is the most effective (or the only presently available effective) means of deterring police conduct." (footnotes omitted)).

[64] *Mapp*, 367 U.S. 643.

[65] *Id.* at 655.

[66] *See* Herring v. United States, 555 U.S. 135, 151-52 (2009) (Ginsburg, J., dissenting) (describing a more "majestic" conception); Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (same).

[67] United States v. Calandra, 414 U.S. 338, 354-55 (1974); *see* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 4 (1975) (*Calandra* "cut the exclusionary rule entirely free from any personal right or necessary remedy approach").

[68] *Calandra*, 414 U.S. at 354-55. This claim leaves aside pre-*Mapp* case law regarding incorporation against the states because those cases maintained that suppression in federal courts was automatic. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("stoutly [adhering]" to the *Weeks* rule "that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure"). Tracey Maclin persuasively argues that *Linkletter v. Walker* was the first post-*Mapp* case to consider judicial exclusion separately from the Fourth Amendment right. MACLIN, *supra* note 1, at 108. Nonetheless, because *Linkletter* seems to turn largely on fears of causing a "jail break," *id.* at 113-14; *see* Linkletter v. Walker, 381 U.S. 618, 637 (1965), and its discussion of exclusion is terse, this Article begins with *Calandra* on this point.

[69] *Calandra*, 414 U.S. at 354-55.

Once the Court severed applicability of the exclusionary rule from whether police violated the Fourth Amendment,[70] it began to significantly shrink the scope of the exclusionary remedy. *United States v. Leon*[71] held that the exclusionary rule did not apply to use of evidence at trial obtained by police officers relying on a warrant that was not facially deficient.[72] The Rehnquist and Roberts Courts further pared back the judicially-enforced exclusionary rule by expanding the good-faith exception to include warrantless searches resulting from an error by a court clerk[73] or a "merely negligent" error by a police warrant clerk.[74] Most recently, the Court held that the exclusionary rule does not apply when police comply with later-overruled judicial precedent.[75] As Christopher Slobogin puts it, "exceptions have made

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[70] *See Herring*, 555 U.S. at 145 (majority opinion) (describing "Fourth Amendment violation" in contrast to "more stringent test for triggering the exclusionary rule"); *Evans*, 514 U.S. at 10 (majority opinion) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."); Bloom & Fentin, *supra* note 1, at 49 (describing invocation of exclusionary rule as "failing to apply a remedy to an acknowledged constitutional violation"); Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 378 (2013) (describing "severance of the Fourth Amendment right from the remedy"); J. Donald Hobart, Jr., Illinois v. Krull: *Extending the Fourth Amendment Exclusionary Rule's Good Faith Exception to Warrantless Searches Authorized by Statute*, 66 N.C. L. REV. 781, 793 n.92 (1988) ("[G]ood faith exception acknowledges a violation of a defendant's constitutional rights yet wholly denies him a remedy . . . ."); Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 850 (2013) ("While acknowledging the invasion of constitutional rights occasioned by an unreasonable search, the Court has severed the suppression remedy from that right, calling the substantive Fourth Amendment question a 'separate' issue from the remedial one.").

[71] United States v. Leon, 468 U.S. 897 (1984).

[72] *Id.* at 922. In *Leon*, Justice Stevens criticized the Court's refusal to afford a remedy even when it recognized that Fourth Amendment rights were violated, *id.* at 977 (Stevens, J., dissenting), which indicates that good faith defines the contours of the Fourth Amendment judicial remedy rather than the right itself. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. (forthcoming 2014) (manuscript at 68-71), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2401979 (explaining that the Supreme Court describes the good faith exception as limiting the Fourth Amendment remedy rather than defining constitutional reasonableness of a search but advocating the latter approach). *Leon* is not the first post-*Calandra* case to contract the exclusionary remedy, but it made the most significant inroad—at least until the Roberts Court.

[73] *Evans*, 514 U.S. at 14-15.

[74] *Herring*, 555 U.S. at 137-39, 144, 147-48.

[75] Davis v. United States, 131 S. Ct. 2419, 2428-29 (2011). A Fourth Circuit decision involving a different Mr. Davis reads *Herring* and *Davis*'s curtailment of the

the Fourth Amendment exclusionary rule a mockery of the original version established in the early twentieth century."[76]

A. *Underenforcement Through Right-Remedy Divide*

Importantly, although *Calandra* departed from the more majestic judicial exclusionary rule embodied in *Mapp*, *Weeks*, and other early exclusionary rule cases, this departure contracted only *judicial* enforcement of the Fourth Amendment—the exclusionary rule—and not the Fourth Amendment itself.[77] *Calandra* emphasized that the rule

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exclusionary rule quite broadly. *See* United States v. Davis, 690 F.3d 226, 253 (4th Cir. 2012) (holding that exclusion is inappropriate if officer's actions were merely negligent on specific facts of the case). Describing this jurisprudential trend narrowing exclusion, two commentators recently wrote that "the degree of hostility in recent Supreme Court decisions toward this longstanding rule has been quite breathtaking." Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1611 (2012).

[76] Slobogin, *Is It on Its Way Out?*, *supra* note 8, at 348. Slobogin's assessment of the current state of the exclusionary rule rightly accounts for states that have implemented broader exclusion under their state constitutions than the Supreme Court requires under the Fourth and Fourteenth Amendments. *See id.*; *see, e.g.*, Dorsey v. State, 761 A.2d 807, 821 (Del. 2000) (rejecting good faith exception); State v. Guzman, 842 P.2d 660, 671 (Idaho 1992) (same); State v. Cline, 617 N.W.2d 277, 284-85, 292-93 (Iowa 2000) (same).

[77] In a recent article, Jason Cade argues that the Fourth Amendment is underenforced in immigration proceedings because the exclusionary rule does not apply at all. Cade, *supra* note 1, at 193-98.

Daryl Levinson has criticized the "rights essentialism" approach to constitutional law that divides the spheres of rights and remedies where the former is concerned with "pure" constitutional value and the latter with pragmatic concerns. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999). He rightly identifies underenforcement as a version of rights essentialism. *Id.* at 868-70. In the criminal procedure context, Levinson argues that dividing right and remedy undermines the practical force of rights because police are less likely to respect them. *Id.* at 909-11. His conclusion about disrespecting rights without remedies squares with the ethics claim of this Article: prosecutors cannot ethically signal to law enforcement that the Fourth Amendment remedy is a mere inconvenience that prosecutors can frequently evade because doing so would undermine the right. *See infra* Part III.B. As to Fourth Amendment underenforcement more broadly, however, this Article maintains that there must be a meaningful distinction between right and remedy. Aside from the Court's express statements on this point, for example, *Herring*, 555 U.S. at 140; United States v. Calandra, 414 U.S. 338, 350-51 (1974), inquiring whether an officer has reasonably relied in good faith on a warrant or whether an officer's error was merely negligent makes little sense unless the Fourth Amendment right is broader than its remedy, *see Herring*, 555 U.S. at 144-46; United States v. Leon, 468 U.S. 897, 922 (1984). It would be rather strange to say that a warrant lacking probable cause or particularity does not violate the Fourth Amendment simply because courts refuse to provide a remedy. *See* U.S. CONST.

was "a judicially created remedy" meant not to redress injuries but to deter future unlawful conduct[78] and that the Court faced "a question, not of rights, but of remedies."[79] Moreover, the Court explained that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[80] Mr. Calandra's rights were undoubtedly violated;[81] the Court simply had to decide the pragmatic question of whether the judiciary should provide a remedy.[82] Suppression, according to *Calandra*, was merely a mechanism for the judiciary to remove the incentive for executive disregard of the Fourth Amendment.[83]

After *Calandra* concluded that the exclusionary rule did not apply despite recognizing that Mr. Calandra's rights were violated, the Court purported to speak to constitutionality—the full breadth of the constitutional norm. It framed the issue as whether a prosecutor's grand jury questioning based on illegally-obtained evidence violated the defendant's Fourth Amendment rights.[84] But the actual question before the Court was whether the district court should prevent the prosecutor from presenting to a grand jury evidence obtained from an unlawful search and seizure.[85] *Calandra*'s language is sloppy. It ostensibly rejects the argument that each question a prosecutor asks before a grand jury based on illegally-obtained evidence constitutes a separate Fourth Amendment violation.[86] But there are three reasons not to read this language as actually speaking to the executive's Fourth Amendment duties. First, this reading conflicts with the Court's

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amend IV ("[N]o Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched, and the persons or things to be seized.").

[78] *Calandra*, 414 U.S. at 348.

[79] *Id.* at 354; *see also id.* at 347, 350-51.

[80] *Id.* at 348.

[81] Both lower courts found that Calandra's Fourth Amendment rights were violated, and the government did not challenge that finding in the Supreme Court. *Id.* at 342 n.2.

[82] *Id.* at 349-52 (weighing costs and benefits of affording a remedy).

[83] *Id.* at 347, 350-51. *Calandra* itself addresses only a *federal* grand jury's use of evidence gathered by *federal* agents, but there is no reason to think that federalism would operate differently than separation of powers in this regard. *Cf.* United States v. Leon, 468 U.S. 897, 902 (1984) (employing reasoning similar to *Calandra* for search by local police officers).

[84] *Calandra*, 414 U.S. at 353-54.

[85] *Id.* at 339.

[86] *Id.* at 353-54 (stating that grand jury questions "work no new Fourth Amendment wrong" because they involve no additional intrusion into the defendant's person, house, papers, or effects).

explicit statement that it was addressing a question of remedies, not rights.[87] Second, whether the district court should have compelled the witness to answer was the only judicially-redressable question, which would render any statement about the executive's duties or indeed the defendant's rights the purest dictum.[88] And relying on this dictum would be problematic because it would contradict never-overruled holdings that improperly-obtained evidence should not be used at all.[89] Third, for the Court to address the scope of the executive's duties beyond the scope of judicial enforcement, particularly with respect to criminal prosecution, violates the separation of powers.[90] Therefore, the Court's statements about grand jury questioning in *Calandra* seem best read as concluding that the district court did not err in refusing to preclude questioning about illegally-obtained evidence. That the federal government directs its prosecutors to refrain from introducing illegally-obtained evidence before the grand jury further supports this reading.[91]

To the extent that it is unclear whether *Calandra* holds that *judicial* exclusion—rather than a bar on all government use of evidence—is not a necessary consequence of a Fourth Amendment violation, *United States v. Janis*[92] helps resolve the ambiguity. *Janis* cites *Calandra* repeatedly when discussing whether "a [judicially-created] deterrent sanction" would be appropriately applied,[93] and it explains that extending the exclusionary rule "would be an unjustifiably drastic action *by the courts* in the pursuit of what is an undesired and undesirable supervisory role over police officers."[94] In support of this separation of powers point, *Janis* cites *Rizzo v. Goode*,[95] which held

[87] *Id.* at 350-51, 354.

[88] *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (requiring judicial redressability for Article III standing).

[89] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920); *see also* Weeks v. United States, 232 U.S. 383, 393 (1914).

[90] Erwin Chemerinsky, *The Court Should Have Remained Silent: Why the Court Erred in Deciding* Dickerson v. United States, 149 U. PA. L. REV. 287, 292-96 (2000); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983, 985-86, 988 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221-22, 231 (1994) [hereinafter *The Most Dangerous Branch*].

[91] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.231 (1997) [hereinafter U.S. ATTORNEYS' MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm.

[92] United States v. Janis, 428 U.S. 433 (1976).

[93] *Id.* at 446-48.

[94] *Id.* at 458 (emphasis added).

[95] Rizzo v. Goode, 423 U.S. 362 (1976).

that the judiciary impermissibly intruded into a state executive branch's affairs regarding police misconduct.[96] *Janis* further emphasizes that its decision hinges on the role of the judiciary rather than the scope of the Fourth Amendment right, explaining that the Court cannot "continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches."[97] And in fact, *Janis* cites *Calandra* for the proposition that "the law has since been clarified" that courts should "focus on the deterrent purpose of the exclusionary rule."[98]

Like *Calandra* and *Janis*, *Leon* too contracts only the *judicial* role in Fourth Amendment enforcement. *Leon* explains that judicial suppression "operates as a judicially created remedy."[99] Although *Leon* says that "the use of fruits of a past unlawful search or seizure works no new Fourth Amendment wrong,"[100] *Leon*, like *Calandra*, must have addressed the only judicially-redressable question: whether the judicial exclusionary remedy applied.[101] Thus, *Leon* should be read for the proposition that the Fourth Amendment does not require *courts* to suppress unconstitutionally-obtained evidence when police obtained it relying on a warrant in good faith.[102]

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[96] *Id.* at 378-80.

[97] *Janis*, 428 U.S. at 459.

[98] *Id.* at 457.

[99] United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (internal quotation marks omitted).

[100] *Id.* (quoting *Calandra*, 414 U.S. at 354).

[101] *See id.* at 905-06. *Pennsylvania Board of Probation & Parole v. Scott* also suggests that the use of evidence does not violate the Fourth Amendment. 524 U.S. 357, 362 (1998). But as with *Leon* and *Calandra*, the Court's opinion should be read as addressing the only judicially-redressable question: whether a court should force a state agency to suppress illegally-obtained evidence in parole revocation hearings. *See id.* at 367-69 (explaining federalism concerns with federal court intruding into states' correctional schemes or parole systems).

[102] Although then-Assistant Attorney General Stephen Trott did not directly address administrative suppression when discussing the *Leon* decision, he embraced the notion that *Leon* narrowed judicial suppression but did not alter the executive's Fourth Amendment duties:

> This landmark Supreme Court ruling should be heralded by those of us in law enforcement not just as a victory for truth in the courtroom or "for our side" but more importantly as a solemn occasion to reaffirm our faithful dedication to all constitutional principles as well as the historic right of the American people to be free from totalitarian searches . . . . As officials charged with upholding all the laws of the land, the Constitution is our sacred trust. I am confident that we shall avail ourselves of this opportunity to demonstrate without ambiguity to the Supreme Court and to the American people that we are fully capable of discharging this duty.

Herring v. United States[103] is more straightforward. There the Court openly declined to address the scope of the Fourth Amendment right but assumed that it was violated, and the Court spoke in expressly remedial terms.[104] *Herring* therefore must have addressed only the bounds of the judicial exclusionary remedy.

Although distinguishing the constitutionality of prosecutors' actions from the appropriate *judicial* role in policing these prosecutors' actions might seem finely parsed, it cuts to the core of constitutional underenforcement: some unconstitutional executive branch conduct should not be prevented by the judiciary because the executive branch must enforce the full breadth of the constitutional norm even though the judiciary has institutional limitations on its enforcement role.[105] In *Irvine v. California*,[106] Justice Jackson and Chief Justice Warren—both former prosecutors, Jackson a former U.S. Attorney General—envisioned a different form of Fourth Amendment executive enforcement beyond the judicial remedy. Although they joined the judgment affirming the defendant's conviction, Jackson and Warren called for the U.S. Attorney General to examine the record and opinion in the case and consider prosecuting the offending officers.[107]

The nature of the Fourth Amendment as primarily a regulation of executive conduct and the "fragmentary" conception of the federal government generate underenforcement. *Calandra* adopted this "fragmentary" conception—as Thomas Schrock and Robert Welsh label it—in which courts treat the judicial and executive branches of the federal government as separate entities for Fourth Amendment purposes.[108] Under the fragmentary conception, "[a] criminal court is morally separate from and indifferent to the conduct of the rest of the government."[109] Courts' role is solely to provide a fair trial; they are

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Stephen S. Trott, Assistant Attorney Gen., The Challenge to Law Enforcement of the Reasonable Good-Faith Exception to the Exclusionary Rule, Address Before the Career Prosecutor Course of the National College of District Attorneys (July 5, 1984) (quoted in Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 561-62 (1999)).

[103] Herring v. United States, 555 U.S. 135 (2009).

[104] *Id.* at 139, 148-49; *see also* Brief for United States at 10 n.3, *Herring*, 555 U.S. 135 (No. 07-513), 2008 WL 2847070, at *10 n.3 (inviting this approach).

[105] *See* SAGER, *supra* note 4, at 90-99; *supra* Part I.

[106] Irvine v. California, 347 U.S. 128 (1954).

[107] *Id.* at 137-38. Jackson and Warren wrote about the Court's limited pre-incorporation role in enforcing search and seizure violations against the states through evidentiary suppression, but that schema resembles the current right-remedy divide.

[108] *See* Schrock & Welsh, *supra* note 53, at 254-55.

[109] *Id.* at 255.

blameless for allowing fruits of executive misconduct into the courtroom.[110] *Calandra* applies this fragmentary conception to hold that allowing the grand jury to consider unconstitutionally-obtained evidence does not violate the Constitution because the judiciary can simply close its eyes to the origins of that evidence.[111] *Leon* and its progeny implicitly employ this fragmentary conception as they distance whether a judicial sanction is appropriate from whether police violated the Fourth Amendment.[112]

The fragmentary conception conceives of the Fourth Amendment not as directly regulating the judiciary but rather as directly regulating the executive branch.[113] The fragmentary conception requires judicial action only when violations by a co-equal branch become intolerable.[114] Adopting the fragmentary conception and the secondary judicial-enforcement role repositions the Court's institutional Fourth Amendment role vis-à-vis the executive.[115] In *Payner v. United States*,[116] Chief Justice Burger wrote separately to explain the separation of powers concerns that underpin the fragmentary conception in the Fourth Amendment context:

> Orderly government under our system of separate powers calls for internal self-restraint and discipline in each Branch; this

[110] *Id.*

[111] *See* United States v. Calandra, 414 U.S. 338, 353-54 (1974).

[112] *See, e.g.*, United States v. Leon, 468 U.S. 897, 906-07 (1984) (holding that whether courts must exclude evidence is a separate question from whether the defendant's Fourth Amendment rights were violated).

