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The Fourth Amendment and the Problem of Social Cost

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THE FOURTH AMENDMENT AND THE PROBLEM OF SOCIAL COST

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ABSTRACT—The Supreme Court has made social cost a core concept relevant to the calculation of Fourth Amendment remedies but has never explained the concept's meaning. The Court limits the availability of both the exclusionary rule and civil damages because of their "substantial social costs." According to the Court, these costs primarily consist of letting the lawbreaker go free by excluding evidence or deterring effective police practices that would lead to more criminal apprehension and prosecution. But recent calls for systemic police reform by social movements have a different view of social cost. So too do calls for reforming qualified immunity. Police illegality—the precondition for exclusion or damages—itself produces substantial social costs, especially when one considers the systemic effects of minor illegality on a community-wide scale. The Court does not currently take account of these social costs, raising the question: why not? Taking a cue from Professor Ronald Coase's famous analysis of the problem of social cost, this Article analyzes why it is necessary for the Court to refocus its social cost inquiry to include pervasive and corrosive social costs external to its present doctrinal focus. Surprisingly, given its analytic centrality, neither the Court nor commentators have clarified what "social cost" entails or how to calculate it. This Article takes up this task and charts the unexpected implications that would follow if the Court were to take its own commitment to minimize "social cost" seriously.

Conceptions of social cost rely on choices of perspective and judgments about what counts as salient harms that necessitate a remedy. To date, the predominant perspective the Court takes in constructing and implementing Fourth Amendment doctrine is the policing perspective. This perspective is evident both when doctrine is applied to ordinary cases and when doctrine is shaped by using video evidence such as body-worn cameras that reinforces law enforcement's perspective. The result of prioritizing a policing perspective is to focus on the harms produced by imposing the exclusionary rule or civil liability on law enforcement's illegal acts, not upon the harms suffered by innocent individuals and broader communities. Such a narrow perspective is a problem because it constructs constitutional meaning in a way that excludes much of what scholars and the public take the Fourth

Amendment to mean through the values it protects. Harms that flow from those citizens who are law enforcement officers—those empowered with the authority to search, arrest, employ violence, and use deadly force—that break the law may be particularly acute given the special role they play in political society. This Article articulates this concern as an inverted "broken-windows" analysis. Just as minor crime left unregulated within a community is said to produce greater social harm through the spread of lawlessness, minor illegality perpetrated by police left unregulated can produce greater social harm—with sometimes tragic effects—through police impunity. This latter possibility is insufficiently recognized in theory and practice. Through such internal criticism of Supreme Court doctrine, this Article begins from the Court's own commitment to the analytic centrality of social cost when constructing the meaning of the Fourth Amendment through its exclusionary-rule and qualified-immunity doctrines and proposes additional perspectives necessary for more accurate calculations designed to protect constitutional rights and promote political community.

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INTRODUCTION

Violations of the Fourth Amendment's right of the people to be free from "unreasonable searches and seizures"[1] are notoriously problematic to remedy. The Supreme Court in *Mapp v. Ohio* applied a rule that evidence acquired in violation of the Fourth Amendment should be excluded from trial, explaining that "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[2] Justice Holmes explained that the right without the exclusion remedy would be "a form of words."[3] In the wake of *Mapp*, the exclusionary rule became the primary remedy for violations of

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

[2] 367 U.S. 643, 656 (1961); *see also* Weeks v. United States, 232 U.S. 383, 393 (1914) (explaining that if documents seized in violation of the Constitution can be "used in evidence against a citizen accused of an offense, the protection of the Fourth 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").

[3] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Justice Holmes further 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." *Id.*

the Fourth Amendment. But as the principal remedy against unconstitutional searches or seizures, the exclusionary rule has a checkered past, subject to good faith exceptions to ease a central problem Justice Cardozo long ago identified: the lawbreaker must "go free because the constable has blundered."[4] The problem of letting a known lawbreaker go free induces courts to create exceptions to the rule to dampen its impact on policing practice. Because of judicial attempts to temper the consequences of violating constitutional strictures, critics allege that Fourth Amendment cases in general are an "embarrassment,"[5] and that the exclusionary rule in particular has become a "mockery of the original version established in the early twentieth century."[6]

Because of this difficult dynamic—excluding reliable evidence of criminal wrongdoing because police have themselves acted illegally—the Court increasingly complains that the rule produces "substantial social costs."[7] The Court has repeatedly explained that these substantial social costs are a reason for limiting the scope of exclusion to those cases in which "the deterrence benefits of suppression [of evidence] . . . outweigh [the rule's] heavy costs."[8] On this reasoning, if the enjoyment of the right requires an exclusionary-rule remedy, and if the remedy incurs "heavy costs," then protecting the right entails "substantial social costs." The Court's analysis of the tension between effectuating rights against unreasonable searches and seizures and "letting guilty and possibly dangerous defendants go free"[9] therefore makes "social cost" central to the meaning of the Fourth Amendment.

In a series of more recent cases, the Court has emphasized that because the exclusionary rule produces "substantial social costs," there are good reasons to limit its application to those cases in which the deterrence purpose is "most efficaciously served."[10] Benefits of exclusion in terms of its value in deterring police misconduct must be weighed against the "high cost to

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[4] People v. Defore, 242 N.Y. 13, 21 (1926) (Cardozo, J.). On good faith, see United States v. Leon, 468 U.S. 897, 920–21 (1984), and Arizona v. Evans, 514 U.S. 1, 14–15 (1995).

[5] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997).

[6] Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 348 (2013).

[7] Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987)).

[8] Davis v. United States, 564 U.S. 229, 237 (2011).

[9] *Herring*, 555 U.S. at 141. *But see* Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) ("We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.").

[10] *Davis*, 564 U.S. at 237 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

both the truth and the public safety."[11] From such reasoning, the social costs that appear to matter most include "setting the guilty free and the dangerous at large" and the "'costly toll' upon truth-seeking and law enforcement objectives" incurred by suppressing reliable evidence of wrongdoing.[12] According to this reasoning, society incurs these costs from providing a remedy for violations of a particular individual's right. By contrast, society benefits when individual wrongdoers face predictable punishment as a means of incentivizing law abidingness. Framed in this way, the exclusionary rule harms society more broadly in order to benefit an individual most specifically when it fails to hold the citizen lawbreaker accountable. Indeed, by this calculus, the individual benefitted receives an undeserved windfall. Thus, the Court has warned that applying the exclusionary rule—bounded by such heavy social costs—"has always been our last resort, not our first impulse."[13] If the right against unreasonable searches and seizures is tightly linked with the exclusionary remedy as the Court has explained,[14] then by implication from this reasoning, the protection of the right itself must also implicate substantial social costs.

To speak of a constitutional right as socially costly, however, is a puzzling claim at odds with a general treatment of rights as public goods with correlative responsibilities.[15] Surprisingly, given its analytic centrality, neither the Court nor commentators have clarified what "social cost" entails, how to calculate it, or how it relates to the meaning of Fourth Amendment rights. This Article takes up this task and charts the unexpected implications that would follow if the Court were to take its own commitment to minimize "social cost" seriously.

Currently, the Court's analysis is one-dimensional, looking only at the social costs incurred by excluding evidence of the citizen lawbreaker. But if

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[11] *Id.* at 232.

[12] Hudson v. Michigan, 547 U.S. 586, 591 (2006) (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364–65 (1998)).

[13] *Id.*

[14] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648 (1961) ("[T]he Court . . . clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.'" (quoting Weeks v. United States, 232 U.S. 383, 398 (1914))).

[15] *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 319 (1980) ("The point of a bill of rights or a supreme court is . . . to assure . . . each citizen's right to protect himself against exploitation in the name of the greater happiness."); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1977) ("[I]f rights make sense at all, then the invasion of a relatively important right must be a very serious matter."); JOEL FEINBERG, SOCIAL PHILOSOPHY 58–59 (1973) ("Legal claim-rights are indispensably valuable possessions. A world without claim-rights . . . would suffer an immense moral impoverishment. . . . A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect . . . ."); *see also* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 31 (1913) (explaining how rights have correlative duties).

social cost is relevant to Fourth Amendment analysis—and the Court has made it doctrinally relevant—then there is no good reason to limit consideration of social cost to this single dynamic. A more comprehensive accounting of the total social cost of lawbreaking—by citizen and police—is necessary. This Article analyzes the implications of taking seriously the total social cost of Fourth Amendment violations and their remedy.

On closer inspection, social costs accrue when police break the law as well—costs that are not currently calculated by the Court's "substantial social cost" doctrine. When the constable blunders on Justice Cardozo's formulation, the constable becomes a lawbreaker too, not simply of a specific positive law prohibition, but of fundamental law. When law enforcement becomes the lawbreaker, and when individuals face the risk and reality of violence and death at the hands of police, the failure of adequate remedies also produces "substantial social costs" calculated by the effects on both individuals and the political community.[16]

Recent incidents of police brutality, such as the murders of George Floyd and Breonna Taylor, generated widespread protests during the summer of 2020, which illustrates how these socially dispersed "substantial social costs" are borne by individuals and communities.[17] These cases demonstrate how when police illegality goes without a remedy, society at large also suffers harms in addition to those suffered by the individual victim of the police misconduct.[18]

As the Court explained in *Mapp*, "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[19] That charter requires protecting constitutional rights along with their broad social and political benefits,

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[16] Even if policing conduct is lawful, the effects can still produce costs on society as a whole. *See, e.g.*, Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 875 (2015) [hereinafter Harmon, *Federal Programs*] ("Police coercion—in the form of arrests, uses of force, invasions of privacy, and the like—imposes real, quantifiable costs."); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313 (2016) [hereinafter Harmon, *Why Arrest?*] ("[A]rrests also have more concrete consequences, and yet the legal tools we generally use to evaluate them are inadequate to consider whether those costs are justified.").

[17] *See, e.g.*, Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/GFB9-B48K]; Josh Wood & Tim Craig, *As Breonna Taylor Protests Stretch into 12th Week, Calls for Officers' Arrests Intensify*, WASH. POST (Aug. 18, 2020, 8:02 PM), https://www.washingtonpost.com/national/as-breonna-taylor-protests-stretch-into-12th-week-calls-for-officers-arrests-intensify/2020/08/18/ce6f2b9a-d823-11ea-930e-d88518c57dcc_story.html [https://perma.cc/7CJ8-MVVR]; Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 781 (2021).

[18] The Court warned: "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest." 367 U.S. at 660.

[19] *Id.* at 659.

which the Court often describes as essential to liberty.[20] Failure to live up to rule-of-law ideals inflicts harm on the political body as a whole. It can delegitimize governing authority and burden equal political standing for all citizens. The Court's current social cost analysis does not consider how law enforcement legitimacy requires an effective means for both individual officers and police departments as institutions to internalize constitutional norms in practice.[21] When law enforcement practices—backed by implicit Supreme Court sanction—alter constitutional norms, they change constitutional meanings in ways that undermine the democratic and constitutional legitimacy of those practices.