[113] *Compare Calandra*, 414 U.S. at 353-54 (describing Fourth Amendment as regulating only executive branch intrusion), *with id.* at 357-58 (Brennan, J., dissenting) (noting that the exclusionary rule "enable[s] the judiciary to avoid the taint of partnership in official lawlessness"); *see also* Schrock & Welsh, *supra* note 53, at 255-57 (identifying fragmentary conception as critical difference between the majority and dissent in *Calandra*). Leaving aside the Warrant Clause, reading the Fourth Amendment to primarily regulate the executive branch is grounded in the constitutional text. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[114] *See* Schrock & Welsh, *supra* note 53, at 256-57.

[115] *See* Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 402-03 (2013) (explaining that through *Mapp* in 1961, the exclusionary rule was seen as implementing the "judiciary's need to stand as a 'guardian' to ensure that the other branches stayed within their constitutional mandates"); *see also* Morrison, *supra* note 46, at 1225 ("In every area of constitutional law, the Supreme Court's doctrine reflects its institutional limitations.").

[116] Payner v. United States, 447 U.S. 774 (1980).

> Court has no general supervisory authority over operations of the Executive Branch, as it has with respect to the federal courts. I agree fully with the Court that the exclusionary rule is inapplicable to a case of this kind, but that should not be read as condoning the conduct of the IRS "private investigators" as disclosed by this record, or as approval of their evidence-gathering methods.[117]

This first sentence explicitly embraces the fragmentary conception and the idea that the judiciary should not police every error of the executive branch. Rather, the executive branch should primarily police its own house. Burger addressed the scope of the supervisory power in *Payner*; nonetheless, his explanation that the Court's decision not to *judicially* suppress unconstitutionally-obtained evidence should not be read to condone the officers' evidence gathering methods strongly supports the notion that judicial enforcement of the Fourth Amendment should be secondary to broader executive branch enforcement.

But this fragmentary conception has no bearing on the relationship between police officers and prosecutors within the executive branch,[118] as the ethical standards recognize,[119] and as Burger recognized when he distinguished the propriety of the investigators' conduct from the propriety of judicial suppression resulting from that conduct.[120] Although courts may be able to avert their eyes to the origins of the evidence that prosecutors present, prosecutors cannot. Indeed, Justice Brandeis recognized in *Olmstead v. United States*[121] that for the Department of Justice to avail itself of the fruits of a Fourth Amendment intrusion to obtain a conviction would assume moral

[117] *Id.* at 737-38 (Burger, C.J., concurring).

[118] *See* Bar-Gill & Friedman, *supra* note 75, at 1626 (labeling police-prosecutor relationship an "obvious assembly line from street to prison"); Schrock & Welsh, *supra* note 53, at 289 (analyzing *Calandra*'s reasoning: "*the executive* is the sole addressee of the fourth amendment: courts are addressed only as warrant-issuing magistrates" (emphasis added)).

[119] *See* NAT'L PROSECUTION STANDARDS § 3-1.3 (Nat'l Dist. Att'ys Ass'n 2009) ("A prosecutor is ultimately responsible for evidence that will be used in a criminal case. A prosecutor who knows or who is aware of a substantial risk that an investigation has been conducted in an improper manner, or that evidence has been illegally-obtained by law enforcement, must take affirmative steps to investigate and remediate such problems."); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002) (noting that prosecutor may be required to undertake procedural and remedial measures as matter of obligation in response to lack of procedural justice).

[120] *Payner*, 447 U.S. at 737-38.

[121] Olmstead v. United States, 227 U.S. 438 (1928).

responsibility for the officers' crimes.[122] *Weeks* and other early exclusionary rule cases reasoned that admitting unconstitutionally-obtained evidence violates judicial integrity and taints the judiciary with the executive's unclean hands.[123] Under the fragmentary conception of the federal government, it seems plausible to say that the taint of a violation does not run between branches of government from the police to the judiciary;[124] judicial suppression is therefore not required for every illegality.[125] These reasons that courts need not suppress all unconstitutionally-obtained evidence do not apply with the same force to prosecutors within the executive branch.[126]

The Court's rationale behind its deferential exclusionary rule jurisprudence most closely resembles the reasoning behind qualified immunity. In both instances, the Court allows executive branch officers to do their jobs without judicial micromanagement.[127] The concept of offering breathing space to the executive branch in Fourth Amendment enforcement also underlies Anthony O'Rourke's recent article in which he argues that in criminal procedure the Court

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[122] *Id.* at 483 (Brandeis, J., dissenting).

[123] Schrock & Welsh, *supra* note 53, at 257-60, 282. The judicial integrity notion appears from the judicial exclusionary rule's beginnings, Weeks v. United States, 232 U.S. 383, 392-94 (1914), and in subsequent cases for more than a half-century. *See* Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Mapp v. Ohio, 367 U.S. 643, 648, 660 (1961); *Olmstead*, 277 U.S. at 483 (Brandeis, J., dissenting); *id.* at 469-70 (Holmes, J., dissenting); *see also* Burger, *supra* note 54, at 5 (*Weeks* relies on judicial integrity rationale); Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 750-51 (1966) ("Also present [in *Mapp*] is the notion of Justices Brandeis and Holmes in *Olmstead*, that 'the government ought not to use evidence obtained . . . by a criminal act,' lest by such use the government ratify the illegality and become a lawbreaker." (footnotes omitted) (quoting *Olmstead*, 277 U.S. 438)).

[124] *See supra* notes 108-114 and accompanying text.

[125] The judicial integrity rationale for exclusion as a matter of judicially-enforceable right was relegated to the dissent in *Calandra* and more recent cases. *See, e.g.*, Herring v. United States, 555 U.S. 135, 151-52 (2009) (Ginsburg, J., dissenting) (stating that exclusionary rule "'enables the judiciary to avoid the taint of partnership in official lawlessness,'" and it "'assures the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) (alterations omitted)).

[126] *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 150 (1936) (explaining that prosecutor's non-participation in the illegality had no bearing on her ethical obligations); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 3.5(b) (2008) (requiring prosecutors to limit taint from illegally-obtained evidence).

[127] *See supra* notes 42-43 and accompanying text.

delegates enforcement responsibility to executive officials.[128] He explains that *Herring* is best read as ceding the judiciary's authority to enforce negligent constitutional violations to law enforcement.[129] Although O'Rourke does not say as much, his delegation paradigm equates to judicial underenforcement coupled with executive enforcement of the full breadth of the constitutional norm.[130]

This judicial deference also emerges out of concern for the Court's institutional legitimacy. When explaining the costs of the exclusionary rule, *Stone v. Powell*[131] articulates the concern that judicial suppression would "generat[e] disrespect for the law and administration of justice."[132] This abstract statement seems to hinge on the idea that judicial suppression of relevant evidence would undermine judicial legitimacy. In other cases the Court has defined the cost of judicial suppression as "imped[ing] unacceptably the truth-finding functions of judge and jury,"[133] which similarly seems concerned that the public would perceive the judiciary as standing in the way of truth.

As further evidence that the right-remedy divide is institutional rather than analytical and therefore has no bearing on executive branch constitutional duties, it is important to consider what it means for something to be an exception to the exclusionary rule. Exceptions to the exclusionary rule come into play only when a court first holds (or assumes) that the Fourth Amendment was violated and must then decide whether to provide a remedy; exclusionary rule exceptions are therefore definitionally independent of substantive Fourth Amendment analysis, which makes them necessarily not analytical.[134]

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[128] Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407 (2013).

[129] *Id.* at 411-12.

[130] O'Rourke cites Sager's *Fair Measure* at several turns. *Id.* at 420 n.42, 421 n.48, 469 n.261.

[131] Stone v. Powell, 428 U.S. 465 (1976).

[132] *Id.* at 491.

[133] United States v. Leon, 468 U.S. 897, 907 (1984) (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

[134] This divide is not identical to the underenforcement Sager described because the Court occasionally speaks in dictum to whether Fourth Amendment rights were violated even when it concludes that judicial exclusion is inappropriate for reasons rooted solely in the exclusionary rule. *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (explaining that the question before the Court is whether the exclusionary rule should apply even though "the search turned out to be unconstitutional").

B. *Full Breadth of Fourth Amendment Norm*

When the Supreme Court pared back the scope of the judicially-enforced exclusionary rule for institutional reasons, it left intact the more majestic Fourth Amendment as the full breadth of the constitutional norm but rendered it underenforced. An important part of this more majestic conception was that the government should not benefit from invading the rights of its citizens by using evidence gathered from that invasion to obtain a conviction.[135] Notably, despite the recoiling of the judicial role policing Fourth Amendment violations, neither *Weeks* nor *Silverthorne Lumber* and their holdings that the Fourth Amendment prevents the government from benefitting from a violation have ever been overruled. With a few carve-outs discussed in this section, these older cases continue to provide the full breadth of the constitutional norm; *Calandra*, *Leon*, and their progeny did not alter or even address the full scope of the norm. Rather, exclusionary rule cases beginning with *Calandra* addressed only the scope of judicial enforcement.[136]

Having established this framework for analyzing executive branch Fourth Amendment duties, it is worth considering how to think about each of the doctrinal exceptions to the exclusionary rule. Some exceptions since *Weeks* and *Silverthorne Lumber* define the scope of the Fourth Amendment right, while others limit merely its remedy. To enforce the full breadth of the constitutional norm, when analyzing administrative suppression prosecutors should consider only *rights-defining* exceptions. Because *Calandra* and *Leon* expressly severed Fourth Amendment rights from remedies,[137] their remedial holdings do not constrict the scope of Fourth Amendment rights. In contrast, *Weeks* and other pre-*Calandra* exclusionary rule cases speak to both rights and remedies because these cases treated rights and remedies as intertwined.[138] Determining whether the existing doctrinal exceptions to the exclusionary rule are rights based or remedies based accordingly requires parsing the language in decisions that created these exceptions with an eye to whether they preceded or followed *Calandra*.

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[135] *See supra* notes 52-65 and accompanying text.

[136] *See supra* Part II.A.

[137] *Leon*, 468 U.S. at 906-07; United States v. Calandra, 414 U.S. 338, 354-55 (1974).

[138] *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (not suppressing evidence "reduces the Fourth Amendment to a form of words"); Weeks v. United States, 232 U.S. 383, 393 (1914) (allowing use of unconstitutionally-obtained evidence renders Fourth Amendment meaningless).

Exceptions that limit the scope of the right include attenuation, standing, independent source, and impeachment. Prosecutors should accordingly consider these exceptions when analyzing whether to administratively suppress evidence. Exceptions that limit only the judicial remedy that prosecutors should therefore not consider in analyzing administrative suppression include: good faith, grand jury questioning, and inevitable discovery.

Taking these in turn, prosecutors are constitutionally required to administratively suppress evidence only if it is "fruit of the poisonous tree" not sufficiently attenuated from the violation based on judicial precedent defining the limits to attenuation.[139] The Supreme Court explained the contours of the fruit of the poisonous tree doctrine and its attenuation limit in *Wong Sun v. United States*,[140] which preceded *Calandra*.[141] Unlike *Calandra*, *Wong Sun* did not explain the exclusionary rule as a deterrent for officer misconduct but rather cited *Weeks* for the notion that "evidence seized during an unlawful search could not constitute proof against the victim of the search."[142] *Wong Sun* then quoted *Silverthorne Lumber* for the proposition that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is . . . that it shall not be used at all."[143] It is in this context rather than one focused on whether deterrence is sufficiently important to warrant a prudential remedy of suppression that the Court crafts *Wong Sun*'s attenuation limit.[144] For that reason, the exception is rights based and prosecutors need not administratively suppress evidence that is sufficiently attenuated from what they conclude to be a constitutional violation.[145]

Similarly, the Fourth Amendment standing doctrine also limits the scope of the right rather than merely its remedy. Like *Wong Sun*, *Alderman v. United States*[146] explains the exclusionary rule within the *Weeks/Silverthorne Lumber* line of cases and precedes *Calandra*.[147] More specifically, *Alderman* explains that "any petitioner would be

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139 Wong Sun v. United States, 371 U.S. 471, 487-88, 491 (1963).

140 *Id.*

141 *Id.* at 471.

142 *Id.* at 484.

143 *Id.* at 485 (quoting *Silverthorne Lumber Co.*, 251 U.S. at 392) (internal quotation marks omitted).

144 *See id.* at 488.

145 It is not, however, inconceivable to view attenuation in *Wong Sun* as limiting judicial remedy rather than right even though the Court had not yet articulated the Fourth Amendment right-remedy divide.

146 Alderman v. United States, 394 U.S. 165 (1969).

147 *Id.* at 171-72.

entitled to the suppression of government evidence originating in electronic surveillance violative of his own Fourth Amendment right."[148] This language explicitly addresses the scope of the Fourth Amendment right itself insofar as it speaks to "entitlement" to suppression and expressly addresses whose rights were violated. Moreover, *Alderman*'s statement that Fourth Amendment rights are personal and "may not be vicariously asserted"[149] also speaks to the scope of the right. For these reasons, prosecutors should administratively suppress evidence from use only against those defendants who would have standing to challenge an unlawful search or seizure.

Evidence obtained from a source independent of the Fourth Amendment violation also need not be administratively suppressed because the independent source doctrine too limits the scope of the Fourth Amendment right. The Court created the independent source exception in *Silverthorne Lumber* in the same paragraph in which it explained that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely *evidence so acquired* shall not be used before the Court but that it shall not be used at all."[150] To read this paragraph of *Silverthorne Lumber* as internally consistent requires viewing the independent source doctrine as standing for the largely uncontroversial proposition that the Fourth Amendment right requires exclusion only of evidence derived from the violation and not unrelated evidence. In other words, evidence obtained from an independent source does not constitute "evidence so acquired"[151] and therefore falls outside the purview of the Fourth Amendment. Accordingly, prosecutors need not administratively suppress evidence obtained from a source independent of what they determine to be a Fourth Amendment violation.

Lastly, permitting the use of unconstitutionally-obtained evidence for impeachment also limits the scope of the Fourth Amendment right rather than merely its remedy. As with the other rights-based exceptions, the case that created the impeachment exception, *Walder v. United States*,[152] preceded *Calandra* and relies on the

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[148] *Id.* at 176.

[149] *Id.* at 174.

[150] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (emphasis added); *see also* Clancy, *supra* note 70, at 389 (explaining that independent source doctrine "has a long pedigree, with roots in case law" that treated exclusion as a constitutional right).

[151] *Silverthorne Lumber*, 251 U.S. at 392.

[152] Walder v. United States, 347 U.S. 62 (1954).

Weeks/Silverthorne Lumber line of cases considering exclusion as part of the Fourth Amendment right.[153] The impeachment exception relies on the notion that an amendment protecting the security of persons, houses, papers, and effects should not provide "a shield against contradiction of . . . untruths"[154] because that outcome would "perver[t] the Fourth Amendment."[155] In other words, the Fourth Amendment itself does not condone perjury. Accordingly, while prosecutors should not charge a case based on evidence that they conclude was obtained unconstitutionally, if they can ethically charge and pursue a case based on evidence that was obtained constitutionally they need not refrain from using unconstitutionally-obtained evidence solely for impeachment purposes.

In contrast, prosecutors cannot rely on the good faith exceptions to use unconstitutionally-obtained evidence. For reasons explained above, allowing the use of evidence obtained by officers relying in good faith on a warrant or a police warrant clerk are remedy-based exceptions to the exclusionary rule and not the Fourth Amendment right.[156] Similar reasoning applies to reliance on court clerks: *Arizona v. Evans*[157] created that exception because suppression would not sufficiently deter police misconduct.[158] Relatedly, prosecutors cannot constitutionally charge cases based on evidence obtained unconstitutionally but in good-faith reliance on binding judicial precedent or a statute. As to binding judicial precedent, *Davis v. United States*[159] was quite forthright that the question for the Court was a remedial one: should the exclusionary rule apply even though "the search turned out to be unconstitutional."[160] Regarding reliance on a statute, *Illinois v. Krull*[161] too relies on the *Leon* remedy-based inquiry of whether exclusion would sufficiently deter police misconduct to justify the costs of exclusion.[162]

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[153] *Id.* at 64-65.

[154] *Id.* at 65.

[155] *Id.*

[156] *See supra* notes 99-104 and accompanying text.

[157] Arizona v. Evans, 514 U.S. 1 (1995).

[158] *Id.* at 10-16.

[159] Davis v. United States, 131 S. Ct. 2419 (2011).

[160] *Id.* at 2428.

[161] Illinois v. Krull, 480 U.S. 340 (1987).

[162] *Id.* at 349-55.

As also explained in detail above, prosecutors cannot rely on unconstitutionally-obtained evidence before the grand jury because *Calandra*'s holding was remedy rather than rights-based.[163]

Inevitable discovery too does not apply to administrative suppression of unconstitutionally-obtained evidence as it does to judicial exclusion. Much like the good faith cases, the case that created the inevitable discovery exception, *Nix v. Williams*,[164] relies on a prudential cost-benefit analysis of whether suppression would be worth the cost to the courts.[165] If the discovery of evidence can be shown inevitable, the Court explained, "the deterrence rationale has so little basis that the evidence should be received."[166] Although inevitable discovery is somewhat related to the independent source exception,[167] which does define the contours of the right,[168] they are not coextensive.[169] The "functional similarity" that the Court describes between the two doctrines does not counsel similar treatment because the reasoning underlying inevitable discovery and independent source is not in fact coextensive. Evidence obtained from an actually independent source is not the fruit of a Fourth Amendment violation at all and therefore does not implicate Fourth Amendment rights. Evidence that was the fruit of a violation that a court concludes hypothetically could have been—but was not—obtained legally is evidence for which the Court pragmatically concluded that judicial suppression would not pay its way. Accordingly, prosecutors should not rely on inevitable discovery to excuse administrative suppression.

Taking the older cases together with the modern exclusionary rule cases leaves an underenforced Fourth Amendment that precludes the government from benefitting from an illegal search or seizure by using not-sufficiently-attenuated fruits of the poisonous tree against the victim of the constitutional violation for non-impeachment purposes.[170]

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[163] *Supra* notes 77-97 and accompanying text.

[164] Nix v. Williams, 467 U.S. 431 (1984).

[165] *Id.* at 442-44.

[166] *Id.* at 444.

[167] *See id.* at 443-44 (describing "functional similarity"). Inevitable discovery is also sometimes known as "*hypothetical* independent source." State v. Williams, 285 N.W.2d 248, 256 (Iowa 1979) (emphasis added).

[168] *See supra* notes 150-151 and accompanying text.

[169] *Nix* holds that the questioned evidence is admissible based on the inevitable discovery exception even though it was not in fact obtained from an independent source. *Nix*, 467 U.S. at 443-44.

[170] Mapp v. Ohio, 367 U.S. 643, 652-53 (1961); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920); Weeks v. United States, 232 U.S. 383, 392-93 (1914); *supra* notes 139-169 and accompanying text.

Yet it is no longer the judiciary's role to enforce this no-benefit proposition in every instance.[171] Instead, it is prosecutors, as members of the executive branch tasked with enforcing the full breadth of the constitutional norm who must administratively suppress such evidence even though the judiciary would not suppress it.[172]

This conception of prosecutors' Fourth Amendment obligations establishes that prosecutors should consider rights-based exceptions to per se excluding all evidence that they adjudge to be unconstitutionally-obtained. Prosecutors' ethical obligations, however, exceed that constitutional floor and impose a broader responsibility of administrative suppression. The bases and scope of this ethical responsibility will be analyzed in greater detail below.[173] For now, suffice it to say that unlike the constitutional obligation, prosecutors' ethical responsibilities require them to administratively suppress all fruits of a Fourth Amendment violation. The only exclusionary rule exception that this ethical obligation preserves is independent source: evidence obtained in a manner unrelated to a constitutional violation need not be administratively suppressed.[174]

Even some of those who accept that the Court has not addressed the full breadth of the Fourth Amendment right since *Calandra* because it

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[171] *E.g.*, Herring v. United States, 555 U.S. 135, 140 (2009); United States v. Leon, 468 U.S. 897, 906-07 (1984). In some respects, this divide between executive and judicial power is similar to the Court's role enforcing the Fourth Amendment against the states during the *Wolf* pre-incorporation era. MACLIN, *supra* note 1, at 43-52 (explaining that during pre-incorporation era Court enforced Fourth Amendment violations only when they were sufficiently extreme as to shock the conscience); *see also, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (holding that federal court would prevent use of evidence obtained by local sheriff's officers because forcing open the defendant's mouth and forcibly extracting the contents of his stomach, all without a warrant, shocks the conscience).

[172] Marc Miller and Ron Wright seem to briefly allude to a concept of administrative suppression as having constitutional grounding when they mention that the executive branch might refrain from using evidence because of its "principled allegiance to constitutional ideals" rather than merely in anticipation of an unfavorable judicial ruling. Miller & Wright, *Black Box*, *supra* note 2, at 139; *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 816-19 (1994) (advocating different Fourth Amendment responsibilities for judicial and executive branches).

[173] *See infra* Part III.

[174] Labeling the independent source doctrine an exception to the exclusionary rule is a misnomer in any event because under that doctrine a constitutional violation is not the but-for cause of police obtaining the evidence in question. *See, e.g.*, Segura v. United States, 468 U.S. 796, 814 (1984) (allowing admissibility of evidence seized pursuant to valid warrant despite earlier unlawful entry into same premises because earlier entry was unrelated to basis of warrant).

could not as a matter of separation of powers[175] might contend that *Weeks* and the other early exclusionary rule cases were simply wrong to conclude that the no-benefit proposition is any necessary part of the Fourth Amendment. The debate over whether the Fourth Amendment itself requires the government to refrain from using evidence or from benefitting from a violation has been well plowed and need not be rehashed in detail here.[176] This Article sides with Schrock and Welsh's contention that due process requires that the government observe its Constitution in prosecuting its citizens, which includes not using evidence obtained in violation of the Fourth Amendment against the victim of the violation.[177] It is also sympathetic to *Silverthorne Lumber's*

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[175] *See supra* note 90.

[176] *Compare, e.g.*, Bloom & Fentin, *supra* note 1, at 73 ("It is the Fourth Amendment right, not the exclusionary rule, that demands the exclusion of illegally obtained evidence."), *id.* at 75 ("If we are to take seriously the court's duty to protect our constitutional rights and preserve its sanctimonious role in the administration of justice, then courts must utilize the remedy of exclusion for acknowledged Fourth Amendment violations."), Kamisar, *supra* note 53, at 640 ("I believe that the goals 'uppermost in the minds of the framers of the rule' were 'enabling the judiciary to avoid the taint of partnership in official lawlessness' and 'assuring the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.'" (quoting United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting))), Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 361 (1982) ("[W]e would be illadvised to tamper with the sanction of exclusion, without which the fourth amendment would be only 'a form of words.'" (quoting Mapp v. Ohio, 367 U.S. 643, 648 (1961))), Schrock & Welsh, *supra* note 53, at 371 ("[T]he defendant has a due process personal right to have the government observe its own laws, at any rate its own constitution, in its prosecution of him—and therefore to have the court exclude unconstitutionally seized evidence . . . ."), *and* Stewart, *supra* note 52, at 1389 ("I agree with [*Mapp's*] conclusion that the exclusionary rule is necessary to keep the right of privacy secured by the fourth amendment from 'remaining an empty promise.'" (footnotes omitted)), *with, e.g.*, Amar, *supra* note 172, at 785 (the Court "has concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt, and has then tried to water down this awkward and embarrassing remedy in ad hoc ways"), *and* Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 527 (2013) ("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.").

[177] Schrock & Welsh, *supra* note 53, at 371. Richard Re has recently developed this due process basis for the exclusionary rule in much greater detail. *See* Re, *supra* note 72. Whether the origin of exclusion on this theory is properly seated in the Fourth Amendment itself or in the Due Process Clauses insofar as those provisions guarantee that the government must abide by specific constitutional protections such as the Fourth Amendment seems largely semantic and irrelevant to the discussion of prosecutors' administrative suppression duties. *See id.* at 6 (criticizing commentators and judges for suggesting that the Fourth Amendment itself requires suppression

principle that the Fourth Amendment itself requires exclusion lest that fundamental right become a mere form of words.[178]

To exercise this duty of administrative suppression, prosecutors must make their own determination of whether evidence was obtained unconstitutionally. Prosecutors may not be better at interpreting the Fourth Amendment than neutral magistrates; indeed, several prosecutors reviewed the defective warrant application in *Leon*.[179] But prosecutor review is not intended as a substitute for judicial review. Involving prosecutors as a second, serial layer of the warrant review process should improve accuracy.[180]

The notion that administrative requirements within the executive branch might provide at least as much protection for defendants as does judicial review is not foreign to search and seizure law. In the Title III wiretap context, Congress implemented heightened statutory protections including administrative protections within the executive

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rather than combination of Fourth Amendment and Due Process Clauses). Although Re's explanation of the due process origin of the exclusionary rule is valuable, the notion that seating exclusion in due process spawns exceptions to the exclusionary rule is less convincing.

[178] Other remedies for Fourth Amendment violations have proven nearly meaningless in practice. *See* Mapp v. Ohio, 367 U.S. 643, 652 (1961) (Fourth Amendment remedies other than exclusionary rule have proven "worthless and futile"); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920) (allowing government to benefit from illegal seizure of evidence "reduces the Fourth Amendment to a form of words"); Weeks v. United States, 232 U.S. 383, 393 (1914) ("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, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); Bloom & Fentin, *supra* note 1, at 75-76 (exclusion is the only effective Fourth Amendment remedy); *see also* Bar-Gill & Friedman, *supra* note 75, at 1611 ("[W]hat cannot be denied is that no alternative to exclusion has attracted sufficient support to see it implemented."). The Supreme Court plays a "shell game" with Fourth Amendment rights in which it claims that civil suits adequately substitute for suppression yet makes such suits more difficult to sustain. Pamela S. Karlan, *Shoe-Horning, Shell Games, and Enforcing Constitutional Rights in the Twenty-First Century*, 78 UMKC L. REV. 875, 882 (2010); *accord* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 90 (2011) (quoting Karlan, *supra*); *see also* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 711 (2011) ("The net effect of these procedures is the creation of a constitutional three-way stop, and there is no movement in any direction because each wrongly creates the illusion that the other has the right of way."). Alternative remedies are particularly meager for illegal searches. Stuntz, *supra* note 51, at 918-19.

[179] United States v. Leon, 468 U.S. 897, 902 (1984).

[180] *See* Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 796 (2003) [hereinafter *Prosecutors and Their Agents*].

branch.[181] The Department of Justice has gone even further than Congress.[182] To obtain a Title III wiretap, a federal agent must first receive approval of an Assistant United States Attorney who must submit an application to the Office of Enforcement Operations in the Electronic Surveillance Unit of the Criminal Division of the DOJ.[183] Pursuant to statute, the application then requires approval of a high-ranking DOJ official.[184] Accordingly, as with the mandatory administrative procedures in the Title III context, administrative suppression within the executive branch will likely provide additional protections for defendants' rights beyond that which the judiciary provides.[185]

Requiring prosecutors to make this administrative suppression decision is consistent with prosecutors' widely acknowledged[186] duties as members of the executive branch to interpret the Constitution.[187] This interpretive duty emerges from the duty to enforce the law because the executive must enforce the law within constitutional boundaries.[188]

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[181] Derik Fettig, *When "Good Faith" Makes Sense: Applying* Leon's *Exception to the Exclusionary Rule to the Government's Reasonable Reliance on Title III Wiretap Orders*, 49 HARV. J. LEGIS. 373, 397 (2012); *see* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, § 801(b), (d), 82 Stat. 197, 211-12.

[182] U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-7.010.

[183] *Id.* § 9-7.110; U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 90 (2009), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00090.htm; Fettig, *supra* note 181, at 397-98.

[184] 18 U.S.C. § 2516(1) (2012).

[185] *See* Fettig, *supra* note 181, at 400 (explaining that it is much easier to obtain a search warrant than wiretap authority).

[186] *E.g.*, Chemerinsky, *supra* note 90, at 292-96; Paulsen, *The Most Dangerous Branch*, *supra* note 90, at 221; Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 687 (2005); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 138 (1993) (citing GERALD GUNTHER, CONSTITUTIONAL LAW 21-28 (12th ed. 1991)).

[187] *See* Morrison, *supra* note 46, at 1226 ("[T]he executive branch (through the President) does have an independent responsibility to interpret and implement the Constitution, and . . . , depending on the constitutional norm involved, the executive's responsibility may entail enforcing the norm more robustly than the courts would.").

[188] Meese, *supra* note 90, at 985-86; Paulsen, *The Most Dangerous Branch*, *supra* note 90, at 221; Pillard, *supra* note 186, at 687; Rosenfeld, *supra* note 186, at 138; *see also* U.S. CONST. art. II, § 1 (President must take an oath to "preserve, protect and defend the Constitution of the United States"); *id.* § 3 ("[H]e shall take Care that the Laws be faithfully executed . . . .").

The executive branch has essentially complete authority vis-à-vis the other branches as to whether and how to prosecute federal cases[189] limited only by extremely deferential judicial boundaries against overreach.[190] This authority includes the power to conclude that a substantive law is unconstitutional and therefore decline to prosecute anyone under that law. President Jefferson refused to enforce the Sedition Act for that reason.[191] In fact, the executive branch is not only *permitted* to refuse enforcement of laws that it concludes are unconstitutional but may be *required* to do so.[192] Executive authority over prosecutions also includes authority to refrain from using evidence in any prosecution that is expressly rendered admissible by a statute that the executive concludes is unconstitutional. For example, since 1968 every presidential administration has refused to rely on the statute designed to supersede *Miranda v. Arizona*[193] because they concluded that it was unconstitutional.[194] As Erwin Chemerinsky explains, both the executive and judicial branches must concur to enforce a criminal law, so either branch can interpret the Constitution to block its enforcement.[195]

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[189] Brief of Benjamin R. Civiletti Amicus Curiae in Support of the United States at 11-12, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525) ("Th[e] principle of judicial non-interference extends to such basic subjects as what evidence to introduce [or] what witnesses to call . . . ."); Chemerinsky, *supra* note 90, at 292-93 ("The choice of whether to proceed with a criminal case and the decisions about how to do so are thus entirely within the discretion of the executive branch."); *see also* United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . .").

[190] There is a narrow judicial check on selective prosecution based on suspect or quasi-suspect class status. *See* Wayte v. United States, 470 U.S. 598, 607-08 (1985).

[191] Paulsen, *The Most Dangerous Branch*, *supra* note 90, at 255; *see also* Morrison v. Olson, 487 U.S. 654, 707 (1988) (Scalia, J., dissenting) ("[T]he executive can decline to prosecute under unconstitutional statutes."); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907 (1990) (explaining that the President can effectively nullify statutes by refusing to prosecute); Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 310, 311 (Paul Leicester Ford ed., 1897) ("[T]he Executive, believing the law to be unconstitutional, was bound to remit the execution of it[;] because that power has been confided to him by the Constitution.").

[192] *See* Chemerinsky, *supra* note 90, at 296; Walter Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313, 315-17 (1995).

[193] Miranda v. Arizona, 384 U.S. 436 (1966); *see* 18 U.S.C. § 3501 (2012).

[194] Chemerinsky, *supra* note 90, at 289-90. In 2000, the Supreme Court endorsed the executive's interpretation and held the *Miranda*-repealer unconstitutional in relevant part. Dickerson v. United States, 530 U.S. 428, 444 (2000).

[195] Chemerinsky, *supra* note 90, at 295; *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1041 (2006) ("[A] criminal

The executive duty to interpret the Constitution extends not only to the chief executive but also to prosecutors in individual cases.[196] As Strauss explains, "whenever a federal law enforcement officer decides whether there is probable cause for an arrest, the executive branch has interpreted the Fourth Amendment."[197] Similarly, for prosecutors to determine whether evidence in their cases was obtained constitutionally—and therefore whether they may use it consistent with the Fourth Amendment—merely asks prosecutors to interpret the Constitution to enforce the law.

This interpretive duty and correlative duty of administrative suppression applies to state prosecutors just as it does to federal prosecutors.[198] Michael Paulsen concludes that state executive officials have the same interpretive duties to the federal Constitution as do federal officials because the Oath Clause of Article VI requires state and federal officials to take an oath to uphold the federal Constitution.[199] But even without the Oath Clause, it is indisputable that state and local police officers are bound by the Fourth Amendment through incorporation.[200] And Strauss's point that every federal officer interprets the Constitution when she makes an arrest[201] applies equally to state and local officers. State and local prosecutors too are bound by the Fourth Amendment through incorporation, and

conviction usually requires affirmative approval by all branches of government . . . .").

[196] *See* United States v. Navarro-Vargas, 408 F.3d 1184, 1205-06 (9th Cir. 2005) (en banc) (individual prosecutor may decide not to enforce or to underenforce law that she believes is unconstitutional); *id.* at 1205 (executive "Take Care" duty can be delegated to prosecutors); John Stick, *He Doth Protest Too Much: Moderating Meese's Theory of Constitutional Interpretation*, 61 TUL. L. REV. 1079, 1089 (1987) (citing Kent Greenawalt, *Conflicts of Law and Morality-Institutions of Amelioration*, 67 VA. L. REV. 177, 217 (1981)) (arguing that prosecutor may take her personal views of constitutionality of a criminal statute into account even if the Supreme Court has upheld that statute); *see also* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011) (discussing "prosecutorial nullification," meaning when prosecutor declines to prosecute because of disagreement with the law or belief that its application would be unwise or unfair).

[197] Strauss, *supra* note 48, at 114.

[198] *See* Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 180 (1986) (the Constitution "implies that all legislators and public officials, *both state and federal*, are obligated to interpret the Constitution" (emphasis added)).

[199] Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2735-37 (2003); Paulsen, *The Most Dangerous Branch*, *supra* note 90, at 314 n.332; *see* U.S. CONST. art. VI, cl. 3.

[200] Mapp v. Ohio, 367 U.S. 643, 650 (1961).

[201] Strauss, *supra* note 48, at 114.

any Fourth Amendment duty to refrain from using evidence applies to them just as to federal prosecutors because of incorporation.

Articulating prosecutors' duty to interpret the Constitution to determine whether the evidence in their cases was obtained constitutionally is not intended to widely embrace a vision of prosecutors having truly independent constitutional authority to depart from settled judicial interpretations.[202] Rather, it simply asks prosecutors to conduct ordinary constitutional interpretation by applying existing judicial precedent regarding the scope of the Fourth Amendment right to the facts of their cases.

In this "ordinary" mode of executive interpretation, because of the right-remedy divide, prosecutors analyzing administrative suppression will frequently face thorny questions of whether discussion of Fourth Amendment rights in a particular case is holding or dictum. Courts can (and do) simply assume without deciding that the Fourth Amendment was violated in a particular instance but that suppression is unnecessary.[203] The holding in such cases speaks only to the remedial doctrine. In other instances, however, courts may announce that a defendant's rights were (or were not) violated as they also decide that suppression is unnecessary for some remedial reason such as good faith.[204] When a court concludes that the defendant's Fourth Amendment rights were violated but that it nonetheless need not suppress evidence—as it did in *Davis*—the conclusion that the defendant's rights were violated is dictum. The court could simply have assumed it in reaching the same result. When a court concludes that the defendant's rights were not violated, it may be difficult to know whether the right or remedy conclusion represents the holding.

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[202] There is extensive literature addressing how much deference executive officials owe to judicial interpretations, including whether judicial interpretations bind executive officials. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997) (arguing that executive officials are bound by judicial decisions); Paulsen, *The Most Dangerous Branch*, *supra* note 90, at 334-35, 344 (arguing that executive officials owe judicial decisions "very high respect" but are not bound by them); Rosenfeld, *supra* note 186, at 173 (executive officials owe obligation to judicial precedent equal to members of Supreme Court); Strauss, *supra* note 48, at 127 (same).

[203] *See, e.g.*, Herring v. United States, 555 U.S. 135, 139 (2009) (assuming Fourth Amendment violation); *see also* Marceau, *supra* note 178, at 733-42 (describing courts' reliance on exceptions to exclusionary rule to avoid deciding existence of Fourth Amendment violations); *id.* at 732 (explaining that addressing "the merits of the Fourth Amendment" without any available remedy would be pure dictum).