The problem of social cost sweeps wider than establishing the liabilities between cops and robbers regarding the admissibility of illegally obtained evidence.[22] Rather, the comprehensive problem of social cost for official illegality occurs whenever the Fourth Amendment is violated without a remedy—no matter whether the state seeks to prosecute an individual and introduce evidence. Indeed, the exclusionary rule has always been a limited remedy, inapplicable when no evidence of wrongdoing results from an illegal search.[23] And the Court has never allowed civil remedies to flourish

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[20] Early due process and incorporation cases all described the essential protection for liberty, asking whether a criminal procedure right belongs to "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)); *Mapp*, 367 U.S. at 650 (observing that protecting the "security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty" (internal quotation marks omitted) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

[21] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 58–59 (1990) [hereinafter TYLER, WHY PEOPLE OBEY] (exploring the relation between willingness to obey the law and the perception of law enforcement legitimacy); Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 329 (2009) [hereinafter Tyler, *Legitimacy*] (arguing that the legal authorities' legitimacy depends on their internalizing a responsibility to live up to certain moral values); *see also* 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, 349–56 (2011) (discussing the need to train officers to build community trust).

[22] *See, e.g.*, Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627–28 (1984) (arguing that often there is a difference between the conduct rules directed at specific actors and the rules of decision a court applies).

[23] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347 (1974) ("The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . ."); Illinois v. Gates, 462 U.S. 213, 223 (1983) (exclusion is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct"); *see also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 373 (noting the limitations of the exclusionary rule in the context of behavioral theory); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1257–63 (1983) (discussing the Court's disregard for the impact of police intrusion on the innocent); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 449 (1997) (explaining that the exclusionary rule applies only in limited search scenarios and not in police beatings or shootings when there is no evidence to suppress).

as a robust alternative, though they might seem appropriate, despite the fact that the individual stakes are often too small to pursue legal action even as the aggregate costs of small-scale illegality are large.[24]

When exclusion of evidence is irrelevant, civil liability can function as an alternative remedy for illegal police conduct perpetrated against both innocent and culpable citizens alike. But here too, the Court interposes social cost analysis as a means of limiting the availability of constitutional remedies through a doctrine of qualified immunity.[25] The Court admonishes that "permitting damages suits against government officials can entail substantial social costs."[26] Like the social cost analysis of the exclusionary rule, the Court's qualified-immunity analysis is one-dimensional, considering only the costs incurred by law enforcement and society at large from the potential overdeterrence of purportedly desirable, robust policing practices.[27] Leaving constitutional violations without a remedy for many innocent citizens highlights the extent to which the Court's one-dimensional "substantial social cost" doctrine fails to provide an accurate accounting of the actual costs society incurs from illegal police actions.

Policing practices that violate the Constitution but do not give rise to excludable evidence can—and do—become systemic. When police engage in illegal street stops and frisks, or use unreasonable force, or perform searches without authority, their actions become systemic practices that have systemic effects, which individual instances of exclusion do not remedy. In the case of technologically enhanced surveillance practices, law enforcement can invade the privacy of far more citizens in the search for the few lawbreakers outside the purview of the exclusionary rule.[28] On closer inspection, as this Article explores, the problem of uncalculated social costs of police practices cannot be resolved by simply asserting that a supposed

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[24] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[25] *See infra* Section I.B.

[26] Anderson v. Creighton, 483 U.S. 635, 638 (1987).

[27] *See, e.g.*, *Harlow*, 457 U.S. at 807.

[28] Think here of the effects of widespread use of camera surveillance or access to home security devices. *See* Drew Harwell, *Doorbell-Camera Firm Ring Has Partnered with 400 Police Forces, Extending Surveillance Concerns*, WASH. POST (Aug. 28, 2019), https://www.washingtonpost.com/technology/2019/08/28/doorbell-camera-firm-ring-has-partnered-with-police-forces-extending-surveillance-reach/ [https://perma.cc/239E-GTM3]; Jon Schuppe, *Amazon Is Developing High-Tech Surveillance Tools for an Eager Customer: America's Police*, CNBC (Aug. 8, 2019), https://www.cnbc.com/2019/08/08/amazon-is-developing-high-tech-surveillance-tools-for-police.html [https://perma.cc/V7EP-95C5]; *see also* Andrew Guthrie Ferguson, *The "Smart" Fourth Amendment*, 102 CORNELL L. REV. 547, 551 (2017) (analyzing "the ever-increasing ability for surveillance technologies to track individuals through the data trails they leave behind"). *But see* Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018) (holding that a warrant is required to access historical cell-site data held by a third party).

constitutional equilibrium exists when police have access to enhanced surveillance capacities for which exclusion of evidence can rarely ever serve as a check.[29] The systemic use of technology produces costs external to the particular occasion in which the exclusionary rule might apply.

Systemic policing practices that violate the Constitution are also connected to political priorities in ways that the Court's social cost analysis does not reflect. Placing additional law enforcement officers on the streets to conduct more stops and frisks in pursuit of order-maintenance policing is a relatively low-technology, resource-intensive way to make policing present in people's daily lives.[30] The political decision in many jurisdictions to pursue a "broken-windows" approach to law enforcement that focuses on nonviolent, relatively minor offenses has effects on the interaction between discretionary policing and law-abiding citizens.[31] Even in the original description of broken-windows policing, George Kelling and James Wilson reported that "[y]oung toughs were roughed up, people were arrested 'on suspicion' or for vagrancy, and prostitutes and petty thieves were routed. 'Rights' were something enjoyed by decent folk, and perhaps also by the serious professional criminal, who avoided violence and could afford a lawyer."[32] Policing illegality was built into the model. This Article argues that an inverse broken-windows phenomenon is a more troubling development of unremedied Fourth Amendment violations. When police engage in everyday, low-level unconstitutional actions, it erodes rule-of-law principles throughout the community. These rippling effects of official illegality produce diffuse social and political harms with corrosive effects

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[29] *See* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 481–82 (2011) (arguing that equilibrium adjustment is a way for courts to maintain a "balance of police power"). *But see* David Alan Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 237–41 (2015) (arguing against the assumptions of balance and continuity over time on which a conception of equilibrium relies).

[30] *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1982, at 29–30, https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/9EH3-J757]. For critical commentary, see Thomas P. Crocker, *Order, Technology, and the Constitutional Meanings of Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 685, 693–702, 711–14 (2013); and BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 6–22 (2001).

[31] *See, e.g.*, Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1165–66 (1966). On the role of violence in how we view the propriety of particular kinds of policing, see DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 3 (2021) ("The failure of police reform . . . is partly a story about a decline in the salience of violence in the rules that govern law enforcement, and in our thinking about the police more broadly.").

[32] Wilson & Kelling, *supra* note 30, at 33; *see also* HARCOURT, *supra* note 30, at 127–30 (further describing broken-windows policing and its dependence on frivolously arresting people under a system of broad criminal laws).

on communities that are left uncalculated by the current "substantial social cost" doctrine.

Unaccounted social costs not only affect the law-abiding citizen subject to unlawful searches that discover no excludable evidence but also subject self-governing citizens to a more "permeating police surveillance"[33] that "may alter the relationship between citizen and government in a way that is inimical to democratic society," as Justice Sotomayor observed in *United States v. Jones*.[34] Systemic harms to democratic society follow from systemic constitutional violations. These harms are felt by communities who feel less free and less safe as a result of police practices of the kind at issue in the deaths of unarmed children and young men such as Tamir Rice and Amir Locke, among many others.[35] Recognition that the social cost of unconstitutional police actions can be "inimical to democratic society" also suggests that the problem is not merely one of calibrating the scope of a constitutional right, but also of setting structural boundaries between a self-governing sovereign people and the executive offices tasked with law enforcement responsibilities.[36] In this way, rights and structure are mutually implicated by the problem of social cost the Court raises.

Social harms result from the systemic effects of unconstitutional police conduct. These harms include a loss of law enforcement legitimacy,[37] a decline in respect for government, a loss of equal dignity as respected members of the political community, a loss of physical safety, and the dampening of public and political activities the Constitution protects.[38] The

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[33] United States v. Di Re, 332 U.S. 581, 595 (1948).

[34] 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)); *see also* Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1723 (2014) (defining panvasive surveillance as "the idea that modern government's efforts at keeping tabs on the citizenry routinely and randomly reach across huge numbers of people, most of whom are innocent of any wrongdoing").

[35] Emma G. Fitzsimmons, *12-Year-Old Boy Dies After Police in Cleveland Shoot Him*, N.Y. TIMES (Nov. 23, 2014), https://www.nytimes.com/2014/11/24/us/boy-12-dies-after-being-shot-by-cleveland-police-officer.html [https://perma.cc/AG9Y-REZV]; Tim Arango, *No Charges Against Police in Amir Locke Shooting*, N.Y. TIMES (Apr. 6, 2022), https://www.nytimes.com/2022/04/06/us/amir-locke-shooting-no-charges.html [https://perma.cc/UE5Q-4LPY].

[36] Rights and structure can form "interlocking gears," both contributing to progress toward equality and liberty, as Professor Gerken argues. Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 588, 594 (2015).

[37] *See, e.g.*, Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 291 (2003) (proposing that community members' perception of governmental authority is a key factor in determining public behavior); Richard Delgado, *Law Enforcement in Subordinated Communities: Innovation and Response*, 106 MICH. L. REV. 1193, 1194 (2008) (arguing that tougher policing practices cause communities to seek alternatives to police).

[38] For further discussion of the effects of unconstitutional police conduct on political community, see Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 332–45 (2010).

continuation of a large social movement aimed at highlighting the social costs of insufficiently regulated use of police violence makes the constitutional question of social cost acute and highlights the one-sided and incomplete analysis in which the Supreme Court has to date engaged.[39] The Court proclaims the problem of the exclusionary rule's social costs as if they were the inevitable result of objective legal analysis, when in fact any conclusion about overall costs depends entirely upon choices the Court makes about what counts as a cost. These choices have effects for the lived experience of constitutional law in the life of the political community. This Article argues that the Court's current choice to limit its social cost calculation to the effects upon policing practice and the harms of letting a lawbreaker go free lacks justification and that any accurate calculation must account for the total social cost of a constitutional rule that facilitates or inhibits policing practice.[40]

To protect the Fourth Amendment, the Court needs a framework for analyzing "social cost" that includes the diffuse costs borne by law-abiding citizens, the costs of lost law enforcement legitimacy, the harm from lost respect for government, and the cost to political and civic engagement that improper control of public space engenders. The Court makes social cost into a constitutive element of Fourth Amendment analysis but fails to implement this insight in a more comprehensive, rights-protective way, instead using it as a counterintuitive means of limiting the scope of privacy rights. Because the Court focuses on individual citizen–police transactions, the systemic effects remain largely unexamined, as if they were the product of an invisible hand guiding individual market decisions. But citizen–police encounters are not market transactions, and the Court's social cost doctrine does not have a mechanism for internalizing holistic issues when matters of government structure and democratic processes are at stake.[41] Using insights about the

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[39] *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://nyti.ms/2ZqRyOU [https://perma.cc/5GL2-EPZS]; Adam Serwer, *The Next Reconstruction*, ATLANTIC, Oct. 2020, at A43; Juliet Hooker, *Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair*, 44 POL. THEORY 448, 463 (2016).