[204] *See, e.g.*, Davis v. United States, 131 S. Ct. 2419, 2428 (2011) (explaining that the question before the Court is whether the exclusionary rule should apply even though "the search turned out to be unconstitutional").

Once a prosecutor separates holding from dictum, the question remains how much deference prosecutors should give dictum addressing the scope of the Fourth Amendment right. They should treat dictum defining the scope of the Fourth Amendment right as do lower federal courts.[205] To the extent that it conflicts with prior holdings, dictum should not serve as a basis for administrative suppression decisions. But to the extent that dictum is consistent with prior holdings, is carefully considered, and illuminates questions as to which there is no binding holding in the jurisdiction, dictum merits considerable weight.

If prosecutors were to base their administrative suppression decisions on existing case law that approach could potentially prompt the judiciary to more frequently adjudicate the scope of a defendant's rights rather than simply holding that no remedy would apply regardless of a violation because the practical impact of those judicial decisions would increase significantly.[206] Additional rights-based adjudications would promote Fourth Amendment law development and could prevent future rights violations by adding clarity.[207] A more potent executive-branch remedy for a constitutional violation might

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[205] *See, e.g.*, Winslow v. FERC, 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("'[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative.'"); Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings . . . ."); McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) ("[M]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement though technically dictum, must carry great weight, and may even be regarded as conclusive." (internal quotation marks and omissions deleted)); United States v. Bell, 524 F.2d 202, 206 (2d Cir. 1975) (Supreme Court dictum "must be given considerable weight").

[206] *See* Albert W. Alschuler, Herring v. United States: *A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 463 (2009) (broad reading of *Herring*'s good faith exception would "block judicial development of the law of search and seizure"); *see also* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 413 (2012) ("Rights-making is so important that in many circumstances it trumps other reservations we may have about various disadvantages associated with [rights before remedy] qualified immunity adjudication.").

[207] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009) (deciding scope of right before availability of remedy "promotes the development of constitutional precedent"); Jack M. Beerman, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 149 (explaining importance of deciding right before remedy to law development); Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 253-57 (analyzing problems with existing criminal and civil remedies jurisprudence in facilitating Fourth Amendment law development).

mitigate the lack of incentive that a weak judicial remedy creates for defendants to "seek the law's elaboration."[208]

Administrative suppression should incorporate an administrative law separation-of-functions construct: the prosecutor who analyzes the need for administrative suppression should not be someone who was involved in authorizing or advising regarding the searches or seizures in question.[209] The second prosecutor's review would not be as badly skewed by tunnel vision or confirmation bias as would a prosecutor involved earlier in the case, and the anticipation of this second prosecutor's review should have a debiasing effect on the first prosecutor's decisionmaking.[210] Moreover, separation of functions is consistent with already existing ethical precepts for prosecutors[211] and

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[208] Karlan, *supra* note 178, at 887-88 (internal quotations omitted). These additional rights-based adjudications could redound to the detriment of defendants because courts are inclined to rule against guilty defendants caught red-handed. Stuntz, *supra* note 51, at 883-84, 912-13; *see also* Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 39 (2013) (court's knowledge that defendant was caught with contraband has tendency to sway court in favor of government on Fourth Amendment issue). In that respect, Fourth Amendment rights adjudication in criminal cases seems rather different than in civil cases with innocent plaintiffs. *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98-100 (1999) (explaining that reducing cost of finding constitutional violation allows constitutional law to grow and develop).

[209] *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 898 (2009) ("[P]rosecutors who are involved with the investigation of a case—including involvement in any decision about a case that is made pre-indictment, such as decisions to seek warrants or to bring someone before a grand jury—should be prevented from making adjudicative decisions."). A panel of prosecutors would probably bring greater accuracy to administrative suppression decisions, *see id.* at 901, but that may be impractical in many instances.

[210] *See* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 26, 128 (2012); Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 525-26 (2007) [hereinafter, Burke, *Neutralizing Cognitive Bias*]; *see also id.* at 516-18 (explaining belief perseverance, cognitive bias, selective information processing, and tunnel vision in prosecutorial context); Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 95 (2010) [hereinafter *Prosecutorial Agnosticism*] ("[B]elief perseverance describes the tendency of people to adhere to their prior beliefs even when contradictory evidence firmly refutes them."); Richman, *Prosecutors and Their Agents*, *supra* note 180, at 803 ("[P]rosecutors who have helped call the shots in an investigation will be hard pressed to retain their magisterial perspective not just about the tactics used in the investigation, but about whether charges should be pursued thereafter."); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 881 (1975).

[211] *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.2(e)

with prosecutors' existing duties to independently assess their cases.[212] Prosecutors' offices could be well served to designate a group of prosecutors as the administrative suppression analysts, who could develop greater Fourth Amendment expertise and would be further removed from the adversarial cauldron.[213]

Even if the prosecutor believes that a search or seizure was unconstitutional under existing law, she may nonetheless rely on the evidence if she can make a good-faith argument for an extension, modification, or reversal of existing law that would render the search or seizure constitutional.[214] Although this good-faith argument extension might seem to collapse administrative suppression decisions onto judicial suppression, good-faith extension arguments under administrative suppression apply only to constitutionality and not to admissibility.

Requiring prosecutors to make administrative suppression decisions would incorporate Fourth Amendment analysis into what scholars have labeled our administrative system of criminal justice.[215] Our criminal justice system is largely administrative because prosecutors make the important decisions subject to limited judicial review.[216] But some important decisions, including decisions regarding constitutionality of searches and seizures, remain largely exogenous[217] to the current administrative model, which undermines their practical

(2008) ("Generally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation.").

[212] *See id.* §§ 1.3(a)(ii), 2.13(b)(i), 2.17(a); MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2002); *Recommendation*, 2008 A.B.A. SEC. CRIM. JUST. REP. 105D, at 45.

[213] *See* MEDWED, *supra* note 210, at 26 (suggesting that prosecutors' offices might wish to designate charging specialists to provide independent viewpoint and debiasing); *cf.* Andrew M. Perlman, *A Behavioral Theory of Legal Ethics* 30 (Suffolk Univ. Law Sch., Working Paper No. 13-31, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320605 (suggesting that lawyers seek second opinions from objective observers as a way to minimize adversarial bias in determining what the law permits).

[214] *See* MODEL RULES OF PROF'L CONDUCT R. 3.1.

[215] *See, e.g.*, Lynch, *supra* note 29.

[216] *See* sources cited *supra* note 30.

[217] According to Miller & Wright, prosecutors do consider how courts would likely rule on the admissibility of evidence, Miller & Wright, *Black Box*, *supra* note 2, at 138, but unconstitutionality is not itself sufficient to result in inadmissibility. Moreover, the "executive exclusionary rule" is predictive rather than adjudicative and is simply meant to prevent prosecutors from wasting resources on motions they are likely to lose; prosecutors may therefore opt to take the risk and try to use evidence even if they as adjudicators would conclude it was unconstitutionally-obtained.

import.[218] Early plea agreements cause defendants to rarely file suppression motions.[219] The vast majority of state and federal convictions result from guilty pleas.[220] And because prosecutors seek guilty pleas primarily to alleviate docket congestion,[221] the sooner a case can plead out the better. Accordingly, prosecutors frequently offer favorable early plea deals.[222] Prosecutors sometimes offer deals that expire[223] or degrade[224] if a defendant files a suppression motion. Some plea offers include recommending a time-served sentence. For the vast majority of defendants incarcerated pending trial, time served is an

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[218] *See* Lynch, *supra* note 29.

[219] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (plea bargaining "*is* the criminal justice system" (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992))); Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

[220] *Frye*, 132 S. Ct. at 1407 (citing Padilla v. Kentucky, 130 S. Ct. 1473, 1485-86 (2010)); SEAN ROSENMERKEL ET AL., BUREAU OF JUST. STAT., U.S. DEP'T. OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES 1 (2010), *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf; *Table 5.22.2009: Criminal Defendants Disposed of in U.S. District Courts*, SOURCEBOOK CRIM. JUST. STAT. ONLINE, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (last visited Feb. 14, 2014).

[221] *See Frye*, 132 S. Ct. at 1407; George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 865 (2000) ("Prosecutors of the nineteenth century, like prosecutors today, plea bargained to ease their crushing workloads, made heavier in the nineteenth century both by their part-time status and utter lack of staff and by a caseload explosion perhaps set off by newly founded police forces and massive immigration."); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process*, 46 LOY. L.A. L. REV. 457, 466-67 (2013) (citing Fisher, *supra*).

[222] *See, e.g.*, United States v. Vanderwerff, No. 12-cr-00069, 2012 WL 2514933, at *1 (D. Colo. June 28, 2012) (describing guilty plea based on plea agreement shortly after indictment as "characteristic of modern criminal justice"); *see also* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 64 (2011) (describing hypothetical prosecutor's "one-time offer"); George C. Thomas III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1966 (2004) ("[M]ost of the cases will be plea bargained before any motion to suppress . . . .").

[223] *See* J.A. Gilboy, *Guilty Plea Negotiations and the Exclusionary Rule of Evidence: A Case Study of Chicago Narcotics Courts*, 67 J. CRIM. L. & CRIMINOLOGY 89, 93-95 (1976); *see also* Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1407 (1986) (plea bargaining may deter filing suppression motions because prosecutors may retaliate).

[224] *See, e.g.*, Ann Marimow, *Suspected D.C. Drug Kingpin Offered Plea Deal*, WASH. POST (Jan. 16, 2013), http://www.washingtonpost.com/local/suspected-dc-drug-kingpin-offered-plea-deal/2013/01/16/7d8dd196-6011-11e2-9940-6fc488f3fecd_story.html (explaining that defendant was offered shorter sentence under plea deal waiving right to challenge use of wiretaps than under plea deal that preserved rights to challenge wiretap and appeal).

extremely welcome disposition.[225] A defendant with a meritorious suppression motion could rationally prefer going home on time served than sitting in jail for the time necessary to brief, argue, and receive a ruling on their motion, or perhaps through a full trial and appeal.[226] For defendants without a nearly-bulletproof suppression motion, time served is an offer they can't refuse. A defense attorney would have to be extremely confident in a suppression motion and extremely persuasive to convince his client to decline an early plea offer in favor of filing a motion.[227]

Administrative suppression resembles some features of the prosecutor "hard screening" procedure that Ron Wright and Marc Miller advocate.[228] Hard screening requires prosecutors to take a hard look at their cases at the charging stage and test various sources of evidence rather than relying solely on the police file and the officers' evaluation.[229] Administrative suppression too requires prosecutors to take a hard look at their cases at the charging stage beyond merely the police report with a focus on the constitutionality of the searches and seizures that generated their evidence. Hard screening also requires "reasoned evaluation," meaning that prosecutors should not charge every crime that seems provable but only those that "deserve prosecution and punishment" and are resource justified.[230] Reasoned evaluation supports prosecutors declining to charge even provable cases.[231] Although administrative suppression does not advocate a

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[225] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1136 (2008) ("The trial course is long; even if convicted, the defendant often has already served any postconviction sentence, and then some. . . . If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment. Any plea that frees this defendant may be more than advisable—it may be salvation."); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW 86 (2010) ("Never before in our history, though, have such an extraordinary number of people felt compelled to plead guilty, even if they are innocent . . . ."); MEDWED, *supra* note 210, at 53-54 (explaining that a "sizable number" of innocent defendants plead guilty, and at least some of these pleas are rational choices).

[226] *See* 28 U.S.C. § 1291 (2012). The time from an unsuccessful motion to a final judgment on an appeal could be shortened if the defendant enters a conditional guilty plea and reserves the right to appeal, *see, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1855 (2011); Carr v. United States, 560 U.S. 438, 442 (2010), but the appellate process may still take years, which is a far cry from time served.

[227] Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 321 (2005).

[228] Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 28, at 104-10.

[229] *Id.* at 104.

[230] *Id.* at 105.

[231] *Id.* at 106.

focus based on just deserts, it similarly embraces the notion that some charges should not be brought even if they could in fact be proven in court with admissible evidence. Despite sufficiency of admissible evidence, prosecutors should nonetheless—as a constitutionally-required screening principle—refuse to charge cases that rely on what prosecutors determine to be unconstitutionally-obtained evidence. Although administrative suppression is not limited to the screening decision, screening constitutes its most important application because of the prevalence of guilty pleas.

To sum up Parts I and II together, the Fourth Amendment prohibits the executive branch from using not-sufficiently-attenuated fruits of an unconstitutional search against the victim of the constitutional violation except for impeachment.[232] To implement this duty, prosecutors must therefore determine whether the evidence in their cases was obtained in violation of the Fourth Amendment. If they conclude that a piece of evidence was obtained unconstitutionally and it does not fall within one of the rights-based limitations on suppression, they must administratively suppress it even if the judiciary would not suppress that evidence. That this executive duty exceeds the judicial duty to enforce the Fourth Amendment is a facet of underenforcement that emerges from the explicit divide between Fourth Amendment rights and remedies.[233] Calling on prosecutors to interpret judicial precedent to determine when they must administratively suppress evidence adheres to the well-accepted notion that members of the executive branch must interpret the Constitution. Accordingly, although the judiciary need not check a co-equal branch of government to purge illicit governmental benefit by excluding all unconstitutionally-obtained evidence, the executive is constitutionally obligated to check itself in that manner. Indeed, "the prosecutor" is the answer to then-Judge Burger's question: "who will watch the watchman."[234]

III. PROSECUTORS' ETHICAL RESPONSIBILITIES

In a brief informal opinion from 1936, the ABA recognized prosecutors' ethical duty to refrain from using at least some admissible

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[232] *See supra* notes 52-65, 135-170 and accompanying text.

[233] *See* SAGER, *supra* note 4, at 116 (where Court's decisions not intended to exhaust full meaning of constitutional norm it is non-sequitur to limit political branches to "deference-drenched" doctrine).

[234] *See* Burger, *supra* note 54, at 2-3.

but illegally-obtained evidence;[235] however, the contours of that duty were never articulated and it has never been theorized. This Article posits that prosecutors' responsibilities to their constituencies to promote rights protection and public safety provide a theoretical justification for that duty. Prosecutors' role as an intra-executive branch check to encourage police to comply with the law creates a duty to administratively suppress all fruits of a constitutional violation. The constitutional duty of administrative suppression incorporates exceptions for attenuation, standing, independent source, and impeachment.[236] The ethical duty exceeds that constitutional floor, however, and allows for a so-called exception only when the source of challenged evidence is actually independent of the violation.

That prosecutors' ethical duties exceed constitutional minimums is not unique to the administrative suppression context.[237] Prosecutors' ethical duties to disclose exculpatory evidence exceed *Brady v. Maryland*'s[238] constitutional floor.[239] As a matter of due process, the government need only disclose material, exculpatory evidence.[240] Yet the ethical rules require prosecutors to disclose exculpatory evidence even when not material.[241] Due process does not require disclosure of

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[235] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 150 (1936).

[236] *See supra* Part II.

[237] *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 899 (2012) [hereinafter *Professional Regulation*]; *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 47 n.6 (1991) ("Most commentators fail to recognize that prosecutors' ethical obligations may differ from their constitutional responsibilities."); *id.* at 47 n.7 ("Hence, the [Model] Code [of Professional Responsibility] secures protections not contemplated by the Constitution." (quoting United States v. Hammad, 846 F.2d 854, 859 (2d Cir. 1988))).

[238] Brady v. Maryland, 373 U.S. 83 (1963).

[239] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.11 cmt. (1993); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 498 (2009) [hereinafter *Revisiting Prosecutorial Disclosure*]; Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 328 (2001) [hereinafter *Prosecutor's Duty to Truth*]; Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure in Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57, 67, 74 (2011); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 616 (1999) [hereinafter *Seek Justice*]; Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 app. at 485-86 (2009) (Report to the ABA Commission on Evaluation of the Rules of Professional Conduct Concerning Rule 3.8 of the ABA Model Rules of Professional Conduct: Special Responsibilities of a Prosecutor); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 909 (1995); *see* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

[240] *Brady*, 373 U.S. at 87.

[241] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009);

evidence that is inadmissible, cumulative, or that the defense can acquire with reasonable diligence;[242] ethical rules contain no such limitations.[243]

Moreover, *Brady* is not the only context in which prosecutors' ethical duties exceed constitutional minimums. Prosecutors should present evidence to a grand jury that tends to negate guilt or mitigate an offense, though due process does not so require.[244] Prosecutors also bear an ethical responsibility to help investigate and rectify possible wrongful convictions,[245] which due process does not require.[246]

Part A of this section provides background on existing ethical standards for prosecutors. Part B then explains why the ethical responsibilities embodied in those standards should be read to create an ethical duty of administrative suppression.

Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1628-29 (2006); Green, *Professional Regulation*, *supra* note 237, at 884.

[242] Gershman, *Prosecutor's Duty to Truth*, *supra* note 239, at 328.

[243] *Id.*; *see* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2002) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of *all* evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. . . ." (emphasis added)). Commentators recognize that prosecutors violate *Brady* not infrequently. *E.g.*, Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 401-03 (2007); Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 22 (2010). The lack of *Brady* compliance suggests that prosecutors may be unlikely to embrace administrative suppression, which would presumably be damaging to prosecutors' chances of conviction. How to encourage prosecutors to administratively suppress evidence and whether to sanction violations is addressed below. *See infra* Part III.B.4.

[244] NAT'L PROSECUTION STANDARDS § 3-3.5(a) (Nat'l Dist. Att'ys Ass'n 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.6(b) & cmt.

[245] MODEL RULES OF PROF'L CONDUCT R. 3.8(g)(2)(ii) (investigate); *id.* 3.8(h) (remediate); Kuckes, *supra* note 227, at 431.

[246] *See* Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (describing due process duty to disclose exculpatory or mitigating evidence before trial and ethical duty to inform others of later-discovered evidence casting doubt on conviction); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 780 n.46 (2010) (same); Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 320 (2010) (explaining that wrongful conviction amendments to Model Rule 3.8 impose *new* duties on prosecutors).