[40] Balancing rights is itself conceptually more complicated than is often acknowledged. *See* Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 J. POL. PHIL. 191, 199 (2003); *see also* THOMAS P. CROCKER, OVERCOMING NECESSITY: EMERGENCY, CONSTRAINT, AND THE MEANINGS OF AMERICAN CONSTITUTIONALISM 164–93, 192 (2020) (arguing "that neither 'security' nor 'liberty' can serve as unexamined categories that give priority to a particular governing policy"); Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511, 1517–18 (focusing on the difficult question of who decides how much liberty must be forgone to achieve adequate security).

[41] For discussion of the pervasiveness of such market-oriented thinking, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy*

problem of social cost first articulated by Professor Ronald Coase, I argue that it is clear that the Court's doctrine fails to account for a range of social externalities to the individual citizen–police encounter, while failing to explain why only the few social costs on which it focuses are most relevant.[42] The Court already looks beyond the individual citizen–police encounter for externalities—costs beyond the policing transaction—without explaining the failure to consider aggregate costs of police illegality. Because the Court focuses on particular cases to guide doctrine with systemic effects, it is important to bring into focus the full social cost of individual citizen–police encounters.

Recent calls for broad police reform are based upon recognition that unconstitutional police actions, such as the killings of George Floyd and Breonna Taylor, produce widespread social costs that have so far not been included in the Court's "substantial social cost" doctrine. This Article provides a defense of including comprehensive analysis of social cost, argues that the more serious social harm comes from systemic law enforcement misconduct, and suggests a path forward for a more comprehensive social cost calculus. The analysis that follows utilizes a method of internal critique. The argument begins from the doctrinal commitments the Court has already articulated, demonstrates the conceptual incompleteness and incoherence of the Court's current approach, and then uses this internal tension to suggest a solution that is grounded in these existing conceptual and doctrinal precedents.

Part I first explains how the argument conceptually and methodologically borrows from Coase's famous analysis of the problem of social cost.[43] From the general problem of social cost, Part I then describes the Court's doctrinal focus on "social cost" in analyzing the scope and application of the exclusionary rule. When exclusion of evidence is unavailable or inapplicable, then civil damages are meant to provide an alternative remedy. Following the reasoning of its exclusionary-rule jurisprudence, however, the Court limits the availability of civil remedies when the social costs exceed the expected benefits, concerned primarily that remedies do not curtail robust policing practices. As this Part explains, social cost is a central Fourth Amendment doctrinal concept that the Court incompletely analyzes. As Part II diagnoses, the Court's incomplete analysis of social cost arises because the Court takes the perspective of police, not the

Framework: Beyond the Twentieth-Century Synthesis, 129 YALE L.J. 1784, 1800 (2020), and BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 8–12, 32–34 (2011).

[42] *See generally* R.H. Coase, *The Problem of Social Cost*, J.L. & ECON., Oct. 1960, at 1.

[43] *Id.* at 837–77.

citizen, when constructing Fourth Amendment rights and remedies. Prioritizing doctrinal rules designed for their easy administration by law enforcement, the Court adapts Fourth Amendment rights to the needs of law enforcement. Use of technology such as dash-mounted or body-worn cameras risks further entrenching law enforcement perspectives in tension with rights as limits on state actors.

Yet there are insufficient grounds for prioritizing the policing perspective, as Part III explains. The social cost of any Fourth Amendment rule requires a more holistic analysis that captures the experiences of individuals and communities who are subject to the policing practices doctrinal rules either enable or inhibit. This much is implied by the Coasean approach to social cost and follows from the nature of rights as limits to—not enablers of—state policing power. Following an inverted broken-windows logic aids in analyzing why it is important to remedy a particular police action—even if a lawbreaker goes free—in order to preserve the integrity of the whole. Because the Court is already committed to analyzing the Fourth Amendment's meaning in terms of its social costs, an internal reappraisal of exclusionary-rule and qualified-immunity doctrinal reasoning to include the costs imposed on individuals and communities from particular policing practices is necessary. A recalibrated calculus of social cost would come much closer to realizing the structural ideal of the people's Fourth Amendment rights against police intrusion into their everyday lives.

I. THE SOCIAL COST OF THE FOURTH AMENDMENT

The basic structure of a Fourth Amendment complaint is not unlike that for any other civil liberties violation: official government agents have violated a constitutionally protected right, requiring a judicial sanction. For example, a free speech claim might argue that a prosecution for speech-related activities violates the First Amendment,[44] or a law forbidding certain speech-related activities chills protected speech.[45] In each case, the constitutional infirmity can be rectified by judicial declaration and injunction against enforcing the unconstitutional law. By contrast, Fourth Amendment rights violations occur not because the application of a substantive law violates the Constitution, but because the means by which evidence has been acquired violates the Constitution.

This gap between substance and procedure makes Fourth Amendment violations notoriously difficult to remedy, since the dominant means—

[44] *See* Cohen v. California, 403 U.S. 15, 19 (1971).

[45] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 692 (1978); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1649–50 (2013).

exclude the evidence found from the trial of the accused—is a rather indirect sanction.[46] No individual police officer need suffer official sanction when the prosecutor's key evidence is suppressed. There is usually no law to be declared unconstitutional, and the Court has admonished that injunctions are available only to remedy official policies that violate constitutional standards.[47] The innocent person harmed will have little incentive or opportunity to hold an officer liable for damages that may be monetarily insignificant, even if personally important.[48] Navigating the high standard of qualified immunity will also provide no remedy for unconstitutional acts that have not met the Court's standard for "clearly established."[49] The Court has deliberately made remedies other than exclusion difficult to obtain.

Yet when the individual constable errs in conducting a fruitful search, thereby violating the Fourth Amendment, the criminal gets a windfall; though the state has proof of criminal wrongdoing, it is unable to utilize its evidence.[50] As a result of this windfall, the Court has granted increased consideration to the fact that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights."[51] This consideration is based in part on a countervailing recognition "that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."[52] But the primary social cost the Court identifies is the cost of letting the lawbreaker go free measured against what the Court

[46] *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–404 (1995).

[47] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

[48] In seeking money damages, claimants must run the qualified-immunity gauntlet of proving that the officer's specific actions violated a constitutional right that was clearly established by the Supreme Court. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Anderson v. Creighton, 483 U.S. 635, 640 (1987); *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.").

[49] *See Creighton*, 483 U.S. at 640 ("The contours of [a] right [are] sufficiently clear that [every] reasonable official would [have] underst[ood] that what he is doing violates that right."); Pearson v. Callahan, 555 U.S. 223, 227 (2009).

[50] In response to this dynamic in which the criminal gets a windfall but other remedies seem too insubstantial, one influential commentator explains, "I have long believed that the exclusion of relevant criminal evidence is a high price to pay for judicial enforcement of the fourth amendment and that the exclusionary sanction is an evil in itself. I believe, however, that it is a necessary evil because the supposed alternatives to it are pie in the sky." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974).

[51] Rakas v. Illinois, 439 U.S. 128, 137 (1978).

[52] United States v. Payner, 447 U.S. 727, 734 (1980).

believes is a minimal potential deterrent against future police illegality.[53] The Court explains that the goal of exclusion is to deter future unlawful police conduct by depriving the state of the benefits of its own illegality. As a result, the Court begins—and increasingly ends—an analysis of social cost with the exclusionary rule's deterrence effect.

As a methodology, this single dynamic—the costs of excluding prosecutorial evidence relative to the deterrent effect on police—fails to account for the actual social costs it purports to calculate. A brief detour through one aspect of Ronald Coase's *The Problem of Social Cost* will aid in seeing better what the task of calculating social cost entails.[54] After that, this section turns in greater detail to analyze how the Court balances social cost with the deterrent benefits of exclusion, and of civil liability.

A. A Methodological Note on Ronald Coase and the Problem of Social Cost

Let's postulate that we the people suffer social costs from both exclusion and nonexclusion of illegally obtained evidence. In either case, a lawbreaker—the offending citizen or the unlawful police officer—might go unpunished, violating society's expectations that individuals must conform to its legal norms. The question is which costs are greater. To use the form of the question about social cost that Professor Coase posed in another context: "The problem is to avoid the more serious harm."[55] But which is the more serious harm—letting the citizen lawbreaker go free or allowing the law enforcement officer to break the law without remedy?

To determine how to analyze these social costs, we must better understand the value of what is gained and lost through either exclusion or nonexclusion—or liability or nonliability—when the existence of official wrongdoing is a constant.[56] The choice has a measure of tragedy to it, not in the sense that society remains blind to harms it cannot reconcile, but that the Court remains blind to the broader problem of social cost its decisions impose.[57]

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[53] Herring v. United States, 555 U.S. 135, 144 (2009) (arguing that because "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system," merely negligent conduct does not warrant exclusion).

[54] Coase, *supra* note 42, at 2.

[55] *Id.*

[56] The nature of this core inquiry parallels that raised by Coase in how to resolve problems where liabilities should occur: "What answer should be given is, of course, not clear unless we know the value of what is obtained as well as the value of what is sacrificed to obtain it." *Id.*

[57] *See* GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17–20 (1978).

Rather than an analysis of "frictionless transaction costs," this Article draws inspiration from Coase's *The Problem of Social Cost* for the idea that when judges and policymakers assign entitlements and liabilities, they must recognize the complexity of calculating the total social cost. For when "comparing alternative social arrangements, the proper procedure is to compare the total social product yielded by these different arrangements."[58] Thus, to analyze only the effects in one direction—say, the harms from railway sparks on burned crops, to use one of Coase's examples—without considering the total effects of broader social costs in the allocation of resources is to derive an incomplete picture that is in this sense partially blind.[59] Any calculation that purports to reflect the social cost of such a resource allocation—or an assignment of liabilities—will be inaccurate, leaving many costs uncalculated despite their salience and aggregate scope. Likewise, to draw the Coasean analogy outside the economic domain, focusing narrowly only upon the social costs incurred by holding police liable produces an inaccurate calculation. This is because "the total effect of these arrangements in all spheres of life should be taken into account"[60]—where "these arrangements" are to be understood as including distributions of policing power, social and community effects, as well as individual rights and political inclusion within a system of criminal justice.

Thus, in borrowing a part of the title from Coase's work, my approach here also borrows a methodology. The Court has made the social cost relevant to the scope and meaning of Fourth Amendment rights. So, if we take the social cost of Fourth Amendment remedies—or their absence—seriously, then we must examine more closely what the total social cost of providing or withholding remedies would be. Otherwise, like turning the right merely into "a form of words,"[61] talk of social cost as a "substantial social cost" doctrine becomes an empty incantation, not a serious legal analysis. To see why, we must first examine in detail how social cost enters

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[58] Coase, *supra* note 42, at 34. For analysis of Coase's central insight along these lines, see Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 184 (2013); Deirdre McCloskey, *The So-Called Coase Theorem*, 24 E. ECON. J. 367, 369 (1998); Brett M. Frischmann & Alain Marciano, *Understanding* The Problem of Social Cost, 11 J. INSTITUTIONAL ECON. 329, 348–49 (2014); and Steven G. Medema, *Debating Law's Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s*, 2 TEX. A&M L. REV. 159, 161 (2014). This approach is distinguished from the enormous literature that uses the Coase theorem to analyze frictionless transactions with zero transaction costs. For early statements along these lines, see Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 729 (1965); and GEORGE J. STIGLER, THE THEORY OF PRICE 113 (3d ed. 1966).

[59] *See* Coase, *supra* note 42, at 30–34. On the relation between relative blindness and constitutional meaning, see Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 6–7 (2007).

[60] Coase, *supra* note 42, at 43.

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

into the Court's reasoning over the scope of Fourth Amendment rights and remedies.

B. Balancing the Cost of Exclusion

Despite affirmative claims that Fourth Amendment rights are closely connected to the remedy of evidentiary exclusion, the Court has more recently emphasized the basic claim that "[t]he fact that a Fourth Amendment violation occurred . . . does not necessarily mean that the exclusionary rule applies."[62] If the constitutional violation is causally unrelated to the eventual discovery of evidence because, for example, officers acquired it from a separate and independent source, then the Court reasons that the exclusionary rule offers no relevant deterrence.[63] In addition, if officers would have inevitably discovered the evidence despite the unconstitutional act, the Court likewise argues that exclusion does not apply.[64]

Moreover, there are occasions, including good faith error, in which the Court will not apply the exclusionary rule because the costs are claimed to be too high, even when the unconstitutional act is the sole source of the evidence.[65] When police rely in good faith upon a search warrant that later proves inadequate to support the necessary probable cause, the Court explained that there are inadequate deterrence benefits in light of the social costs to justify exclusion of evidence.[66] The Court admonished that "[p]articularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system."[67]

This idea—that letting the guilty go free offends the judicial process—has its roots in a narrowing of *Mapp*, where the Court reasoned that "the [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment

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[62] Herring v. United States, 555 U.S. 135, 140 (2009). The *Herring* Court explained further: "We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." *Id.* at 141.

[63] Murray v. United States, 487 U.S. 533, 536–38 (1988).

[64] Nix v. Williams, 467 U.S. 431, 443–44 (1984); Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016).

[65] United States v. Leon, 468 U.S. 897, 907–08, 913 (1984) (articulating the "good faith" exception to the exclusionary rule). The Court also refused to apply the exclusionary rule to violations of the Fourth Amendment requirement that police knock and announce before executing a warrant. Hudson v. Michigan, 547 U.S. 586, 593 (2006).

[66] *Leon*, 468 U.S. at 919.

[67] *Id.* at 907–08.

against unreasonable searches and seizures."[68] In terms of whose illegality offends the integrity of the courts more—the police officer's or the criminal defendant's—the Supreme Court asserted that the analysis "is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."[69] As the Court further explained, "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh [the rule's] heavy costs."[70] In this way, deterrence is a forward-looking remedy designed to influence law enforcement behaviors by altering incentives. If law enforcement officers know that evidence obtained to prosecute a defendant is at risk of being suppressed unless they follow constitutional rules, then they have incentives to comply with the conduct rules the Court provides. Following this logic, if the aim is to alter official behavior, then use of the exclusionary rule in cases that lack a means of changing incentives would fail to fulfill a deterrent purpose.

When weighing the social cost of letting the lawbreaker go free, the Court has come to focus primarily on the benefit of deterring unlawful police conduct. In keeping with the idea that some illegality might have occurred in good faith, the Court in *Herring v. United States* emphasized that the central question "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."[71] Courts must balance culpability in terms of its deterrent effect, mindful of the fact that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable" to overcome the social cost of excluding evidence.[72]

In *Herring*, a police officer relied in good faith upon information that there was an outstanding arrest warrant—later found erroneous—which he used as probable cause to stop, arrest, and search Mr. Herring. Though he had no actual legal grounds for the search incident to arrest that uncovered evidence of wrongdoing, the Court reasoned that the police officer had no culpable state of mind because he reasonably believed his actions were authorized by a warrant. The fact that there was a database error was not the officer's fault. And even though this error rendered the initial arrest unjustified, the Court concluded that because the officer acted pursuant to what he believed to be a valid arrest warrant, there was no illegal conduct to deter on the officer's part.

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[68] United States v. Calandra, 414 U.S. 338, 347 (1974).

[69] *Leon*, 468 U.S. at 921 n.22 (quoting United States v. Janis, 428 U.S. 433, 458 n.35 (1976)).

[70] Davis v. United States, 564 U.S. 229, 238 (2011).

[71] 555 U.S. at 137.

[72] *Id.* at 144.

Without culpability for knowingly breaking the law, the Court reasoned that a mere incremental benefit in deterring police conduct would not outweigh the substantial social costs in excluding the evidence found during the search incident to arrest.[73] For the exclusionary rule to provide more benefits than costs, the Court's analysis must be "focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[74] And, as the *Herring* Court repeated, "We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."[75] Because the officer had acted pursuant to a warrant, the Court concluded that no more than marginal deterrence value would exist in excluding evidence in this case.[76]

Although the Court offers no formula, it appears that "marginal deterrence" can tolerate far more than marginal amounts of illegality. In prior case law, the Supreme Court through Justice Thomas held that the common law heritage of the Fourth Amendment's protections for the home required law enforcement officers to knock and announce their presence before attempting to enter.[77] To do so at common law established the authority for an officer to enter, in contrast to a trespasser, and overrode the general principle that a person's home is his castle.[78] So called "no-knock" warrants would be reasonable, and thus consistent with the Fourth Amendment, only when officers could cite specific circumstances that knocking and announcing their presence "would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[79] Fast-developing circumstances when serving a warrant might create an exigency that would justify sudden forcible entry.[80]

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[73] *Id.* at 141 ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." (quoting Illinois v. Krull, 480 U.S. 340, 352–53 (1987))).

[74] *Id.*

[75] *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 368 (1998)).

[76] *See* Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 511 (2009) ("[T]oday the Supreme Court threatens to leave most violations of the Fourth Amendment without any remedy, not even on paper.").

[77] Wilson v. Arkansas, 514 U.S. 927, 934 (1995) ("Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."). In *Hudson*, the Court further explained, "The common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door is an ancient one." Hudson v. Michigan, 547 U.S. 586, 589 (2006).

[78] *Wilson*, 514 U.S. at 931–32.

[79] Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

[80] *See* United States v. Banks, 540 U.S. 31, 36–37 (2003) (holding no-knock entries reasonable under exigent circumstances).

In *Hudson v. Michigan*, there was no mistaken belief about whether law enforcement's conduct was permissible because of an intervening database mistake or the like.[81] The Fourth Amendment requires that, in the absence of an exigent circumstance, police knock and announce their presence and wait for acknowledgement before they can be justified in forcibly entering a home in furtherance of a search warrant. In violation of that requirement, police waited only a few seconds after announcing their presence to enter Booker Hudson's home.[82]

Despite explaining that the "knock-and-announce" rule is an element of Fourth Amendment reasonableness, however, the Court in *Hudson* refused to exclude evidence obtained after police violated it.[83] The Court reasoned that the causal connection between the constitutional violation and the discovery of evidence was too attenuated for exclusion to provide appropriate deterrence. According to the Court, attenuation occurs when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[84] The exclusionary rule, the Court explained, protects a constitutional rule that "citizens are entitled to shield 'their persons, houses, papers, and effects' from the government's scrutiny."[85] But the knock-and-announce rule protects a different interest, and therefore "the exclusionary rule is inapplicable."[86] Accordingly, "deterrence of knock-and-announce violations is not worth a lot" because in the Court's judgment, there is no strong incentive to violate the requirement.[87]

In contrast to what it saw as the relatively worthless deterrence benefit of excluding the evidence obtained subsequent to the knock-and-announce violation, the Court explained that "[t]he costs here are considerable."[88] First, there is the "grave adverse consequence . . . viz., the risk of releasing dangerous criminals into society."[89] Second, there is the problem of imposing a "massive remedy" of exclusion for a seemingly small-potatoes

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[81] 547 U.S. at 588.

[82] *Id.* at 588–89.

[83] *Id.* at 593.

[84] *Id.; see also* Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1761–65 (2008) (noting that the rule in *Hudson* is that "exclusion must serve an interest protected by the rule").

[85] *Hudson*, 547 U.S. at 593 (citation omitted) (quoting U.S. CONST. amend. IV).

[86] *Id.* at 594. The Court explained that these alternative interests include protecting life and limb from violence at the unexpected entry, protecting property from damage, and protecting privacy and dignity from embarrassment from the sudden entry. *Id.*

[87] *Id.* at 596.

[88] *Id.* at 595.

[89] *Id.*

constitutional violation, which would generate a "flood" of litigation over difficult, fact-specific, circumstance-dependent practice.[90] Third, the overdeterrence might lead officers to delay entry longer than legally necessary, placing them at risk of violence and harm and raising the risk of evidence destruction.[91] These, the Court reasons, add up to "substantial social costs" that far exceed the "minimal" incentives police have to violate the constitutional rule.[92] Because officers were warranted in obtaining the evidence, penalizing the unconstitutional manner in which they executed the warrant would provide little benefit in light of the social costs on which the Court focused.

The values that the knock-and-announce rule protects do not form any part of the social cost calculation, the Court reasons, because they do not involve blinding the government to evidence it is entitled to seek. These values include an interest in protecting life and limb from violence that might ensue from surprised and frightened residents initiating self-defense. In addition, there are interests in avoiding the destruction of the searched person's property, including the door, as well as privacy and dignity interests of household residents surprised by the sudden, unannounced entry of police.[93]

Although privacy and dignity are values at the heart of the Fourth Amendment's protections, when confronted with their violation, the *Hudson* Court nonetheless refused to make their protection part of the social cost calculation.[94] According to the Court, any privacy intrusion that occurred as a result of the no-knock entry was not causally related to the evidence obtained, and thus was unprotected by exclusion.[95] Violating the knock-and-announce rule, the Court reasoned, was ancillary to the question of whether excluding the evidence discovered on the other side of the door furthered the

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[90] *Id.*

[91] *Id.* (fearing "police officers' refraining from timely entry after knocking and announcing").

[92] *Id.* at 596.

[93] *Id.* at 594; *see also* L.A. Cnty. v. Rettele, 550 U.S. 609, 611, 615–16 (2007) (finding police did not violate the Fourth Amendment by entering the wrong home, where a sleeping couple was found in bed nude).