A. *Background*

Prosecutors have a well-recognized ethical duty not merely to seek convictions but to serve as "minister[s] of justice."[247] This minister of justice duty stems from the nature of the prosecutor's client—the public as a whole.[248]

Analyzing the minister of justice duty is difficult to do in isolation,[249] but it transcends that of an advocate for a private client; the prosecutor bears "specific obligations to see that the defendant is accorded procedural justice," which "may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation" to guard the rights of defendants.[250] "Prosecutors have a

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[247] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *accord* United States v. Agurs, 427 U.S. 97, 110-11 (1976) (prosecutors should ensure that "justice shall be done"); Berger v. United States, 295 U.S. 78, 88 (1935) (same); NAT'L PROSECUTION STANDARDS § 1-1.1 ("The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice . . . ."); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(c) ("The duty of the prosecutor is to seek justice, not merely to convict.").

[248] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.2(b) (2008); Green, *Seek Justice*, *supra* note 239, at 625; Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1127 (2011) [hereinafter *ABA's Project*] (Summer 2010 Proposed Prosecution Function Standard 3-1.4); Rory K. Little, *"It's Not My Problem?" Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685, 687 (2010) [hereinafter *Not My Problem*]; *see also Agurs*, 427 U.S. at 110-11 ("For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.'"); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 160 (1969) ("Uncle Sam is not an ordinary client. Uncle Sam always wins when justice is done. This means he may lose when judgment is entered for him, and he may win when judgment is entered against him."); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 77-78 (2011) (public prosecution system meant to vest public's trust in single prosecutor to act on people's behalf).

[249] *See* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 638 (2006) [hereinafter *Character and Context*]; Green, *Seek Justice*, *supra* note 239, at 618; Little, *Not My Problem*, *supra* note 248, at 688.

[250] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1; *see also* Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 972 n.59 (2005) ("The ethics rules assume that procedural justice is a societal goal."); Little, *ABA's Project*, *supra* note 248, at 1143 (Summer 2010 Proposed Prosecution Function Standard 3-4.6) ("The prosecutor's obligation to enforce the law while exercising sound discretion includes honoring the constitutional and legal rights of suspects, defendants, and victims."); Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 303 (2009) (duty to seek justice "is also quite commonly understood to mean that prosecutors should 'play by the rules' and should

duty as 'ministers of justice' to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends."[251]

American Bar Association ("ABA") Model Rule 3.8 addresses the unique duties of prosecutors.[252] Relevant to this Article, Rule 3.8 provides, "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge *that the prosecutor knows* is not supported by probable cause."[253] By specifying "that the prosecutor knows," Rule 3.8 requires prosecutors to exercise independent judgment.[254] Although Rule 3.8(a) addresses only probable cause,[255] the ABA Prosecutorial Investigation standards reach more broadly.[256] The ABA

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ensure that defendants are afforded a fair process").

[251] *See* R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. (forthcoming 2014) (manuscript at 103) [hereinafter *(Ad)ministering Justice*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328274.

[252] MODEL RULES OF PROF'L CONDUCT R. 3.8. The bulk of the ABA Model Rules apply to prosecutors just as they do to private attorneys. *See* Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573, 1576 [hereinafter *Ethics As Usual*]. But prosecutors' duties vary from private counsel's because prosecutors do different work involving grand juries and warrants, face different procedural rules regarding disclosure, bear a higher burden of proof, and because the prosecutor must make many decisions that clients would make in private litigation. Green, *Ethics As Usual*, *supra*, at 1576-77.

[253] MODEL RULES OF PROF'L CONDUCT R. 3.8 (emphasis added).

[254] *See id.* 3.8(a); *Recommendation*, *supra* note 212, at 45 (perhaps no principle in ABA Prosecutorial Investigation Standards is "more critical than the need for the prosecutor to exercise independent judgment throughout the process"); *see also* Gershman, *Prosecutor's Duty to Truth*, *supra* note 239, at 342 (prosecutors should approach cases with "healthy skepticism"); Uviller, *Neutral Prosecutor*, *supra* note 30, at 1704 (urging prosecutors to act as "inquisitive neutral[s]").

[255] MODEL RULES OF PROF'L CONDUCT R. 3.8(a).

[256] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS §§ 1.3(a)(ii), 2.13(b)(i), 2.17(a) (2008); *see also* NAT'L PROSECUTION STANDARDS § 1-1.1 (Nat'l Dist. Att'ys Ass'n 2009); Green, *Professional Regulation*, *supra* note 237, at 877 (describing ABA Criminal Justice Standards as meant to provide guidance on broader set of issues than model rules).

State ethical rules across much of the country follow the ABA Model Rules. Those state ethical standards provide the basis for professional discipline. The ABA Criminal Justice Standards, in contrast, are practice guidelines meant "as a guide to professional conduct and performance" that are not intended to serve as the basis of professional discipline or civil liability. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (1993). Despite their lack of enforceability, the Criminal Justice Standards provide an important source of guidance for the ethical practice of criminal law. As of 2009, they had been cited in more than 120 Supreme Court and 700 federal circuit court opinions, and court rules in several states had adopted them. Martin

Criminal Justice Standards Committee noted that perhaps no duty in the Prosecutorial Investigation Standards was "more critical" than that of the prosecutor to exercise independent judgment.[257] Several commentators have persuasively argued that this independent judgment duty requires prosecutors to satisfy themselves that a defendant is guilty before bringing charges,[258] and the ABA has proposed incorporating that standard.[259]

Prosecutors' minister of justice duty sometimes diverges sharply from private counsel's responsibilities even in the courtroom.[260] For instance, prosecutors ethically may not discredit a witness through cross-examination that they know is testifying truthfully.[261] A criminal defense attorney, by contrast, is not only permitted but probably *required* to seek to discredit adverse testimony even if she knows it to be truthful.[262] Civil counsel need not pull punches in cross-

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Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST., Winter 2009, at 10-12; *see also* Ellen S. Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159, 1175 (2011) ("The Standards, however, provide an opportunity to offer hortatory advice that can improve the legal process." (footnotes omitted)). Moreover, although the Prosecutorial Investigation Standards "address the investigative stage of the criminal justice process," STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.1(a), they also apply to prosecutors' charging and case-presenting responsibilities because decisions made at those later stages significantly impact future investigations.

[257] *Recommendation*, *supra* note 212, at 45.

[258] MONROE H. FRIEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 292 (4th ed. 2010); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522 (1993) [hereinafter *Moral Standard*]; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 699-700. *But see* Burke, *Prosecutorial Agnosticism*, *supra* note 210, at 79, 99-100; H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973). These articles advocate various thresholds of certainty for prosecutors' charging decision. *See* FRIEDMAN & SMITH, *supra*, at 292 (beyond a reasonable doubt); Gershman, *Moral Standard*, *supra*, at 530 (requiring moral certainty); Melilli, *supra*, at 701 (beyond a reasonable doubt).

[259] Little, *ABA's Project*, *supra* note 248, at 1120-21, 1143 (Summer 2010 Proposed Revisions to Standard 3-4.5).

[260] *See, e.g.*, Cassidy, *(Ad)ministering Justice*, *supra* note 239, at 113 (describing "critical ethical inquiry in [courtroom] context [a]s whether and how [prosecutors'] zeal should be tempered by the prosecutor's additional obligation as a 'minister of justice'"); Joy, *supra* note 250, at 979 (contrasting prosecutors' courtroom obligations with defense attorneys'); *see also* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 224-26 (1988) (rejecting idea that prosecutor's role becomes purely adversarial at trial).

[261] NAT'L PROSECUTION STANDARDS § 6-6.4; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.7(b); Green, *Seek Justice*, *supra* note 239, at 632.

[262] *See* STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.6(b) (1993)

examination.[263] Prosecutors must call procedural errors to the court's attention,[264] though private lawyers face no such obligation.[265]

As ministers of justice, prosecutors frequently must refrain from introducing reliable, probative evidence.[266] For instance, prosecutors should not offer tangible evidence that would advance the pursuit of truth absent "a reasonable basis" for its admissibility,[267] and they should not bring inadmissible matters to the jury's attention.[268] Because this standard hinges on admissibility[269]—and not all relevant evidence is admissible[270]—relevance is necessary but not sufficient for a prosecutor to ethically seek to introduce evidence. Defense attorneys are similarly required to refrain from using evidence that they know is inadmissible, but the Criminal Justice Standards provide that the prosecutor should exercise "great care" and note that she should refrain from using reliable, probative evidence "in many instances;"[271] the Standards lack analogous language for defense attorneys.[272] Accordingly, the existing standards already recognize that prosecutors' minister of justice duty does not amount to simply seeking to introduce all relevant or probative evidence. All federal prosecutors have embraced this notion to some extent insofar as the Department of Justice has declined since 1968 to offer evidence of confessions obtained in violation of *Miranda* even though there was statutory authority for its admissibility and confessions can be highly probative.[273]

("Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."); *id.* § 4-7.6 cmt. ("Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." (quoting United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part))); FRIEDMAN & SMITH, *supra* note 258, at 212-13.

[263] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 & cmt. 1 (2002) (duty of diligence and comment regarding zealous advocacy).

[264] *See id.* 3.8 cmt. 1.

[265] Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 228 & n.115 (2000).

[266] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6 cmt. ("It is obviously not easy to forgo using reliable and probative evidence when it is at hand, but the prosecutor must do so in many instances.").

[267] *Id.* § 3-5.6(d).

[268] *Id.* § 3-5.6(b).

[269] *Id.* § 3-5.6.

[270] *See* FED. R. EVID. 402.

[271] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.6 cmt.

[272] *See* STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.5 cmt. (1993).

[273] Chemerinsky, *supra* note 90, at 289-90. Although some illegally-obtained

Moreover, prosecutors are not ethically permitted to introduce all probative, admissible evidence. As early as the 1930s, the ABA's Committee on Professional Ethics explained that prosecutors could not ethically introduce statements that a defendant made to an attorney while in police custody obtained using a secret recording device.[274] The secret recording was illegal, but the resulting evidence was nonetheless admissible under Supreme Court precedent.[275] Yet the fact that the heavily probative recording was admissible had no bearing on the ABA's conclusion that the prosecutor could not ethically introduce it.[276] Despite some hint from the 1930 ABA informal opinion, none of the existing ethical standards currently require administrative suppression. Some standards address only admissibility of evidence rather than constitutionality of the underlying searches or seizures,[277] while others provide that prosecutors should prevent police from using illegal means to obtain evidence but do not urge particular remedial action.[278]

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confessions may lack probative value as a result of coercion, other *Miranda* violations do not result in questioned reliability.

[274] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 150 (1936).

[275] *Id.* (citing Olmstead v. United States, 277 U.S. 438 (1928)).

[276] *Id.*

[277] *See* NAT'L PROSECUTION STANDARDS § 4-2.2 (Nat'l Dist. Att'ys Ass'n 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (1993). Of course constitutionality is a subset of admissibility. *See supra* notes 66-75 and accompanying text.

[278] NAT'L PROSECUTION STANDARDS § 3-1.4; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS §§ 1.3(b), 3.5(b) (2008); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(c) cmt. Proposed changes to the Criminal Justice Standards would add "improper conduct by law enforcement" as a factor for prosecutors to consider in the charging decision, which seemingly turns on constitutionality rather than admissibility, *see* Little, *ABA's Project*, *supra* note 248, at 1143 (Summer 2010 Proposed Revisions to § 3-4.6); Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1265 (2011) [hereinafter *Prosecutorial Decisionmaking*] (2009 Proposed Revisions to § 3-5.6(6)), but it remains unclear in the proposed provision what prosecutors should do when they detect improper conduct.

The U.S. Attorneys' Manual and the National Prosecution Standards ("NPS") are exceptions to the lack of specified remedies. The U.S. Attorneys' Manual directs federal prosecutors not to present evidence to a grand jury that they personally know was the direct result of a clear constitutional violation. U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-11.231; *see also* NAT'L PROSECUTION STANDARDS § 3-3.5(b) (prosecutors should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement); *id.* § 4-8.2(b) (same). These provisions point in the right direction, but their reach is too limited insofar as they apply only to grand juries and require personal knowledge of a violation. *See* U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-11.231; *see also* NAT'L PROSECUTION STANDARDS §§ 3-3.5(b), 4-8.2. The

To serve their minister of justice duty, prosecutors bear significant responsibilities to work with and train police officers. In their interactions with police, a proposed standard would provide that prosecutors should "maintain respectful yet independent judgment."[279] Prosecutors should neither "knowingly use illegal means to obtain evidence" nor "employ or instruct or encourage others to use such means."[280] Prosecutors should affirmatively "take steps to promote compliance by law enforcement agents with the relevant legal rules."[281] To this end, prosecutors should "take the lead in assuring that investigations of criminal activities are conducted lawfully and in full and ungrudging accordance with the safeguards of the Bill of Rights."[282] Prosecutors should advise police regarding their legal obligations[283] and train police to perform their duties legally,[284] particularly with respect to search and seizure law.[285] Whenever

U.S. Attorneys' Manual is also unduly narrow in requiring that the constitutional violation be "clear." U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-11.231.

[279] Little, *ABA's Project*, *supra* note 248, at 1136 (Summer 2010 Proposed Revisions to Standard 3-3.2(a)).

[280] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(c); *accord* NAT'L PROSECUTION STANDARDS § 3-1.4.

[281] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.3(b); *see also id.* § 1.3(a), (d); Little, *ABA's Project*, *supra* note 248, at 1136 (Summer 2010 Proposed Revisions to § 3-3.2(b)) ("The prosecutor's office should strive to keep law enforcement personnel informed of relevant legal and legal ethics issues and decisions as they relate to prosecution matters . . . .").

[282] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1(c) cmt.; *accord id.* § 3-1.2 cmt. (prosecutor required "to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public"); Jackson, *supra* note 22, at 6 ("Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor."); *see also id.* at 3 (prosecutor is entrusted to do "the right thing" while preserving "the best in our American traditions").

[283] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7(a); *accord* NAT'L PROSECUTION STANDARDS § 2-5.6.

[284] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7(b); *accord* NAT'L PROSECUTION STANDARDS §§ 2-5.3, 2-5.4; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.3(d).

[285] NAT'L PROSECUTION STANDARDS § 3-2.3 ("[P]rosecutor's office should assist in training law enforcement personnel within the prosecutor's jurisdiction on the law applicable to the issuance and execution of search and arrest warrants."); *id.* § 2-5 cmt. ("[T]he prosecutor could educate the police in the area of pre-trial criminal procedure, including search and seizure law, the arrest process, the use of force, and interrogation. In particular, with respect to the various exclusionary rules pertaining to the admissibility of evidence, the prosecutor has a responsibility to educate the police on the effect of court decisions in general and their application in specific cases where evidence was suppressed by a trial court."); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.4(b) ("Prosecutors should take reasonable care to ensure

practicable, prosecutors should review and approve warrant applications.[286]

These specific provisions regarding police-prosecutor interactions point to a broader prosecutorial duty to serve as a constitutional check on police to protect constituents' rights.[287] Law-trained prosecutors understand the intricacies of Fourth Amendment jurisprudence as police officers cannot.[288] Indeed, two commentators have explained that the Department of Justice views increased involvement by prosecutors in criminal investigations as a means to avoid improper

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that investigators working at their direction or under their authority are adequately trained in the standards governing the issuance of arrest and search warrants . . . .").

[286] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 2.8(d); *see also* NAT'L PROSECUTION STANDARDS § 3-2.1 ("The prosecutor's office should develop and maintain a system for providing law enforcement with the opportunity for a prompt legal review of search and arrest warrant applications before the applications are submitted to a judicial officer."); *id.* § 3-2 cmt. ("The standard suggests the prosecutor's review of warrants and applications for the same, whenever practical."); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.4 cmt. ("Where there is no such legal requirement of prosecutorial approval of warrants, prosecutors should nonetheless require law enforcement officers to obtain prosecutorial approval in close or difficult cases . . . .").

[287] *See* United States v. Guerrerio, 675 F. Supp. 1430, 1435 (S.D.N.Y. 1987); NAT'L PROSECUTION STANDARDS § 4-2 cmt. ("Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the [defendant]) is required."); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.1 cmt.; Jackson, *supra* note 22, at 6 ("Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor."); *id.* at 3 (prosecutor is entrusted to do "the right thing" while preserving "the best in our American traditions"); *see also* Re, *supra* note 72, at 43 (explaining that "local prosecutors steeped in legal training and attentive to judicial interpretations of constitutional rights" were responsible for overseeing the professional police force that evolved during the nineteenth century).

[288] *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7 cmt. ("Few lawyers are as well qualified to [train police on the constitutional limits of their authority] as is the prosecutor, who lives with the judicial response to police action on a day-to-day basis."); 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, 333, 345 (1991) (empirical study finding that police officers correctly answered 47.5% of the questions posed about the rules of search and seizure, while lawyers correctly answered 73% of those questions); *see also* PA. R. CRIM. P. 507 cmt. (allowing counties to require "law trained prosecutor" to approve arrest warrants to exercise "some control over the initiation of the proceedings" because prosecutor "is in the best position to assess the existence of probable cause"), *available at* http://www.pacode.com/secure/data/234/chapter5/s507.html. *But cf.* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 371 [hereinafter *Why Liberals Should Chuck the Exclusionary Rule*] (criticizing Heffernan and Lovely study for trying to draw conclusions about actual behavior from laboratory study).

behavior.[289] Prosecutor expertise also explains why some jurisdictions require prosecutor approval of warrant applications.[290] Prosecutors have, on a broad level, embraced their role as an intrabranch check insofar as the National Prosecution Standards—adopted by the National District Attorneys Association—provide that the prosecutor bears ultimate responsibility for all searches and seizures conducted in her cases, including scrutinizing the source of all evidence that she wishes to use.[291] "A prosecutor who knows or who is aware of a substantial risk that an investigation has been conducted in an improper manner, or that evidence has been illegally obtained by law enforcement, must take affirmative steps to investigate and remediate such problems."[292]

As I have developed at greater length elsewhere, prosecutors are public lawyers who should serve their constituencies' interests,[293] at least when doing so does not violate other more specific ethical obligations such as their duty to pursue charges only when supported by probable cause.[294] Because prosecutors cannot simply ask their entity-clients what objectives they should pursue, prosecutors have to make these core decisions based on their best understanding of their constituents' interests.[295] Leaving aside any potential balancing between the two, there is reason to think that American prosecutors' constituents desire civil liberties and crime control.[296]

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[289] Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 459 (2002) [hereinafter *Federal Prosecutors' Ethics*].

[290] COLO. REV. STAT. ANN. § 20-1-106.1 (West 2013) (requiring prosecutors to advise peace officers and review warrant affidavits when asked); MO. ANN. STAT. § 542.276(2)(8) (West 2013) (requiring prosecutor approval of warrant applications); PA. R. CRIM. P. 202 (2010) (authorizing counties to require prosecutor approval of search warrant applications). Pennsylvania counties have widely adopted prosecutor warrant approval pursuant to Rule 202. *See, e.g.*, Pa. R. Lehigh Cnty. R.C.R.P. 202 (2013); Pa. R. Cumberland Cnty. R.P.R. 2002a.1 (2013); Pa. R. Lycoming Cnty. R. Crim. P. L2002A (2013).

[291] *See* NAT'L PROSECUTION STANDARDS § 3-1.3.

[292] *Id.*

[293] Gold, *supra* note 248, at 75-80; *see also* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792-94 (2000).

[294] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2002).

[295] Cassidy, *(Ad)ministering Justice*, *supra* note 9, at 112 ("Because the prosecutor represents society at large, she has no personal client to direct her course of action, and must make decisions about what is in the best interests of the sovereign that ordinarily would be entrusted to a client. This unique role of both principal and agent requires the prosecutor to pursue the public interest, rather than simply pursue a conviction.").

[296] *See* Cassidy, *(Ad)ministering Justice*, *supra* note 239, at 115 ("Representing a

B. *Administrative Suppression and Ethical Responsibilities*

While ethical standards and scholars have not yet recognized a duty of administrative suppression, prosecutors' role as agents of their constituencies provides reason to recognize such a duty. More specifically, prosecutors' responsibilities to advance their constituents' interests in rights protection and crime control as well as to bear ultimate responsibility for evidence used in their cases and act as an independent intrabranch check on police provide bases for prosecutors to administratively suppress evidence that they conclude was unconstitutionally obtained.

Although administrative suppression is not now widespread in practice, following a report cataloging substantial racial profiling, Immigration and Customs Enforcement ("ICE") prosecutors in Charlotte, North Carolina have declined to prosecute deportation cases when their evidence was obtained through unconstitutional searches or seizures.[297] In immigration hearings the exclusionary rule does not apply,[298] so the administratively-suppressed evidence was nonetheless admissible.

Manhattan District Attorney, Cyrus Vance, explained that his office dismisses cases every day after concluding that a stop was unconstitutional.[299] Vance's statement is opaque as to whether it relies on predicted judicial determinations of admissibility or prosecutors' constitutionality determinations, but it could be read as embracing administrative suppression.

1. Constitutional Rights

Imposing consequences on constitutional violations encourages police to comply with their constitutional requirements, which is the lone justification the Supreme Court now offers for the judicial

sovereign requires special attention to the public interest broadly conceived, not just to procedural fairness and accuracy in the litigation of individual cases.").

[297] Cade, *supra* note 1, at 184-86.

[298] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (plurality opinion).

[299] Daniel Prendergast & Jamie Schram, *Manhattan DA Knocks NYPD's Stop-Frisk*, N.Y. POST, Sept. 24, 2013, http://nypost.com/2013/09/24/manhattan-da-rips-nypds-stop-frisk-will-prosecute-abuse/. It is much less likely that Manhattan prosecutors would be able to admit evidence obtained from an unconstitutional warrantless frisk based on exceptions to the exclusionary rule than would the ICE attorneys in North Carolina, but they could nonetheless make practical use of such evidence to obtain a plea agreement before or in lieu of a suppression motion, *see supra* notes 204-216 and accompanying text, or seek to expand exceptions to the exclusionary rule.

exclusionary rule.[300] As agents of a democratic populace, prosecutors have a responsibility to protect their constituents' constitutional rights from police intrusion.[301]

Because prosecutors do not hierarchically control law enforcement officials, they cannot use direct oversight to ensure that police conduct investigations lawfully and obtain evidence legally.[302] They can, however, perform these responsibilities indirectly through deterrence and advising. Administrative suppression would raise the expected cost of constitutional violations, which would deter and create greater incentive for police to consult prosecutors for their expertise. Prosecutors are already urged to facilitate communication with police;[303] greater communication would enhance prosecutors' role checking police within the executive branch and promote more constitutionally-informed citizen-police interactions.

When a prosecutor does not administratively suppress evidence but rather attempts to introduce unconstitutionally-obtained evidence, she

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[300] *See* Herring v. United States, 555 U.S. 135, 141 (2009) ("[W]e have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."); Morgan Cloud, *A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 475, 515 (2013) (explaining that *Davis* stands for proposition that exclusionary remedy "exists solely to deter police misconduct"); *see also, e.g.*, Kamisar, *supra* note 53, at 597-606 (explaining that deterrence was not the original basis for the exclusionary rule).

[301] *See* Jackson, *supra* note 22, at 6 ("Only by extreme care can we protect the spirit as well as the letter of our civil liberties, and to do so is a responsibility of the federal prosecutor."); *supra* Part III.A.

[302] *See* William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621, 721 ("Historically, the American police department has been independent of the prosecutor's office: that is, neither police nor prosecutor directly gives or takes orders from the other. As a result, the prosecutor . . . is unable to command police officers to conduct their searches within constitutional bounds."); Caleb Mason, *The Police-Prosecutor Relationship and the No-Contact Rule: Conflicting Incentives After* Montejo v. Louisiana *and* Maryland v. Shatzer, 58 CLEV. ST. L. REV. 747, 769 (2010) ("The prosecutor must supervise investigations, but is not in a direct chain of command with the enforcement agencies."); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 706 (1970) (describing the "independent character of most United States prosecutors and police organizations, neither of which is in a position to bring any direct command influence on the other"); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 780 (1999) ("[T]he relationship between federal investigative agencies and federal prosecutors is coordinate, not hierarchical."); *see also* Bar-Gill & Friedman, *supra* note 75, at 1626 (criticizing police and prosecutors for "behav[ing] as though they work for different entities").

[303] NAT'L PROSECUTION STANDARDS § 2-5.1 (Nat'l Dist. Att'ys Ass'n 2009) ("The chief prosecutor should actively seek to improve communications between his or her office and other law enforcement agencies.").

signals to police—and defendants—that prosecutors will overcome Fourth Amendment violations with clever lawyering. Successfully introducing unconstitutionally-obtained evidence sends a stronger signal to police that the Fourth Amendment should not seriously concern them and to citizens that Fourth Amendment protections are worth less than they might have thought.[304] Indeed, in reference to the silver platter doctrine,[305] *Mapp* explained that "the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold."[306] The implicit message from prosecutors to police is simple: unconstitutionality is not a problem unless it results in inadmissibility.[307] More specifically, only deliberate constitutional violations have costs;[308] that conclusion undermines the incentive for police caution and the incentive to seek out prosecutors' expertise.[309]

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[304] Although prosecutors have a duty as a minister of justice to do more than seek convictions, *see, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935); NAT'L PROSECUTION STANDARDS § 1-1.1; MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(c) (1993), police officers share no such obligation. And even though police officers must comply with the Fourth Amendment as part of executive enforcement of the Constitution, they may be less concerned with or aware of the details of these constitutional duties than law-trained prosecutors. *See* Mason, *supra* note 302, at 770 ("[P]rosecutors, as attorneys, have independent cultural ties and professional obligations that may not always align with those of police and agents.").

[305] The "silver platter doctrine" allowed federal prosecutors to present unconstitutionally-obtained evidence so long as federal officers did not commit the violation but rather state officers committed the violation and brought the evidence to federal prosecutors on a silver platter. *See* MACLIN, *supra* note 1, at 71-72.

[306] Mapp v. Ohio, 367 U.S. 643, 657 (1961).

[307] After California passed a ballot initiative eliminating the exclusionary rule for violations of the State's constitution, police academy manuals and legal sourcebooks encouraged police to disregard state constitutional prohibitions on certain searches. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580-81 (2008). Moreover, if an officer has seen a prosecutor successfully introduce unconstitutionally-obtained evidence more recently than she has seen the prosecutor fail to do so, she may underperceive the likelihood of judicial suppression because of the availability heuristic. *See* Christine Jolls, *On Law Enforcement with Boundedly Rational Actors*, *in* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 276 (Francesco Parisi & Vernon L. Smith eds., 2005); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

[308] *See* Herring v. United States, 555 U.S. 135, 147-48 (2009); United States v. Leon, 468 U.S. 897, 922 (1984).

[309] *See* Levinson, *supra* note 77, at 910-11 (explaining that government officials are less likely to respect rights not backed by remedies). On the need for prosecutor action to encourage greater police caution, Ron Wright and Marc Miller found that New Orleans prosecutors declined to prosecute an "exceptional number of cases," which those prosecutors viewed as a necessary step to train police to investigate more

Prosecutors cannot be meaningfully involved in investigations and serve as an intrabranch check without a strong incentive for police-prosecutor communication. Practically, however, police officers can and do conduct investigations that implicate Fourth Amendment rights without prosecutors.[310] Even though ethical standards encourage prosecutor approval of warrant applications,[311] police can obtain a warrant without prosecutor approval in most jurisdictions.[312] Similarly, prosecutors should train and advise police officers, particularly regarding the Fourth Amendment,[313] but police lack sufficient incentive to seek advice or train attentively.

The costs to police of constitutional violations are low.[314] Few suppression motions are filed,[315] and fewer still are granted.[316] Because

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thoroughly. Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 28, at 65. Declination created a practical remedy for the police deficiencies, which then encouraged police to correct their mistakes. *See id.*

[310] *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 737 (1999) [hereinafter *Proportionality*] ("Not all criminal investigative techniques require, or even involve, prosecutors. Law enforcement agents may and often do, for example, interview witnesses, obtain public records, and conduct covert surveillance, without ever consulting a prosecutor."); *see also* Uviller, *Neutral Prosecutor*, *supra* note 30, at 1702 (explaining that most prosecutions, particularly in state courts, begin with an arrest).

[311] NAT'L PROSECUTION STANDARDS § 3-2.1 cmt. (Nat'l Dist. Att'ys Ass'n 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 2.8(d) (2008).

[312] *See, e.g.*, CAL. PENAL CODE § 1528 (West 2013); TEX. CODE CRIM. PROC. ANN. art. 18.04 (West 2013); VA. CODE ANN. § 19.2-52 (West 2013).

[313] NAT'L PROSECUTION STANDARDS §§ 2-5.3, 2-5.4, 3-2.3; *id.* § 2-5 cmt.; STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.3(d); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7(b) & cmt. (1993). The good-faith exception relies on the notion of a "reasonably well trained officer." *Leon*, 468 U.S. at 923; *see also* Logan, *supra* note 178, at 106 (arguing that courts should create an incentive for police departments to expand and enhance the quality of training).

[314] Similarly, before *Mapp* incorporated the exclusionary rule, police officers had little incentive to comply with the Fourth Amendment because there was no risk of lost evidence. *See* MACLIN, *supra* note 1, at 84-85 ("[N]either the [Los Angeles] district attorney's office nor the Los Angeles Police Department 'paid any attention' to Fourth Amendment rules until the exclusionary rule was applied to the states." (quotation omitted)); Sidney D. Zion, *Detectives Get a Course in Law*, N.Y. TIMES, Apr. 28, 1965, at 50 (high-ranking New York police officer: "evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?").

[315] *See* Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585, 595 tbl.2 (1983) (motions to suppress physical evidence filed in only 4.6% of cases). This empirical data is neither recent nor a representative sample, *id.* at 606, but given the increasing prevalence of early guilty pleas a recent statistic may be even lower.

[316] *Id.* at 596 (motions to exclude physical evidence have 16.9% success rate). Given the frequency of filing and success rate, motions to suppress physical evidence

of the good-faith exception, admissibility is nearly guaranteed in the warrant context absent fraud by the affiant,[317] and some deference exists too outside the warrant context.[318] Moreover, judges are inclined to deny suppression motions because people who file them are guilty and have typically been caught with contraband.[319] Under the status quo, prosecutors and police officers can operate in separate spheres,[320] but this insular model does not comport with prosecutors' intrabranch checking role.[321]

Important or high-profile cases are the exception to the lack of incentive for police caution because the expected short-term cost of suppression in bad publicity or in allowing a dangerous criminal to go free is so high that a fairly risk-neutral officer would be cautious of suppression despite its low probability.[322]

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succeeded in only 0.69% of cases according to Nardulli's study. *Id.* at 598 tbl.8; *see also* RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES 57 (1984) (finding that suppression motion success ranged from only 0–2% in six out of seven jurisdictions studied); Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1375 (2008) (citing studies showing that federal courts excluded unlawfully-seized evidence in only 1.3% of all federal criminal cases and 0.7% of the state court cases). Because *Herring* and *Davis* narrowed the exclusionary rule significantly over the past few years, *see* MACLIN, *supra* note 1, at 336-44, current numbers are likely lower still.

[317] *See* 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 (2010) [hereinafter *Over-Deterrence Hypothesis*]; John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 166 (2005); Elizabeth Canter, Note, *A Fourth Amendment Metamorphosis: How Fourth Amendment Remedies and Regulations Facilitated the Expansion of the Threshold Inquiry*, 95 VA. L. REV. 155, 179-81 (2009); Rosemarie A. Lynskey, Note, *A Middle Ground Approach to the Exclusionary Remedy: Reconciling the Redaction Doctrine with* United States v. Leon, 41 VAND. L. REV. 811, 830-34 (1988).

[318] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3(h) at 146 n.227 (5th ed. 2012) (*Davis* omits "attenuation," the most significant limitation on *Herring*'s holding that negligent conduct does not warrant suppression); MACLIN, *supra* note 1, at 336-44 (describing broad understanding of *Herring* and *Davis*'s good-faith exceptions outside warrant context); Slobogin, *Is It on Its Way Out?*, *supra* note 8, at 342 (reading *Herring* and *Davis* to suggest that Court is ready to apply good-faith exception more broadly to warrantless intrusions).

[319] *See* Amar, *supra* note 172, at 799; Baradaran, *supra* note 208, at 39; Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 959-66 (1983); Jacobi, *supra* note 51, at 656-60; Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 288, at 403; Stuntz, *supra* note 51, at 912-13.

[320] *See* Little, *Proportionality*, *supra* note 310, at 737.

[321] *See supra* notes 283-286 and accompanying text.

[322] *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An*

Administrative suppression would increase the likelihood of "suppression-in-fact."[323] Administrative suppression would also provide greater incentive for prosecutors to inform police of administrative suppression decisions.[324] Greater officer awareness would in turn raise police officers' perception of the expected cost of a violation.

When prosecutors inform police officers of their decisions to administratively suppress evidence, those conversations will also affect officers' perceptions of the probability of suppression-in-fact by increasing salience and observed frequency.[325] This conclusion builds on the behavioral economics notion that the perceived probability of certain events are skewed based on the ease with which an instance comes to the decisionmaker's mind.[326] If prosecutors confront police officers to inform them of administrative suppression decisions, those discussions would increase the vividness of suppression-in-fact, much like the behavioral economics example of printing parking tickets on brightly-colored paper.[327] Moreover, those discussions following administrative suppression would occur much closer in time to the violations than would conversations following a successful judicial

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Exclusionary Rule in the Chicago Criminal Courts, 63 U. COLO. L. REV. 75, 85-86 (1992) (describing police officers' greater interest in obtaining a conviction in "serious" or "big" cases and finding that this heightened interest increases Fourth Amendment compliance in such cases); *see also id.* at 89 (explaining that 24% of judges, prosecutors, and public defenders polled thought that officers did not care when evidence was suppressed in a small case).

[323] *See* Miller & Wright, *Black Box*, *supra* note 2, at 138 ("executive exclusion" occurred far more frequently than judicial suppression in data set). That number would be larger still if it encompassed searches or seizures that prosecutors concluded were unconstitutional but nonetheless generated admissible evidence because of exceptions to the exclusionary rule.

"Suppression-in-fact" encompasses both judicial suppression and administrative suppression.

[324] Prosecutors have a "responsibility to educate the police on the effect of court decisions . . . where evidence was suppressed." NAT'L PROSECUTION STANDARDS § 2-5 cmt. (Nat'l Dist. Att'ys Ass'n 2009); *accord* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7 cmt. (1993); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.3(d) (2008) (prosecutor should assist in providing training to police concerning best practices in criminal investigations); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.7(b) (prosecutor should provide services to train police to comply with the law).

[325] Jolls, *supra* note 307, at 271, 277 (discussing availability heuristic and importance of salience).

[326] *Id.*

[327] *Id.* at 276-77.

suppression motion.[328] Accordingly, administrative suppression would raise the salience and observed frequency of suppression-in-fact to a point that police would likely perceive a non-negligible expected cost of a constitutional violation even in an ordinary case.

And there is reason to think that police officers would alter their behavior to account for prosecutors' future uses of evidence. Caleb Mason argues that prosecutors should announce and follow a policy of not using statements obtained from represented defendants to adhere to prosecutorial ethical requirements even though police could constitutionally elicit such statements.[329] Police, he contends, will respond to such a policy by no longer seeking to elicit such statements because they know that the statements will be useless.[330] Jack Chin recently suggested that to achieve an important policy objective of rooting out racial profiling in criminal justice prosecutors should refrain from using admissible evidence obtained by a stop or investigation in which the officer pursued a suspect based on race.[331] ICE prosecutors in North Carolina have done as Chin advocates, systematically closing deportation proceedings in cases arising in Alamance County after a DOJ report found significant evidence of racial profiling in that county's search and seizure practices.[332] Several other commentators have recognized that police decide whether to arrest a suspect based on whether they think prosecutors will likely pursue the charges,[333] which also supports the notion that police alter their behavior to account for prosecutors' anticipated behavior. There is also good reason to think that consulting prosecutors whenever practicable before an encounter implicating the Fourth Amendment would reduce the likelihood of lost evidence.[334] The ex ante approval

[328] *See* Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases* 16 (Vanderbilt Pub. Law & Legal Theory, Working Paper No. 13-21, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247746 ("[B]ecause exclusion, on those rare occasions when it does occur, is often announced well after the search or seizure or the suppression hearing, it may not provide much of a lesson to the miscreant officer.").