[94] *See* Katz v. United States, 389 U.S. 347, 350 (1967) (finding that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion"); Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (asserting that the Fourth Amendment protects against "unjustifiable intrusion by the government upon the privacy of the individual"); David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1070 (2014) ("Privacy has long been thought the core concern of the Fourth Amendment, and there is more talk about privacy today than ever before."); *see also* William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 38 (2001) (noting that, despite the importance of privacy in the Fourth Amendment context, "even the slightest exposure of an item to the public can defeat a privacy claim").

[95] *Hudson*, 547 U.S. at 592.

interest of deterrence. Because of the lack of connection, the Court calculated the social cost of potentially excluding evidence to be too high. Under this reasoning, however, the purported high social costs of exclusion are never weighed against the social costs to personal privacy, dignity, and security within the home. The Court can justify a claim that exclusion of evidence entails high social costs only by refusing to calculate the social costs to individuals and communities from the violation of their privacy and dignity. A full accounting would undermine *Hudson*'s rationale.

In *Davis v. United States*, another case limiting the use of the exclusionary rule, the Court was explicit in weighing the deterrence benefits against the "substantial social costs generated by the rule."[96] As the Court explained, "Exclusion exacts a heavy toll on both the judicial system and society at large."[97] Not only do courts have to ignore evidence of criminal wrongdoing, but "its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment."[98] Such pervasive effects on society entail a substantial—yet uncalculated—cost through a remedy about which the Court expresses considerable doubt.

Following the reasoning of *Hudson* and *Herring*, the Court concluded "that society must swallow this bitter pill when necessary, but only as a 'last resort.'"[99] Moreover, there is no deterrence benefit to be gained by retroactively applying a constitutional rule to conduct that police at the time would not know was unconstitutional. In *Davis*, the police had conducted a search of a vehicle incident to the arrest of the occupants—a search which a subsequent Supreme Court decision in *Arizona v. Gant* would decide violated the Fourth Amendment.[100] But to apply the rule of *Gant* retroactively to police conduct in Mr. Davis's case would provide no deterrent benefit, the Court reasoned, and thus would not pay for the substantial social costs the rule imposes. As the Court explained, "[W]hen the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way."[101]

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[96] 564 U.S. 229, 237 (2011) (internal quotation marks omitted) (quoting United States v. Leon, 468 U.S. 897, 907 (1984).

[97] *Id.*

[98] *Id.*

[99] *Id.* (quoting *Hudson*, 547 U.S. at 591). *But see* Sharon L. Davies & Anna B. Scanlon, Katz *in the Age of* Hudson v. Michigan*: Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. DAVIS L. REV. 1035, 1043 (2008) (arguing that the Court has not always treated exclusion as a "last resort").

[100] *Davis*, 564 U.S. at 235–36; Arizona v. Gant, 556 U.S. 332 (2009).

[101] *Davis*, 564 U.S. at 238 (citations and internal quotation marks omitted) (first quoting *Leon*, 468 U.S. at 909; then quoting Herring v. United States, 555 U.S. 135, 137 (2009); and then quoting *Leon*, 468 U.S. at 908 n.6, 919).

Reasoning outward, the *Davis* Court referenced costs of increasing scope: from the truth-seeking function of a particular trial, to the judicial system more broadly, to society at large. Each suffers harms when the Court imposes the bitter pill of exclusion "when necessary," though the exact nature of the harm is left unspecified. On the other side of the ledger, the Court reasoned that benefits accrue only from deterring future unlawful police conduct. Even then, "[r]eal deterrent value is a necessary condition for exclusion, but is not a sufficient one."[102]

The calculation of social cost thus has an asymmetric structure. Costs include both broad effects on society as well as narrow considerations of policing practice, but the benefits are all focused on the narrow deterrence effects on policing practice from which any broader social benefit is incidental or inferred. On the one hand, what counts as social cost to be weighed against deterrence is expansive—including society's general interest in avoiding the risk of freeing dangerous criminals. And in the case of *Hudson*, it is also highly particular to policing practice—considering whether police might unnecessarily delay entry because of heightened Fourth Amendment privacy scruples. On the other hand, the benefits are narrowly confined to effects on police practice, not the effects on citizens surprised by the sudden entry of police. Any broader social benefits that privacy protections confer, according to the Court, are incidental to the incentives that exclusion might structure for the exclusion calculation's primary focus: police.

C. Qualified Immunity as an Alternative Cost Calculation?

Exclusion is not the only remedy available when police violate constitutional rights. Individuals who have suffered constitutional harms may bring suit in federal court to seek damages against law enforcement officers who acted illegally. As the Court in *Hudson* instructs, failure to exclude evidence does not end the legal avenues an aggrieved individual may pursue.[103] Even if the damages to a person's broken door are not large, they are still potentially compensable, the Court explained.[104] In response to the worry that the failure to apply the exclusionary rule to violations of the knock-and-announce rule would remove all incentives for police to comply, the Court commented that "[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."[105] Because "[m]assive deterrence is hardly required" in the context of *Hudson*, the Court

[102] *Id.* at 237 (internal quotation marks omitted) (quoting *Hudson*, 547 U.S. at 596).

[103] *Hudson*, 547 U.S. at 597.

[104] *Id.* at 597–98.

[105] *Id.* at 598.

explained, any amount of deterrence from threat of civil liability—in addition to increased police professionalization—should be sufficient to protect constitutional rights.[106] If exclusion of evidence is a remedy with social costs that are too substantial to justify its use, then the availability of civil damages, the *Hudson* Court intimates, may provide a sufficient alternative remedy.

As a preliminary problem, the Court does no more than assume that "as far as we know," civil remedies for constitutional violations are an adequate remedy. The Court provides no factual basis for this assumption, which is itself implicitly based on a premise that when a constitutional violation has occurred, a remedy should be available. By assuming the adequacy of an alternative deterrent to unconstitutional practices, the Court makes explicit a feature of all its social cost reasoning: it is speculative and partial.

The more substantial problem with this assumed alternative, as we shall see, is that the Court limits the availability of civil damages through a doctrine of qualified immunity that also calculates the social costs of inhibiting police practices.[107] In this way, the availability of both exclusion and damages is limited by the social costs the Court claims they impose. In each case, the social costs the Court uses in its jurisprudential calculations are limited to the costs imposed on policing, not those incurred by individuals and communities. In an unacknowledged paradox, therefore, the Court reasons that the social costs of exclusion are too high in many cases to provide a remedy for constitutional violations, then "assumes" the availability and adequacy of alternative civil remedies, which it then proceeds to limit under its doctrine of qualified immunity based on the same speculative social cost calculations it uses to deny exclusion of evidence.

In order to obtain civil compensation, a litigant must overcome law enforcement claims to qualified immunity—a judicially created doctrine designed to shield police from suit against all but the most egregious conduct.[108] As the Court explained, the general idea motivating the doctrine is that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not

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[106] *Id.* at 596–97 ("We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago.").

[107] Anderson v. Creighton, 483 U.S. 635, 638 (1987).

[108] *See, e.g.*, Joanna Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 314 (2020) ("If the Court decides to take a closer look at qualified immunity, it will find compelling reasons to greatly restrict or abolish the defense."); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1519–24 (2016) (arguing that qualified immunity is a significant barrier to holding police responsible for acts of violence); *see also* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018); Alan K. Chen, *The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018).

violate clearly established statutory or constitutional rights of which a reasonable person would have known."[109]

Worried that a renewed interest in subjecting government officials to suit under a provision of the Ku Klux Klan Act of 1871[110] would unduly hamper law enforcement officials, the Court sought to limit the availability of constitutional claims to those that were clearly established in law.[111] As the Court explained, the goal of qualified immunity is to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[112] Otherwise, society would suffer costs from more hesitant and constrained law enforcement, the very same costs that the Court has sought to avoid in limiting the scope of the exclusionary rule.[113] As the Court explained in *Anderson v. Creighton*, these costs can include "the risk that fear of personal monetary liability and harassing litigation would unduly inhibit officials in the discharge of their duties."[114] Qualified immunity thus serves as a barrier to constitutional remedies because the Court believes that the enterprise of holding officials to account produces "social costs . . . that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[115]

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[109] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[110] 42 U.S.C. § 1983 (codifying the Ku Klux Klan Act of 1871 as amended and authorizing monetary or injunctive relief against anyone who violates a person's constitutional rights under color of state law).

[111] Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) ("An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" (quoting Plumhoff v. Rickard, 572 U.S. 778–79 (2014))); City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) ("The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, . . . [it] defined the clearly established right at a high level of generality . . . saying . . . the 'right to be free of excessive force' was clearly established." (quoting Emmons v. City of Escondido, 716 F. App'x 724, 726 (9th Cir. 2018))); *see also* District of Columbia v. Wesby, 138 S. Ct. 577, 589–93 (2018); John C. Jeffries Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 854–59 (2010) (describing the problem of generality in assessing whether the law is clearly established).

[112] *Harlow*, 457 U.S. at 818.

[113] *See, e.g.*, White v. Pauly, 137 S. Ct. 548, 551 (2017) (explaining that "qualified immunity is important to 'society as a whole,'" (quoting City of San Francisco v. Sheehan, 575 U.S. 600, 611 n.3 (2015))); *see also* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1881 (2018) ("[Q]ualified immunity's core effectiveness might well not be in district courts formally utilizing the defense to dispose of Section 1983 lawsuits. Instead, its main influence could be in discouraging plaintiffs to file Section 1983 lawsuits at all . . . ."); Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 AM. U. L. REV. 379, 391 (2018) ("If officers were liable for every constitutional violation, they might hesitate before taking a step that produces a public benefit because an error would lead to personal liability.").

[114] 483 U.S. at 638.

[115] *Harlow*, 457 U.S. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

As a way of avoiding these costs, a litigant asserting constitutional harms against a law enforcement officer has the burden of navigating a two-step inquiry which the Court solidified in *Saucier v. Katz*.[116] Qualified-immunity claims, the Court explained, should be evaluated by first deciding whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right."[117] If this initial inquiry is satisfied, then a court must ask "whether the right was clearly established,"[118] an inquiry that must focus on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted" in a specific manner based on prior case law.[119]

The facts in *Anderson v. Creighton* are instructive in the way that qualified immunity works to deny remedies to those persons who suffer constitutional harms from police misconduct. Even though police had entered a family's residence without a warrant, holding even children at gunpoint while looking for a relative they thought might be hiding there, the Court in *Anderson* found that the circumstances warranted no further inquiry into whether the officer's actions violated clearly established law.[120] As the Court explained:

> Our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.[121]

Contorting logic, the Court claimed that an officer can reasonably act unreasonably in misapplying a probable cause and exigent circumstances standard to falsely believe that their entry into a home complied with the Constitution. When police reasonably act unreasonably under the relevant constitutional standard, the Court concluded, it is inappropriate to hold officers personally liable for their unconstitutional actions.[122] In this way, the

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[116] 533 U.S. 194, 201 (2001).

[117] *Id.*; *see also* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (describing the two-step inquiry in *Saucier*).

[118] *Saucier*, 533 U.S. at 201.

[119] *Id.* at 202.

[120] See the facts as found in *Creighton v. City of St. Paul*, 766 F.2d. 1269, 1270–71 (8th Cir. 1985). Even though completely innocent, a family was awakened, held at gunpoint, and beaten, and then the father was arrested for obstruction of an unwarranted home search. *Id.*

[121] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[122] *Id.* at 643–44 (finding no problem with officers acting "reasonably unreasonable"); *Saucier*, 533 U.S. at 206 ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.").

Creightons suffered a constitutional harm from the police invasion of their home that the Court was unwilling to remedy. No explanation is given why a harm of this kind—illegal police conduct victimizing innocent citizens—is not also a cost that society suffers for purposes of a Fourth Amendment calculus of social cost that would warrant greater judicial concern.

The *Saucier* two-step process might at least have the virtue of establishing a body of constitutional law under the first step, even if the judgment that an officer's actions in a particular case violated the Constitution was not clearly established. In this way, a case in which qualified immunity applies can also serve to develop Fourth Amendment law by further clarifying when particular actions violate the Constitution. Viewing the necessary order of this inquiry as too rigid and likely to produce unnecessary judgments on constitutional questions, the Court in *Pearson v. Callahan* concluded that courts do not have to decide whether an officer's conduct violates the Constitution if the conduct under consideration had not been clearly established as unlawful.[123] By dismissing a complaint because the unlawful conduct had not been clearly established with the appropriate degree of specificity, courts avoid "[u]nnecessary litigation of constitutional issues," thereby preserving judicial resources—no matter how egregious the underlying police conduct in fact was.[124]

By focusing on whether prior cases have clearly established that an officer's conduct was unlawful—not on whether it was in fact unlawful—this requirement has the potential not only to hinder the development of Fourth Amendment rules but also to exacerbate the costs society bears from failing to remedy constitutional violations. These costs occur not only in the particular case dismissed under the doctrine of qualified immunity, but in the future incidence of similar unlawful conduct that has not been adjudicated as violating the Constitution.[125] Because a qualified-immunity inquiry is fact-

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[123] 555 U.S. 223, 237 (2009).

[124] *Id.* at 236–37. This approach has been criticized by many, as we shall see below, including lower court judges. *See, e.g.*, Ventura v. Rutledge, 398 F. Supp. 3d 682, 698 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); Nelson v. City of Albuquerque, 283 F. Supp. 3d, 1048, 1108 n.44 (D.N.M. 2017) ("[T]he Supreme Court has crafted their recent qualified immunity jurisprudence to effectively eliminate § 1983 claims by requiring an indistinguishable case and by encouraging courts to go straight to the clearly established prong.").

[125] *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015) (showing evidence that courts reach the constitutional question in qualified-immunity cases less frequently and decide constitutional questions less frequently overall); *see also* Zadeh v. Robinson, 928 F.3d 457, 479–80 (5th Cir. 2019) (Willett, J., dissenting). Because qualified immunity is such a daunting barrier for holding police accountable for their unconstitutional actions, structural reform through other means is also needed. *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive*

dependent and case-specific, the Court admonished in *Kisela v. Hughes* that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[126] Being squarely governed by law means that although "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate."[127]

It is unclear what "beyond debate" means other than finding a case nearly identical, particularly when it comes to the Fourth Amendment standards applicable to use of deadly force.[128] In these cases, the Court warned "that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts,'"[129] and therefore liability will only follow if it "was clearly established that the Fourth Amendment prohibited the officer's conduct in the situation [she] confronted."[130] Such a level of fact dependency, which requires courts to dismiss a case when the unlawfulness of an officer's actions was not clearly established in the "situation she confronted," provides a legal shield for using force absent gross incompetence or knowing law violations.[131] The Court has long made this implication clear, explaining that "the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[132]

If qualified immunity protects against all law enforcement actions except those that arise from gross incompetence or willful illegality, the

Policing Reform, 62 STAN. L. REV. 1, 2 (2009) ("Countering the systemic causes of police misconduct requires doing more than punishing individual officers. It requires structurally changing police departments that permit misconduct in order to create accountability for officers and supervisors and foster norms of professional integrity.").

[126] 138 S. Ct. 1148, 1153 (2018) (quoting Mullenix v. Luna, 577 U.S. 7, 13 (2015)).

[127] *Id.* at 1152 (citing White v. Pauly, 137 S. Ct. 548, 551 (2017)).

[128] *See, e.g.*, Brosseau v. Haugen, 543 U.S. 194, 195–98 (2004) (holding that an officer who shot a suspect in the back while he fled in a vehicle did not violate clearly established law); *Kisela*, 138 S. Ct. at 1151, 1153, 1155 (finding that an officer who shot a woman holding a knife near two other people did not violate clearly established law); *White*, 137 S. Ct. at 551 (holding that an officer who arrived at a house during ongoing police action to witness shots fired did not violate clearly established standard when he killed an occupant without warning); Plumhoff v. Rickard, 572 U.S. 765, 768 (2014) (finding that firing fifteen shots at a speeding vehicle that has temporarily stopped does not violate clearly established law).

[129] *Mullenix*, 577 U.S. at 12 (quoting Saucier v. Katz, 533 U.S. 194, 205 (2001)).

[130] *Id.* at 13 (alteration in original) (internal quotation marks omitted) (quoting *Brosseau*, 543 U.S. at 199–200).

[131] *Id.* at 12.

[132] Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 6 (2017) (noting that the Court "appears to be on a mission to curb civil rights lawsuits against law enforcement officers, and appears to believe qualified immunity is the means of achieving its goal").

doctrine leaves much unconstitutional conduct without a remedy, and thus also produces widely dispersed social costs.[133] Actions taken that are merely negligent or indifferent to legality will receive protection from a doctrine invented by the Supreme Court to shield law enforcement from liability. Despite the existence of a statutory right to seek damages for constitutional harms produced by official conduct, the qualified-immunity standard places its thumb on the scale of protecting law enforcement from the very civil accountability for constitutional violations that the statutory right protects.[134] There is no talk of the deterrent value of civil liability. Rather, the focus is on liability avoidance through litigation avoidance and on enabling police practice by limiting legal accountability.[135]

Focused on litigation avoidance, the Court explains that the doctrine of qualified immunity is motivated by the view that police should be unencumbered in their actions from excessive fear of future civil liability.[136] This logic parallels the Court's rationale for limiting the scope of the exclusionary rule. Both civil liability and exclusion of evidence, the Court reasons, should be limited in scope to avoid overdeterring otherwise socially desirable policing practices.[137] Indeed, in developing the standard for qualified immunity, the Court was explicitly concerned about the costly effects of exposure to litigation, which comes "at a cost not only to the defendant officials, but to society as a whole."[138] Moreover, the Court explained, "These social costs include the expenses of litigation, the

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[133] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48 (2018) ("Recently publicized episodes of police misconduct vividly illustrate the costs of unaccountability.").

[134] Similar results follow from attempting to hold officials accountable for causes of action alleged directly under the Constitution. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (refusing to extend *Bivens* to allow recovery against a private prison operating a halfway house under contract with the Bureau of Prisons); Minneci v. Pollard, 565 U.S. 118, 131 (2012) (refusing to provide a constitutional remedy where state tort remedies are said to be available).

[135] A general hostility to litigation has been a primary motivation behind a number of judicial doctrines, including qualified immunity, especially under the Rehnquist Court. *See* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1097–98 (2006).

[136] Pierson v. Ray, 386 U.S. 547, 555 (1967) (explaining that qualified immunity's purpose is to make sure that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does"); Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Pearson v. Callahan, 555 U.S. 223, 231 (2009) (emphasizing "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably").

[137] City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 611 n.3 (2015).

[138] *Harlow*, 457 U.S. at 814.

diversion of official energy from pressing public issues, and the deterrence" of officials in the conduct of their duties.[139]

The Court uses the concept of deterrence in its qualified-immunity doctrine—as it does in the exclusionary-rule doctrine—but with the opposite goal. Rather than deterring illegal police conduct as exclusion seeks to do, the central concern of qualified immunity is to prevent police from being deterred from energetic policing practices. These divergent goals are in practice inconsistent considerations with inconsistent logic. Exclusion is available to deter illegality only if social costs are not too high; otherwise, civil liability is said to provide the proper remedy. But civil liability risks deterring policing practices and thereby creating social costs, the Court reasons, and thus should be made largely unavailable. Through such logic, the Court's overriding concern—by limiting both exclusion and civil liability remedies—seems to be the possibility of diverting police away from their law enforcement activities, not with deterring illegal activity. Otherwise, there would be no reason to require the near-impossible search for a factually similar holding that purports to "clearly establish" the illegality of the officer's conduct.[140] In this way, the central focus of qualified immunity is not to facilitate vindication of constitutional rights, but the avoidance of "costs of trial or to the burdens of broad-reaching discovery in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[141]

D. The Uncalculated Social Costs of Immunity

Absent from qualified immunity's litigation-avoidance reasoning is concern for the victims of unconstitutional police actions who need no evidence excluded and will receive no compensation. In light of this dynamic, and in light of the circumstances of police use of deadly force in cases like Donovan Lewis, who was shot at home in bed, or Walter Scott, who was shot in the back—among too many similar cases—calls for

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[139] *Id.*

[140] *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 607–08 (2021) ("To find a factually similar case is a challenge on its own—particularly given the unending number of ways government officials can violate people's constitutional rights."); John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 256 (2013) ("[T]he search for factually similar precedent extends qualified immunity beyond any defensible rationale. It is as if the one-bite rule for bad dogs started over with every change in weather conditions.").

[141] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (internal quotation marks omitted) (quoting *Harlow*, 457 U.S. at 817–18); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'").

reconsidering the qualified-immunity doctrine have grown louder.[142] For example, in a case in which police tased, kicked, hit, placed in a chokehold, and then shot an individual in possession of a knife while he was incapacitated on the ground, the Fourth Circuit acknowledged difficulties with the qualified-immunity doctrine.[143] Recognizing the gravity of the moment from other police shootings in the summer of 2020, the panel observed:

> Before the ink dried on this opinion, the FBI opened an investigation into yet another death of a black man at the hands of police, this time George Floyd in Minneapolis. This has to stop. To award qualified immunity at the summary judgment stage in this case would signal absolute immunity for fear-based use of deadly force, which we cannot accept.[144]

Similarly, a Fifth Circuit judge complained that "[t]o some observers, qualified immunity smacks of unqualified impunity, letting public officials

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[142] Christine Chung, *Columbus Police Release Body Camera Footage of Fatal Shooting*, N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/us/columbus-police-shooting-donovan-lewis.html [https://perma.cc/J4LC-RBJB]; Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), https://www.nytimes.com/2017/12/07/us/michael-slager-sentence-walter-scott.html [https://perma.cc/Z5VD-GW3Z]. *See, e.g.*, Editorial Board, *How the Supreme Court Lets Cops Get Away with Murder*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/opinion/Minneapolis-police-George-Floyd.html [https://perma.cc/5PJK-ATDZ] ("As the militarization of police tactics and technology has accelerated in the past two decades, pleas from liberals and conservatives to narrow the doctrine of qualified immunity . . . have grown to a crescendo."); David H. Gans, *The Supreme Court Enabled Horrific Police Violence by Ignoring Constitutional History*, SLATE (Jun. 3, 2020, 1:13 PM), https://slate.com/news-and-politics/2020/06/supreme-court-enabled-george-floyd-murder-police-violence.html [https://perma.cc/8AG7-ARM9] ("[Q]ualified immunity makes it incredibly difficult to hold police officers accountable for police brutality . . . which advocates on both the right and the left have decried."); Eric Schnurer, *Congress Is Going to Have to Repeal Qualified Immunity*, ATLANTIC (Jun. 17, 2020), https://www.theatlantic.com/ideas/archive/2020/06/congress-going-have-repeal-qualified-immunity/613123/ [https://perma.cc/XU8C-T9PP] ("[T]he proposed Ending Qualified Immunity Act is sponsored by not just a long list of liberal Democrats, but also the Republican turned Libertarian Justin Amash, from Michigan, and, most recently, Representative Tom McClintock, a California Republican.").