[329] Mason, *supra* note 302, at 779-80.

[330] *Id.*

[331] Jack Chin, *Obama's and Holder's Objections to Profiling: Just Empty BS*, PRAWFSBLAWG (July 23, 2013, 4:46 AM), http://prawfsblawg.blogs.com/prawfsblawg/2013/07/obamas-and-holders-objections-to-profiling-just-empty-bs.html.

[332] Cade, *supra* note 1, at 184-85.

[333] STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 861 (9th ed. 2010); Fairfax, *supra* note 196, at 1266 n.91; Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 575 n.67 (1960).

[334] *See* Green & Zacharias, *Federal Prosecutors' Ethics*, *supra* note 289, at 459.

of one prosecutor will increase the likelihood of ex post approval by the prosecutor who analyzes administrative suppression.[335] Although this Article does not advocate deference by one prosecutor to another's ex ante approval, confirmation bias and selective information processing might result in a form of de facto deference.[336]

Administrative suppression will also serve as a sort of pre-commitment device for prosecutors to encourage themselves to train police regarding the scope of the Fourth Amendment right rather than merely its judicial remedy. Under the status quo, some prosecutors focus training on judicial admissibility because the practical costs of police decisionmaking hinge on this more generous admissibility standard.[337] But training geared toward judicial remedy fails to properly encourage police to protect the full scope of Fourth Amendment rights. And police officers, as members of the executive branch, must respect the broader constitutionality standard.[338] Their responsibilities are not limited by judicial remedies doctrine.[339]

Administrative suppression will also provide a pre-commitment to greater prosecutor care when reviewing warrant applications. At present, if a warrant application is denied, the police (and prosecutor) can simply come back with a slightly revised application and try again.[340] This possibility for a second bite at the apple undermines the incentive for careful scrutiny in the first instance. If a magistrate issues a warrant, admissibility is essentially guaranteed.[341] As a matter of time

[335] *See* 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, 1065-66 (1991) (exclusionary rule provides incentive to have prosecutors review warrants).

[336] MEDWED, *supra* note 210, at 128 (describing power of "conformity effects" leading people to come to same conclusions as peers); *see* Burke, *Revisiting Prosecutorial Disclosure*, *supra* note 239, at 494-96.

[337] Dripps, *Over-Deterrence Hypothesis*, *supra* note 317, at 238; Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 946 (1986) ("[W]e can count on police bureaucracies to train and reward their officers with an eye to admissible evidence and not to abstract legality."); *see also* LaFave, *supra* note 176, at 359 (police "are no less likely than the rest of us to equate admissibility with legality"); Sklansky, *supra* note 307, at 580-81 (after California eliminated judicial exclusionary rule as matter of state law, police academy manuals and sourcebooks encouraged officers to disregard non-judicially-enforced rights).

[338] *See supra* Parts I–II.

[339] *Id.*

[340] *See* United States v. Leon, 468 U.S. 897, 974 (1984) (Stevens, J., dissenting) ("[E]ven when the police know their warrant application is probably insufficient, they retain an incentive to submit it to a magistrate, on the chance that he may take the bait.").

[341] *See supra* notes 317-319 and accompanying text.

efficiency, police and prosecutors have an incentive to see how little they can get away with. If a prosecutor reviewing a warrant application anticipated the possibility of administrative suppression, she would exercise greater care because *Leon* would not save an insufficiently-supported warrant unless it cleared the administrative suppression hurdle first.

Anecdotal evidence from California confirms that increased suppression-in-fact facilitates police-prosecutor communication and training.[342] As Governor Brown explained, California's adoption of the judicial exclusionary rule resulted in "much greater education" of police and more police-prosecutor cooperation.[343]

Administrative suppression is likely to raise the expected cost of a constitutional violation, which would facilitate more frequent police-prosecutor communication. For these reasons, prosecutors should administratively suppress evidence that they believe was unconstitutionally obtained to promote their constituencies' interests in rights protection. Administrative suppression is also likely to encourage prosecutors to confront police about constitutional violations and exercise greater care in warrant application review.

2. Crime Control

Although it seems fairly intuitive that administrative suppression would protect constitutional rights, it is perhaps far less intuitive that administrative suppression would also advance crime control efforts. The Supreme Court's exclusionary rule jurisprudence assumes the contrary about judicial suppression.[344]

As ministers of justice, prosecutors are charged not only with seeking convictions but with ensuring that guilt is adjudicated through fair procedures.[345] The procedural justice model of policing developed by Schulhofer, Tyler, and Huq provides an important reason why, as a practical matter, ensuring fair treatment for defendants is important.[346]

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[342] *See* Letter from Edmund G. Brown, Attorney Gen. of Cal., to Stanford Law Review (Dec. 7, 1956) (quoted in Elkins v. United States, 364 U.S. 206, 220-21 (1960)).

[343] *Id.*

[344] *See* Herring v. United States, 555 U.S. 135, 141 (2009) (contending that the exclusionary rule exacts "a costly toll upon . . . law enforcement objectives").

[345] Berger v. United States, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002).

[346] Schulhofer et al., *supra* note 15, at 345-49.

The procedural justice model of policing relies on empirical work demonstrating that citizens' compliance with the law and with law enforcement is dictated primarily by the extent to which they perceive their law enforcement agencies as legitimate rather than by instrumental factors such as threat of force or fear of consequences.[347] This perception of police legitimacy depends primarily on whether those who interact with the police view their treatment as fair.[348] For instance, because racial profiling is seen as unfair, if members of a community perceive profiling to be widespread they will be less supportive of and cooperative with the police.[349] It seems not terribly controversial that "[t]o be effective in lowering crime and creating secure communities, the police must be able to elicit cooperation from community residents."[350]

In the Fourth Amendment context, Schulhofer, Tyler, and Huq rightly recognize that maintaining respect for the law was one of the

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[347] *Id.* at 338, 363; *see* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 57 (2002) (concluding based on empirical studies in Chicago and California that "people are significantly more focused on the procedural justice of authorities' actions than . . . the favorability or fairness of their own outcomes" during police or judicial encounters); TYLER, *supra* note 16, at 161 (concluding based on empirical study "that legitimacy plays an important role in promoting compliance" with the law); Sunshine & Tyler, *supra* note 16, at 529 (finding that perceptions of police legitimacy had stronger correlation to citizen cooperation with police than did citizens' evaluation of risk); *id.* at 534 ("People are *not* primarily instrumental in their reactions to the police . . . ."); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. L. 231, 262-63 (2008) (concluding based on New York study that "legitimacy shapes willingness to cooperate with the police in fighting crime" and that while instrumental approaches such as creating a credible threat of punishment have some potential value, "the influence of instrumental calculations on behavior is, at best, small"); *see also* Tyler & Fagan, *supra*, at 267 ("Cooperation increases . . . when citizens see the police as legitimate authorities who are entitled to be obeyed. Such legitimacy judgments, in turn, are shaped by public views about procedural justice—the fairness of the processes the police use when dealing with members of the public.").

[348] TYLER, *supra* note 16, at 162 (explaining that views about legitimacy of authority "are strongly connected to judgments of the fairness of the procedures through which authorities make decisions"); Sunshine & Tyler, *supra* note 16, at 526 (reporting results of study concluding that procedural justice had a much stronger impact on police legitimacy than did performance evaluations or distributive justice judgments and was not based at all on citizens' estimates of risk of punishment); Tyler & Fagan, *supra* note 347, at 264-65.

[349] Tyler & Fagan, *supra* note 347, at 265 & nn.86-87; Tom R. Tyler & Cheryl J. Wakslak, *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 CRIMINOLOGY 253, 259, 262, 276 (2004).

[350] Tyler & Fagan, *supra* note 347, at 233; *see also* Sunshine & Tyler, *supra* note 16, at 518.

original bases for the judicial exclusionary rule.[351] Justice Brandeis wrote that the judicial exclusionary rule was essential to preventing the government from "becom[ing] a lawbreaker," which "breeds contempt for law."[352] Even if police violate a citizen's rights, Justice Brennan explained, the judicial exclusionary rule would "assur[e] the people . . . that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[353]

Schulhofer, Tyler, and Huq recognize that the Supreme Court's current exclusionary rule jurisprudence relies on the opposite premise from that of Justices Brandeis and Brennan. The Court now assumes that courts suppressing relevant evidence will *promote* lawlessness by reducing the likelihood of criminals facing consequences for their illegal behavior.[354] It then balances the lost value of crime deterrence attendant to lost evidence against deterrence of police misconduct.[355]

In a recent, prominent example of the procedural justice theory's import on crime control, a Vera Institute study concluded that individuals in New York City's most highly patrolled neighborhoods are eight percent less likely to report a crime to police for each additional time they have been subjected to the City's notorious stop and frisk practice.[356] Even crime *victims*—not merely bystanders—are less likely to report crimes if they have been stopped and frisked.[357]

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[351] Schulhofer et al., *supra* note 15, at 361-62.

[352] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

[353] United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

[354] Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (excluding evidence "allows many who would otherwise be incarcerated to escape the consequences of their actions").

[355] Schulhofer et al., *supra* note 15, at 362.

[356] JENNIFER FRATELLO ET AL., VERA INST. OF JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 70-73 (2013) [hereinafter TECHNICAL REPORT], *available at* http://www.vera.org/sites/default/files/resources/downloads/stop-and-frisk-technical-report-v4.pdf; *see* Michael Jacobson, *Foreword* to FRATELLO ET AL., TECHNICAL REPORT, *supra*, at 6 ("The findings of this study—most significantly, that the City's practice of stop and frisk has unintended adverse consequences resulting in a lack of trust in police and a clear unwillingness to report crimes and provide information to law enforcement—is a starting place for rebuilding trust between those communities and law enforcement."); *see also* JENNIFER FRATELLO ET AL., VERA INST. OF JUST., COMING OF AGE WITH STOP AND FRISK: EXPERIENCES, SELF-PERCEPTIONS, AND PUBLIC SAFETY IMPLICATIONS 2 (2013) [hereinafter SUMMARY REPORT], *available at* http://www.vera.org/sites/default/files/resources/downloads/stop-and-frisk-summary-report-v2.pdf.

[357] JENNIFER FRATELLO ET AL., SUMMARY REPORT, *supra* note 356, at 2, 6-7.

It might seem unusual that prosecutors would be ethically required to refrain from using evidence as to which a court would conclude that the deterrent effect on police behavior was not sufficiently weighty to justify judicial suppression, but this divergence makes sense.[358] Separation of powers and prosecutors' ethical responsibilities play an important role here. In short, judicial suppression and administrative suppression pose different queries.[359] Administrative suppression imposes a lower cost than judicial suppression because it does not impact judicial legitimacy, and it also confers greater benefit.

On the cost side, when considering the cost of judicial suppression to determine whether to create an exception to the judicial exclusionary rule, the Supreme Court analyzes this question through the lens of the fragmentary conception of government including a limited judicial role for Fourth Amendment enforcement.[360] The Court's decisions on this topic are tinged with concern about preserving separation of powers, allowing the executive branch to police itself, and preserving institutional legitimacy.[361] Under the fragmentary conception, the executive branch—not the judiciary—is tasked with primary Fourth Amendment enforcement. Judicial suppression is a last resort. When it is the prosecutor rather than the court who prevents the use of unconstitutionally-obtained evidence, that decision does not impact judicial legitimacy. Accordingly, administrative suppression does not impose the same cost as judicial suppression.

Perhaps some readers instinctively think that allowing criminals to escape conviction in the interest of teaching police a lesson does not genuinely square with prosecutors' ethical responsibility to do justice.[362] Collateral proceedings against the officer that do not undermine a possible conviction may seem preferable. The procedural justice model of policing plays an important role here to explain why

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[358] This discussion addresses the substantive overlap between the current exclusionary rule doctrine and ethical requirements. The broader notion that prosecutors should refrain from conduct that courts would permit is addressed above. *See supra* notes 260-265 and accompanying text.

[359] This Article takes as given the Supreme Court's conclusion that current judicial exclusionary rule doctrine best serves crime control. *But see* Schulhofer et al., *supra* note 15, at 362-63.

[360] *See supra* Parts I–II.

[361] *See supra* notes 131-133 and accompanying text.

[362] *See, e.g.*, Herring v. United States, 555 U.S. 135, 141 (2009) ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that offends basic concepts of the criminal justice system." (internal quotations omitted)).

existing ethical standards provide that prosecutors—as representatives of the public as a whole[363]—should ensure that defendants are afforded fair process.[364] Citizens convicted based on the fruits of a constitutional violation—and their peers—will think their treatment unfair and their government's action illegitimate even if the officer is administratively reprimanded and they are financially compensated.[365] These perceptions will erode police legitimacy and detract from citizen cooperation.[366] Rather, under the procedural justice theory, enforcing constitutional requirements against police instead of profiting from their violations is likely to support rather than suppress crime control.[367] Treating defendants fairly bolsters the legitimacy of the criminal law enforcement apparatus, which in turn serves the public's objective in crime control and increases citizens' willingness to cooperate with law enforcement.[368]

These procedural justice concerns have not prompted the Supreme Court to reinvigorate the judicial exclusionary rule,[369] but they apply with greater force to administrative suppression. Consider a generalized instance of administrative suppression: a prosecutor refrains from using evidence that she believes was obtained

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[363] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 1.2(b) (2008); Green, *Seek Justice*, *supra* note 239, at 625; *see also* Gold, *supra* note 248, at 77-78 (public prosecution system meant to vest public's trust in single prosecutor to act on people's behalf).

[364] *See* Berger v. United States, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT 3.8 cmt. 1 (2002); *see also* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws . . . ."); Sundby, *supra* note 115, at 399 ("The exclusionary rule's command, therefore, is simply an expression of the first principle of constitutional government: when accusing a citizen of a crime, government actors themselves must abide by the law and cannot resort to evidence they have obtained outside the bounds of the Constitution.").

[365] Schulhofer et al., *supra* note 15, at 363 ("[O]penly exploit[ing officials' unlawful conduct] to prosecutorial advantage in court [] is the kind of behavior that, the research establishes, tends to weaken perceived legitimacy and willingness to cooperate with law enforcement.").

[366] *Id.*

[367] *Id.*

[368] In some respects, the idea of refraining from bringing some possible charges based on unconstitutionally-obtained evidence to promote crime control is similar to Mike Cassidy's argument that in broadly serving the public interest prosecutors should support repeal of mandatory minimum sentences because they detract from public safety. Cassidy, *(Ad)ministering Justice*, *supra* note 296, at 117-119.

[369] *See* Schulhofer et al., *supra* note 15, at 363 ("[R]elaxation of the exclusionary rule represents a direct assault on the capacity of our law enforcement system to succeed in its mission of maintaining social order.").

unconstitutionally and announces that decision to the defendant or her counsel. In such an instance, although the police violated a citizen's rights, the government does not then try to profit from that violation.[370] Instead, the government admits its violation to the victim at the outset and brings no criminal charges as a result. In the administrative suppression context, the prosecutor—who the defendant may associate with the police as enforcement officials—could acknowledge the violation early in any potential proceeding and decline to charge the case altogether. In contrast, a prosecutor who seeks to exploit a constitutional violation but is prevented from doing so by the courts leaves the defendant in jeopardy and exposed to the stigma of criminal charges before the court ultimately intervenes. And if a defendant feels pressured to take an early guilty plea without filing a suppression motion, the opportunity for the court to prevent the government from exploiting its misconduct may never arise. Therefore, administrative suppression would promote crime control by enhancing the public legitimacy of criminal law enforcement and would do so more effectively than judicial suppression.

On the benefit side of the Court's current judicial exclusionary rule calculus, there are also reasons to think that administrative suppression would better deter constitutional violations than judicial suppression does. First and second, administrative suppression would increase salience and frequency of suppression in fact.[371]

Third, police and prosecutors have a historically close relationship.[372] Police could discount a judicial suppression ruling as an aberration or the act of a soft-on-crime judge. But when the suppression decision comes from a prosecutor with whom the officer works closely and who is no friend to criminals, the officer might take this decision more seriously and seek to prevent a recurrence. The nature of the relationship likely explains in part Dallin Oaks's

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[370] *See id.* (explaining that citizens' belief that authorities are legitimate and "abide by the law" is undermined by "[o]fficial disregard for the law—made evident when misconduct can be openly exploited to prosecutorial advantage in court").

[371] These two points are discussed in greater detail above. *See supra* notes 325-328 and accompanying text.

[372] *See* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 863 ("Prosecutors ordinarily are naturally aligned with the police . . . ."); *id.* at 863 n.95 ("At a minimum, prosecutors and police officers deal with each other professionally on a daily basis, and must treat each other as colleagues. They may become friends, and identify, with their counterparts."); *see also* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 203 (2d ed. 1975) (suggesting that prosecutors likely have enough credibility with law enforcement officers to convey importance of truth telling).

observation that Toronto police officers took very seriously a limited form of administrative suppression and sought to modify their conduct in response.[373]

Lastly, administrative suppression would more effectively debias police decisionmaking than would judicial suppression. Fourth Amendment questions are highly fact bound, and prosecutors will necessarily have to interview the officers involved to develop a detailed factual record on which to analyze administrative suppression.[374] Those interviews should occur under oath to add reliability to the fact gathering. Of course, simply moving an officer's sworn testimony from the courtroom to a meeting with a prosecutor does not eliminate the possibility of "testilying,"[375] but it would likely improve veracity over an unsworn interview.[376] Moreover, prosecutors are more likely than courts to be able to detect lying from officers because of their repeat exposure to the same officers and perhaps the same fake stories.[377] If prosecutors detect a lie in an officer's story and then prevent the officer from testifying falsely in a public judicial proceeding, they would prevent a loss of police credibility in the public eye—a major cost of testilying.[378] Prosecutors should also consider any factual information or legal arguments that defense attorneys raise in a proffer when determining the constitutionality of

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[373] Oaks, *supra* note 302, at 706. It is, however, worth noting that the relationship between Canadian prosecutors and police is different than in the United States and that Oaks's article is now quite dated. *Id.* As Oaks described it, Canadian prosecutors are part of the Ministry of Justice that has authority over police organizations. *Id.* Although no such direct supervision exists in the United States, *see supra* note 302, police and prosecutors maintain a close relationship, *see supra* note 372, and it seems that American police would react similarly to what Oaks describes.