Scholars have been critical of the doctrine too:

> Qualified immunity has been attacked as ahistorical; unjustified as a matter of statutory interpretation; grounded on inaccurate factual assumptions; antithetical to the purposes of official accountability and of the statute of which it is putatively a part; unadministrable; regularly misapplied; a hindrance to the development of constitutional law; a basis for strategic manipulation by judges; and a source of jurisdictional problems.

Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2000 (2018). *See also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) ("[T]he Court could not justify the continued existence of the doctrine in its current form.").

[143] Estate of Jones v. City of Martinsburg, 961 F.3d 661, 663–64 (4th Cir. 2020).

[144] *Id.* at 673.

duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly."[145]

Calls for reconsideration are not confined to the circuit courts, but include members of the Supreme Court, including Justices Sotomayor and Thomas, who are not so often aligned.[146] Justice Sotomayor, for example, argued in a recent case involving police use of deadly force that "[b]y sanctioning a 'shoot first, think later' approach to policing, the Court renders the protections of the Fourth Amendment hollow."[147] This criticism implies that qualified immunity is designed to allow police to act without regard to constitutional rights, secure in the knowledge that in only a very few perfectly delineated situations will their actions be covered by a doctrine that emphasizes the degree to which rights must be clearly established in advance by factually similar cases.[148] The possibility that Fourth Amendment protections become hollow, as Justice Sotomayor suggests, is a risk entirely of the Court's own making. The doctrine of qualified immunity is a barrier both to the Court's role in protecting constitutional rights and to developing Fourth Amendment rights in relation to policing practice.[149]

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[145] Zadeh v. Robinson, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., dissenting). Judge Willett further elaborated:

> Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful. This current "yes harm, no foul" imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached.

Id. Moreover, he commented on the fact that lower courts need never decide on the constitutionality of police actions if there is no clear precedent. Thus: "No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses." *Id.* at 479–80.

[146] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that granting qualified immunity in this case "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished"). Similarly, Justice Thomas has recently signaled his desire to revisit the doctrine in a case in which the Sixth Circuit granted qualified immunity to police officers who deliberately let a dog loose to bite a burglary suspect as a means of apprehending him. Baxter v. Bracey, 140 S. Ct. 1862, 1862, 1865 (2020) (Thomas, J., dissenting) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."). Although Justice Thomas's grounds for reconsideration rely on his commitment to an originalist methodology, the consequence is to join with others in criticizing the doctrine. *See also* Baude, *supra* note 133, at 57 (discussing how the Court originally "rejected the application of a good-faith defense" to § 1983 claims).

[147] Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

[148] *See* Jeffries Jr., *supra* note 111, at 854–59.

[149] Indeed, as one commentator makes clear, "The Justices can end qualified immunity in a single decision, and they should end it now." Schwartz, *supra* note 142, at 1800; *see also* Michelman, *supra* note 142, at 2002 ("[T]he legal principles of the doctrine have eroded (or most accurately are in regular flux); the factual premises underlying the doctrine have been undermined; it has proven unworkable; and it anchors no reliance interest that the Court should recognize as legitimate.").

Not only is there growing criticism that qualified immunity offers a green light to unlawful police conduct, there is also good evidence that it fails to fulfill its central purpose of shielding police from litigation.[150] To the extent that it shields officers from liability in all but the most egregious and incompetent cases, in pursuit of goods like energetic policing said to be shared by society at large,[151] the doctrine also imposes social costs both on those who are victims of police illegality and those who must live in apprehension of the potential for police illegality. These are costs that the Court does not recognize even though it is very much concerned about the cost to society of diverting the attention and energy of police into litigation that inhibits the fulfillment of their law enforcement duties.[152] Such a cost calculation does not even purport to capture the costs already borne by those subjected to illegality that is not clearly established. It is instead focused on the inchoate costs that might occur were police practices to experience the purported chilling effect that increased exposure to civil liability might occasion.[153]

The costs to the Creighton family, for example, are real and vested. The Creightons' home was in fact unconstitutionally invaded by police, and they were subjected to fear and abuse as the police unconstitutionally detained them. The inchoate costs to policing practices, by contrast, are products of the Court's imagination. The possible future social costs of holding police accountable for their unconstitutional actions are entirely speculative. In this way, like the parallel development of the exclusionary rule, the Court purports to minimize the social costs of underpolicing by imposing unacknowledged and uncalculated social costs of illegal policing on innocent citizens and communities who suffer concrete constitutional harms. These unrecognized harms also reflexively reformulate the meanings of Fourth Amendment rights.[154]

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[150] *See* Schwartz, *supra* note 132, at 2 (reviewing over one thousand § 1983 cases in five court districts and finding "that qualified immunity rarely served its intended role as a shield from discovery and trial").

[151] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986). Moreover, there is evidence that the assumption undergirding qualified immunity that police are trained in "clearly established law" is erroneous. *See* Schwartz, *supra* note 140, at 618–22.

[152] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[153] Federalism considerations are implicated as well. *See generally* Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405 (2019) (discussing how qualified immunity addresses some concerns related to federalism but noting that this "does not justify the current qualified-immunity regime").

[154] *See* Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1006 (2010) (arguing that differential remedial tests "effectively redraw the contours of constitutional criminal procedure doctrine, creating dissonant

Citizens are caught in a paradox. The Court minimizes the availability of the exclusionary rule in cases like *Hudson* and offers civil liability as an alternative, yet it elsewhere makes clear its hostility to damages liability for constitutional violations for which the Court does not—or cannot—exclude evidence. The Court's doctrines make clear that both the imposition of the exclusionary rule and a finding of civil liability produce what it considers substantial social costs. The Court claims civil remedies are the alternative when social costs are too high to exclude illegally obtained evidence. But because the Court views the social costs of civil liability to be also high, no remedy at all is available. Any attempt to vindicate constitutional rights, the Court instructs, imposes social costs by overdeterring beneficial police practices. But all violations of constitutional rights can also impose widespread social costs.[155] In the name of avoiding the social costs of excluding evidence that would set a criminal suspect free, the Court imposes widespread social costs through illegal police conduct entitled to qualified immunity. The Court's doctrines paradoxically impose the high social costs they claim to avoid.

But what is the total value of all these uncompensated constitutional harms? The Court cannot say because it does not inquire. To understand this dynamic better, it is important to recognize how the Court maintains a distinctive perspective on Fourth Amendment values.

II. FOURTH AMENDMENT PERSPECTIVES AS THE PRECONDITION FOR SOCIAL COST CALCULATIONS

If, as the Court explained, exclusion "has always been our last resort, not our first impulse,"[156] the obvious question is: what is the first impulse? One answer suggested by the Court is to adopt the perspective of police. A pervasive way of thinking about Fourth Amendment rights is that they serve

regulatory signals to criminal justice actors and private individuals seeking to understand constitutional constraints on law enforcement").

[155] *See infra* Section III.A; *see also* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 294 (1995) ("Where Congress has failed to provide adequate remedies, or any remedies at all, against unconstitutional actions by the political branches, the courts must step in and ensure that such remedies exist."); John C. Jeffries Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 89–90 (1999) ("In constitutional torts, the right-remedy gap is huge, and the societal loss in underenforced constitutional norms is correspondingly great."). *But see* Richard H. Fallon Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 939 (2019) ("Decisions involving how to define constitutional rights, which causes of action to authorize, and which immunity doctrines to create should all reflect a kind of interest-balancing, aimed at yielding the best overall package.").

[156] Hudson v. Michigan, 547 U.S. 586, 591 (2006).

to provide administrable codes of conduct for police.[157] For example, the Court explained that "Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities."[158] Reasonableness has long been the Fourth Amendment's purported "touchstone," but who is the reasonable person whose perspective gives that touchstone meaning?[159] The police officer. Indeed, the Court often takes the perspective of police as the starting point of constitutional analysis. When faced with a proposal for a constitutional rule more responsive to individual cases, the Court explained that it must "strike a reasonable Fourth Amendment balance" that "credit[s] the government's side with an essential interest in readily administrable rules,"[160] which police officers can easily implement.

Focusing on the ease of administering constitutional rules by the very institution those rules are meant to regulate is an odd approach to protecting constitutional rights. The more the Court shapes doctrine by a principle of administrable ease, the less the broader problem of social cost will be readily apparent. This Section is primarily diagnostic, with the goal of uncovering in both judicial practice and in scholarly theory how much the default Fourth Amendment approach relies on prioritizing policing perspectives, which in turn shapes the social costs that are visible and therefore applicable to the problem of calculating total social cost. The reason why the Court focuses on the social costs of interfering with policing is that Fourth Amendment doctrine has been shaped to facilitate policing practice, not to enhance protections for constitutional rights. In order to shift the analysis towards calculating the total social cost, the Court must shift its perspective.

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[157] *See* Dan-Cohen, *supra* note 22, at 650 (explaining how certain laws can be construed as "decision rules" governing police conduct); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1702 (2005) ("In often minute detail, criminal procedure law regulates how and when the police can conduct searches, seizures, and interrogations.").

[158] New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)).

[159] Florida v. Jimeno, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."); Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."); Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977) ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'" (quoting Terry v. Ohio, 392 U.S. 1, 19 (1968))).