[374] *See* NAT'L PROSECUTION STANDARDS § 3-1.3 (Nat'l Dist. Att'ys Ass'n 2009) (prosecutors have responsibility to investigate suspicions that evidence was obtained illegally).

[375] Instead of potentially lying under oath to protect evidence, *see* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042-43 (1996) [hereinafter *Testilying*], police officers might instead lie to the prosecutor.

[376] There is a risk that administrative suppression, particularly with questioning under oath, would undermine the closeness of the police-prosecutor relationship by positioning the prosecutor as a potential adversary to police rather than a confidante. But Oaks's article provides reason to think that this strain on police-prosecutor relations would be outweighed by the beneficial impact of administrative suppression on police decisionmaking. *See* Oaks, *supra* note 302, at 706.

[377] Gary C. Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829, 836-37 (2001).

[378] *See* Slobogin, *Testilying*, *supra* note 375, at 1039.

the searches or seizures in the case. Additional information from defense counsel may help combat prosecutors' potential tendency toward partisanship that behavioral psychology suggests is already especially pronounced when facts or law are unclear as they may be after an initial factual interview.[379] Defense attorneys might think that notifying the prosecutor in advance of a viable Fourth Amendment suppression issue would be the worst possible tactic, especially considering fears that officers might change their testimony to cover any problems. But the benefit of alerting the prosecutor in advance would be adding adversarial perspective to Fourth Amendment inquiries in the administrative system of criminal justice, and it might prevent the defendant from having to remain under a shroud of criminal charges until the motion is resolved.[380]

Social science literature on debiasing, accountability, and deliberation suggests that forcing officers to articulate their reasoning and confronting them with adverse reasoning will combat biases and lead to more rational decisionmaking.[381] Prosecutors interviewing police officers will accomplish this objective, and to the extent that prosecutors can approach interviews with information gleaned from defense counsel, they can confront officers with adverse reasoning. Moreover, officers who anticipate having to justify their decisions will also make more rational and less biased decisions.[382] Much as officers are forced to internalize the magistrate's neutrality in the warrant context,[383] officers will anticipate and internalize prosecutor neutrality if they come to expect that prosecutors will neutrally evaluate the constitutionality of their searches and seizures.[384] Although the same

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[379] Perlman, *supra* note 213, at 26-27.

[380] This approach presents an alternative to the binary of facing significant jail time until the case can be resolved or pleading guilty. *See supra* notes 215-227 and accompanying text.

[381] Oren Bar-Gill and Barry Friedman have persuasively called for reinvigorating the warrant requirement based on application of these social science concepts to police decisionmaking regarding searches and seizures. Bar-Gill & Friedman, *supra* note 75, at 1642-47.

[382] *Id.*

[383] *Id.* at 1641 (citing Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCHOL. 632, 638 (1989)).

[384] Admittedly, the benefits of requiring officers to justify their actions to prosecutors ex post are less significant than requiring officers to articulate their reasoning ex ante to obtain a warrant because prosecutors and police will suffer from the same cognitive biases that currently impact judicial suppression decisions. *See id.* at 1647. Nonetheless, accountability theory provides reason to think that officers might act more responsibly because they anticipate having to justify their conduct. *See*

results might theoretically follow from anticipating a judicial suppression hearing, the infrequency of judicial suppression hearings and officers' knowledge of that infrequency significantly undermine any potential debiasing effect they might otherwise have. Accordingly, administrative suppression would have a better debiasing effect on police decisionmaking than judicial suppression does.

In sum, administrative suppression imposes lower costs to institutional legitimacy than judicial suppression does and generates greater benefits. It therefore makes sense that a prosecutor would be required to administratively suppress evidence even when a court would conclude that the costs of judicial suppression outweigh its benefits.

There may be a few rare instances of particularly dangerous criminals where the short-term interest in crime control would counsel against administrative suppression when administrative suppression would mean dropping the case because the need for incapacitation is so important.[385] This scenario will be exceedingly rare, however, considering that Fourth Amendment issues arise most frequently in drug cases.[386]

Even though a pure act utilitarian approach might seem to counsel in favor of a dangerous-criminal exception in these exceedingly rare cases because the short-term danger to public safety would seem to outweigh countervailing long-term safety and constitutional rights concerns, such an exception risks swallowing the rule of administrative suppression. Prosecutors might reasonably estimate that turning a dangerous criminal loose on what seems like a technicality could badly tarnish their reputations (or their boss's reputations) and chances of electoral success,[387] particularly if the criminal reoffends. Moreover, because the cost would be so great regardless of the probability, prosecutors would rationally be extremely averse to this risk.[388] District attorney elections are typically

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id. at 1644, 1647.

[385] *See* Cassidy, *(Ad)ministering Justice*, *supra* note 296, at 119 ("Prosecutors should consider public safety their highest priority."); Schulhofer et al., *supra* note 15, at 363-64 (distinguishing between short-term and long-term crime control benefits in exclusionary rule context).

[386] Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 11-12 (2001).

[387] Electoral success is of course much less of a concern in the federal system or in jurisdictions where lead prosecutors are appointed, but there is ultimately some democratic accountability even in these contexts.

[388] *See, e.g.*, Barry R. Furrow, Book Review, 1981 DUKE L.J. 878, 885 n.44 (1981) ("[I]ndividuals can be highly risk-averse to the chance of large losses, even though the

banal affairs in which little of substance reaches the public eye, but a prosecutor dropping charges because of a police error against a dangerous criminal who reoffends would tend to dominate the discourse.[389] The ensuing television ads might outstrip the infamous Willie Horton ad because in such a hypothetical case the prosecution would have dropped charges instead of merely permitting a furlough.[390] In contrast, the detriment to constitutional rights or long-term crime control efforts in such a case that cuts in favor of administrative suppression would be far less salient with voters. Accordingly, if prosecutors were afforded discretion in individual cases to decide whether the risk to public safety is worth administratively suppressing evidence, risk aversion would likely make the exception swallow the rule except in the most benign circumstances.

3. Scope of Ethical Duty

The *ethical* basis for administrative suppression imposes a broader standard on administrative suppression of derivative evidence than the constitutional one.[391] Ethically, prosecutors should administratively suppress *all* fruits of what they determine to be an unlawful search or seizure using the but-for test rather than the more protracted fruit of the poisonous tree doctrine.[392] Any use of illegally-obtained evidence

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probability of occurrence is slight . . . ."); P. Goran T. Haag, *The Economics of Trust, Trust-Sensitive Contracts, and Regulation*, 14 INT'L REV. L. & ECON. 437, 443 n.18 (1994) ("[P]eople tend to be more risk averse towards large losses with small probabilities than minor losses with larger probabilities."). Indeed, the insurance industry can exist only because people are averse to large losses even when the probability of those losses is low. Empirical work has concluded that police officers care about Fourth Amendment compliance much more when cases are "serious" or "big," Orfield, *supra* note 322, at 85-86, 89, and the reasoning for prosecutors here seems similar.

[389] *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009) ("District attorneys' electoral contests are rarely measured assessments of a prosecutor's overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal."); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582-83 (2009) ("[S]tatements [in the typical prosecutor election campaign] dwell on outcomes in a few high visibility cases . . . .").

[390] *See* Laura Sullivan, *Shrinking State Budgets May Spring Some Inmates*, NAT'L PUB. RADIO (Mar. 31, 2009, 12:04 AM), http://www.npr.org/templates/story/story.php?storyId=102536945.

[391] *See supra* Part II.B.

[392] *But cf.* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (rejecting but-for test as constitutional standard).

both undermines constitutional rights and jeopardizes the perception of legitimacy of the criminal justice system, which in turn undermines crime control.[393] Moreover, using illegally-obtained evidence will not sufficiently encourage police to consult prosecutors so that they may serve as an effective intrabranch check. Lastly, embracing the but-for standard simplifies prosecutors' administrative suppression analysis.

The ethical duty of administrative suppression encompasses all fruits of unconstitutional searches and seizures. It does not give way to attenuation or any of the other "inclusionary rules"[394] such as the Fourth Amendment standing doctrine.[395] Even this broader but-for standard, however, would permit prosecutors to use evidence obtained from a source independent of the violation because such evidence is not in fact a fruit of the unconstitutional search.[396] In sum, whether prosecutors are ethically required to administratively suppress evidence should be governed by the but-for test without judicial exclusionary rule exceptions.

4. Implementation and Enforcement

The duty of administrative suppression should be incorporated into ethical standards, prosecutors' manuals, and disciplinary rules.

For example, administrative suppression should be incorporated into the ABA Criminal Justice Standards on Prosecutorial Investigation.[397] These standards already include a provision discussing prosecutors' obligations to limit the taint of illegally-obtained evidence,[398] but that section could be amended to direct prosecutors to inquire as to the constitutionality rather than the

[393] *See* Schulhofer et al., *supra* note 15, at 362-63.

[394] *See* Steiker, *supra* note 9, at 2466, 2469, 2504.

[395] As others have recognized in the context of the judicial exclusionary rule, the standing requirement impedes deterrence of police misconduct. Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 275-78 (1988); Kamisar, *supra* note 53, at 634-35; Steiker, *supra* note 9, at 2505.

[396] *See* Nardone v. United States, 308 U.S. 338, 341 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[397] The ABA Criminal Justice Standards provide an important benchmark for ethical conduct of prosecutors. Marcus, *supra* note 256, at 12; *see also supra* note 256.

[398] STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS § 3.5(b) (2008).

admissibility of evidence in their cases[399] and to direct them to refrain from using evidence that is the fruit of an unconstitutional search.[400]

Similarly, prosecutors' manuals, such as the U.S. Attorneys' Manual should also recognize the duty of administrative suppression. Although the U.S. Attorneys' Manual already recognizes that prosecutors should refrain from using evidence before a *grand jury* that the prosecutor personally knows was the direct result of a clear constitutional violation,[401] the duty of administrative suppression is broader. Administrative suppression applies at all stages of a prosecution, not solely before the grand jury. Administrative suppression would also not require a *clear* constitutional violation.[402] Even with an addition to prosecutors' manuals, whether prosecutors in fact make administrative suppression decisions will likely rely on whether chief prosecutors embrace the proposal and attempt to instill it as part of office culture.[403]

Although it is beyond the scope of this Article to exhaustively address how to enforce this duty of administrative suppression, some preliminary thoughts are in order. Model Rule 3.8 that addresses the specific duties of prosecutors should also incorporate the duty of administrative suppression, and states should follow the ABA's lead as they often do.[404] Unlike the Criminal Justice Standards, the state ethical rules provide the basis for professional discipline. Once added to state ethical rules, a prosecutor's failure to consider the constitutionality standard or to act on her conclusions regarding constitutionality should warrant professional discipline. As explained above, there is reason to think that prosecutors would be reluctant to administratively suppress evidence that meant dropping charges

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[399] The existing standard is tied to admissibility rather than unconstitutionality; it asks the prosecutor to "determine if the evidence may still be lawfully *used*." *Id.* (emphasis added).

[400] As an example, section 3.5(b) could be amended to read: "The prosecutor should independently assess whether each piece of evidence that has been collected in her cases was constitutionally obtained and should refrain from using evidence that she believes was the fruit of a Fourth Amendment violation to secure a plea, conviction, or greater sentence."

[401] U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-11.231.

[402] *Id.*

[403] *See* MEDWED, *supra* note 210, at 83 (recognizing that overaggressive focus on convictions can be combatted by chief prosecutors focusing on broader goals such as justice and not giving promotions based on conviction statistics); Bibas, *supra* note 389, at 997-1000 (recognizing importance of prosecutors' office culture and impact of chief prosecutors in instilling that culture).

[404] *See* Kuckes, *supra* note 239, at 473, 478-79, 482, 487-88, 493.

because of the potential electoral repercussions.[405] Articulating this duty in the ethical rules is meant to help counterbalance that risk aversion, albeit imperfectly.

The prosecutor's administrative suppression duty is limited to an independent, good-faith, subjective assessment of the constitutionality of searches and seizures and use of evidence that corresponds to that decision.[406] Therefore, while courts or professional disciplinary bodies should review whether a prosecutor has performed this duty, those bodies should not be tasked with reviewing the substance of the prosecutor's conclusions as to constitutionality.[407] The duty is subjective, and rigorous substantive review would merely substitute strong judicially-reviewed administrative suppression for a weak judicial exclusionary rule.

CONCLUSION

As this Article has explained, prosecutors have a constitutional duty to administratively suppress evidence that they conclude was unconstitutionally obtained. Based on the doctrinal origins of the judicial exclusionary rule, prosecutors' Fourth Amendment duties include preventing the government from benefiting from Fourth Amendment violations. The Court recognized nearly a century ago in *Weeks* that the Fourth Amendment prevents the government from using illegally-obtained evidence. Since then, the Court pared back the judicial exclusionary remedy for institutional reasons unrelated to the substantive boundaries of the Fourth Amendment; the Court did not, however, pare back the scope of the Fourth Amendment norm. In so doing, the Court left evidentiary exclusion as part of the constitutional norm, albeit for only the executive branch to enforce. Adhering to that norm requires administrative suppression.

Administrative suppression would integrate Fourth Amendment analysis into our administrative system of criminal justice. It would

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[405] *See supra* notes 387-390 and accompanying text.

[406] *Cf.* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 9 (2002) ("A prosecutor's *independent judgment, made in good faith,* that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule." (emphasis added)).

[407] *See id.*; Gershman, *Prosecutorial Decisionmaking, supra* note 278, at 1266 ("[B]oth the current Standard and the proposed Standard [for the filing of criminal charges] focus exclusively on the prosecutor's subjective state of mind; neither Standard requires that the prosecutor's belief be objectively reasonable."); *see also, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (prosecutor should not present charges that *she knows* are not supported by probable cause); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.9(a) (1993) (same).

create an administrative form of the exclusionary rule implemented by prosecutors with a limited backstop of judicial review. That change would prevent the Fourth Amendment from being marginalized in a system where guilty pleas often undercut the ability to seek judicial relief from an illegal search or seizure.

Moreover, prosecutors' existing ethical responsibilities also provide reason to recognize a duty of administrative suppression. First, administrative suppression would help protect constitutional rights by increasing the cost of a Fourth Amendment violation and facilitating greater prosecutor involvement in police decisionmaking. Moreover, administrative suppression would improve crime control efforts because it would signal to defendants and prosecutors' communities that the government does not tolerate the police's constitutional violations. That signal will improve the perceived fairness of criminal law enforcement, which, under the procedural justice theory, is most likely to improve crime control efforts by encouraging citizens to cooperate with the police.

To prevent the perfect from becoming the enemy of the good, this Article would embrace limited administrative suppression as an improvement over the status quo even if prosecutors were unwilling for political or other reasons to embrace the full breadth of administrative suppression. Such limits could take several forms.

Prosecutors could use administrative suppression to alter a consistent unlawful police practice. North Carolina's ICE attorneys have done this to curb racial profiling,[408] and Manhattan prosecutors seem to have administratively suppressed evidence obtained through stop-and-frisk excesses.[409] Or consider a situation in which police in a particular jurisdiction repeatedly fail to adjust to a new Supreme Court decision. In *Arizona v. Gant*,[410] for example, the Supreme Court held that searches of an automobile incident to arrest of a recent occupant were valid only if the arrestee was "unsecured" and "within reaching distance of the passenger compartment at the time of the search."[411] *Gant* limited an earlier decision, *New York v. Belton*,[412]

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[408] Cade, *supra* note 1, at 184-85; *see also* Chin, *supra* note 331 (arguing that Attorney General should order federal prosecutors not to prosecute cases in which the suspect's race tainted officer's stop or investigation).

[409] *See* Prendergast & Schram, *supra* note 299.

[410] Arizona v. Gant, 556 U.S. 332 (2009).

[411] *Id.* at 343. *Gant* also allowed for vehicle searches incident to arrest of a recent occupant based on likelihood of discovering offense-related evidence, *id.* at 344, but that basis is not relevant to the current point.

[412] New York v. Belton, 453 U.S. 454 (1981).

which had been read to permit all searches incident of the passenger compartment of a vehicle so long as the arrestee was a recent occupant.[413] If police did not adjust their behavior to the new *Gant* standard but rather repeatedly applied the old *Belton* standard and searched the passenger compartments of vehicles even when the arrestee was secured or outside the reach of the car, administrative suppression would provide a tool for prosecutors to prompt police to change their practices.[414]

Or prosecutors could administratively suppress evidence obtained in clear Fourth Amendment violations but not in close cases, just as the U.S. Attorneys' Manual provides regarding grand jury proceedings.[415]

Lastly, even if prosecutors completely refuse administrative suppression, it is nonetheless important to recognize prosecutors' intended role as an intrabranch check on police. Prosecutors should charge and prosecute cases with an eye to the signals they send to police and the detrimental impact of using illegal evidence on police behavior and citizens' willingness to cooperate with the police.

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[413] *Gant*, 556 U.S. at 342-43.

[414] *Cf.* Wright & Miller, *Screening/Bargaining Tradeoff*, *supra* note 28, at 65 (finding that New Orleans prosecutors declined to prosecute a significant number of cases to encourage more thorough police investigations).

[415] *See* U.S. ATTORNEYS' MANUAL, *supra* note 91, § 9-11.231.

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