[160] Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

A. Facilitating Policing Practice

When focused on the Fourth Amendment's reasonableness requirement in light of police use of force, the Court explained that the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving."[161] These and related statements by the Court mean that a central purpose of the Court's Fourth Amendment jurisprudence is not only to regulate police practice, but also to facilitate it by easing the administration of any constraints Fourth Amendment rights might impose.[162]

A debate between the majority and the dissent in *Arizona v. Gant* is further illustrative of this central purpose. In deciding that police may not search the interior of an automobile incident to the arrest of a person who was a recent occupant, the majority worried that "[c]ountless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result."[163] In dissent, Justice Alito complained that police should be able to search the contents of an automobile even if the search was unrelated to the crime of arrest (such as a traffic violation), arguing that "the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply."[164]

Elsewhere, the Court explains that the search-incident-to-arrest doctrine serves law enforcement interests by protecting officer safety and preserving evidence—both of which are reasonable grounds for invading privacy.[165] As the Court explained in *Thornton v. United States*, the "need for a clear rule, readily understood by police officers and not depending on differing estimates"[166] of factual circumstances justifies an approach to the search-incident rule that can include circumstances that may strain the initial

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[161] Graham v. Connor, 490 U.S. 386, 396–97 (1989). The Court also claimed that another proposed rule that would have limited police ability to enter homes without a warrant "would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field." Kentucky v. King, 563 U.S. 452, 466 (2011).

[162] *See, e.g.*, Riley v. California, 573 U.S. 373, 398 (2014) (acknowledging the Court's typical role in providing police with "workable rules" under the Fourth Amendment); *see also* Dan M. Kahan & Tracy L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1155 (1998) ("[T]he doctrines that regulate police conduct . . . [constitute] the 'modern regime of criminal procedure.'").

[163] 556 U.S. 332, 349 (2009).

[164] *Id.* at 360 (Alito, J., dissenting).

[165] Chimel v. California, 395 U.S. 752, 762–63 (1969); Thornton v. United States, 541 U.S. 615, 623 (2004).

[166] 541 U.S. at 622–23.

rationale.[167] In other words, the doctrine favors simple overbreadth to a more nuanced precision.

In other cases, the Court goes so far in its concern for police administrability as to limit rights-protective rules in favor of applying broad exceptions to them in a way that turns the exception into its own police-facilitative rule. Ordinarily, police must have a warrant to enter a home and conduct a search.[168] In *Kentucky v. King*, Justice Alito explained by contrast that "a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement."[169] When exceptions facilitate police practice, according to Justice Alito, the privacy-protective constitutional rule is what needs to be limited in order to allow for the expansion of the exception.

Such a facilitative approach expands the opportunities for police to enter a dwelling without knocking and announcing and without a warrant—the implication of *King*, which authorizes warrantless entry into a home when police fear imminent destruction of evidence.[170] According to this inverted logic, only when no exigency exists that would allow the *King* exception to govern are households protected by the "bright" line rule that "the Fourth Amendment draws 'a firm line at the entrance to the house.'"[171] Thus, either by expanding the scope of doctrines such as public exposure or search-incident-to-arrest, or by enhancing the application of exceptions to rights-protective rules, the Court employs multiple police-facilitative strategies to limit the purported social costs of enforcing constitutional rights.

Apart from the limits *Gant* imposes on the search incident doctrine when it applies to recent occupants of automobiles, the Court regularly adheres to a Fourth Amendment perspective focused on the needs of police. For example, recall that a principal concern with qualified immunity is "the

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[167] In *Thornton*, for example, the Court applied the rule to an arrestee who had already exited a vehicle prior to the arrest and search and who was safely confined to the police vehicle. *Id.* at 618.

[168] *See* United States v. U.S. Dist. Ct. ex rel. Plamondon, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); Payton v. New York, 445 U.S. 573, 601 (1980) (stressing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."); *see also* Thomas P. Crocker, *The Fourth Amendment at Home*, 96 IND. L.J. 167, 168–69 (2020) (explaining that the home is particularly protected by the Fourth Amendment).

[169] 563 U.S. 452, 461–62 (2011).

[170] *Id.* at 460.

[171] Kyllo v. United States, 533 U.S. 27, 40 (2001) (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"[172]—not the need to protect individual citizens from unconstitutional police conduct. The explicit goal of the doctrine is to "protect officials" against legal liability for their negligent—albeit not quite reckless—failure to adhere to constitutional rules. The Court's rationale focuses on how greater exposure to possible liability might impact police practice, not how it affects individuals and communities. But there are limits to facilitating police practice. The Court has sometimes recognized the social costs to society through the intrusions on privacy as a way of limiting the mechanical application of doctrines, as they did in *Gant*. But the privacy costs suffered by persons subject to searches are always calculated in relation to the countervailing needs of police where these needs have a doctrinal priority.

For example, when establishing a limit to the mechanical application of the search-incident-to-arrest doctrine that would have allowed police to search the contents of an arrestee's smartphone, the Court in *Riley v. California* began from the premise that "our general preference [is] to provide clear guidance to law enforcement through categorical rules," reached by balancing the interests of law enforcement against the intrusions on privacy.[173] Despite the emphasis on providing police with "workable rules," Chief Justice Roberts reasoned that the privacy interests were too great given the large amount of content available on the typical smartphone.[174]

In contrast to prior cases that allowed searches incident to arrest of a person's physical possessions, including containers such as the crumpled cigarette pack in *United States v. Robinson*,[175] the Court reasoned that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[176] A

[172] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)).

[173] 573 U.S. 373, 398 (2014). The Court explained that "we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 385 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

[174] *Id.* at 393–97. Regarding workable rules, the Court explained that "if police are to have workable rules, the balancing of the competing interests . . . 'must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers.'" *Id.* at 398 (quoting Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981)).

[175] 414 U.S. 218, 236 (1973) (holding that police may search the contents of a crumpled cigarette package).

[176] *Riley*, 573 U.S. at 386, 393.

person would have to carry around "every piece of mail they have received . . . every picture they have taken, or every book or article they have read"[177] to match the physical equivalent of the information contained on a typical smartphone. As the Court explained, "A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is."[178] Because of the degree of intrusion, the Court concluded that police would have to obtain a warrant in order to search the contents of a person's smartphone.

The *Riley* Court admonished that "[p]rivacy comes at a cost," and acknowledged the inconvenience that this privacy-protective holding imposed on police.[179] From a police-facilitative perspective, society suffers a cost when the Court upholds privacy by denying police access to the content of a smartphone under the search-incident-to-arrest doctrine—itself an exception to the warrant requirement. From a rights-protective perspective, by contrast, when police invade individual privacy, society suffers a cost measured by the loss of security in a right to be free from unreasonable searches.[180] Even from a police-facilitative approach, however, some losses of privacy are too great to ignore, considering the amount of information that would be available to police from searching a person's smartphone. Had the *Riley* Court expanded the search-incident doctrine, police would have incentive to make arrests for relatively trivial offenses to enable more sweeping smartphone searches, which would produce substantial social costs, not only for the loss of privacy, but for the loss of trust in police that could follow. Even without the extra incentive, legal arrests themselves can produce social harms.[181]

Take, for example, *Atwater v. City of Lago Vista*, in which the Court held that it was reasonable under the Fourth Amendment for police to make arrests for minor offenses even when no jail time was authorized from a successful conviction.[182] Despite recognizing the "pointless indignity" and "gratuitous humiliations" wrought by "a police officer who was (at best) exercising extremely poor judgment" in arresting Ms. Atwater for a minor seatbelt violation, the Court did not contemplate the costs society might

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[177] *Id.* at 393–94.

[178] *Id.* at 396–97.

[179] *Id.* at 401.

[180] *See* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 131 (2008) (exploring how the Fourth Amendment protects the "people's right of security").

[181] These harms are especially apparent when arrests are conducted without justification, even when the police have the law on their side. *See* Harmon, *Why Arrest?*, *supra* note 16, at 313–20 (analyzing the many uncalculated costs of arrests to individuals, their families, and their communities).

[182] 532 U.S. 318, 354 (2001).

suffer from police engaging in more widespread practices of minor-offense arrests.[183] Making such gratuitous arrests would have been all the more profitable for police had *Riley* been decided in California's favor. Police would have been empowered to make arrests for minor offenses as a pretext to more sweeping searches of electronic devices under a search incident doctrine, producing widespread social costs.[184]

These putative costs, however, differ from those incurred from the underenforcement of the exclusionary rule or of civil liability. These costs would derive from calculating the loss of privacy from a less privacy-protective Fourth Amendment rule than the Court in fact imposes. This possibility is a reminder that the social cost of privacy intrusions can occur both through violation of constitutional rules and through compliance with more police-facilitative constitutional rules. The nature of the cost changes from actual harms to opportunity costs from lost privacy. These costs include intrusions on the freedom of movement, exposure to additional searches, and loss of trust in the legitimacy of law enforcement motives and practices, among others.

Underlying the Court's claim that "privacy comes at a cost," moreover, is a default view that constitutional standards must be "sufficiently clear and simple"[185] to "provide clear guidance to law enforcement"[186] because the government has "an essential interest in readily administrable rules."[187] In this way, privacy comes at a cognizable cost only if the underlying priority of Fourth Amendment doctrine is to facilitate police practice rather than to protect a constitutional right. Otherwise, a calculation of the social cost of constitutional criminal procedures should measure the cost of lost privacy, not the cost of its protection.

In keeping with the structure of rights protections, the cost calculation related to privacy should focus on its intrusion into the personal lives of individuals by widespread policing practices the Fourth Amendment is empowered to prevent. Cost considerations from a rights perspective bring into view questions of police legitimacy or the need for more effective means

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[183] *Id.* at 346–47; *see also* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1002 (2014) (noting that the Court's "exclusive object of analysis" was the act of arrest rather than its context or motivation).

[184] *See* Whren v. United States, 517 U.S. 806, 818–19 (1996) (allowing stops and arrests under pretext unless "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests").

[185] *Atwater*, 532 U.S. at 347.

[186] Riley v. California, 573 U.S. 373, 398 (2014).

[187] *Atwater*, 532 U.S. at 347.

of internalizing constitutional norms in policing practice.[188] To emphasize easily administrable rules obviates the need for law enforcement officials to internalize constitutional norms rather than think in instrumental terms. Such instrumentality reflexively alters the meaning of Fourth Amendment rights now understood through the lens of a more limited exclusionary remedy.

Facilitating policing practice through ease of administrable regulations is an odd way to construe the purpose of a constitutional right otherwise designed to limit the power of law enforcement officials to conduct searches and make arrests.[189] Rights ordinarily serve to protect persons from official interference with their liberties and to provide structural checks on the power of the state—not to empower government practice through easy application of the doctrinal rules that implement the rights.[190] If the Court's goal in construing the Fourth Amendment is to empower police through straightforward regulations, then it follows that social cost analysis will focus on factors such as overdeterring police practices and underprosecuting civilian lawbreakers. When it focuses on these and other such factors, the Court is actively and affirmatively choosing to view the matter from the police perspective.

It bears emphasizing that this choice could be otherwise. The preceding discussion illustrates that social costs occur no matter which constitutional rules have priority, so the question shifts to how to assess which costs and which harms to avoid. Cost avoidance is in part a matter of calculation—adding up the degree and kind of harms that follow from particular rules. But cost avoidance is also a normative matter dependent upon the values the Court chooses to prioritize by the perspectives it takes. As the next Section explores, when the Court takes the police perspective, that normative choice has tremendous implications for the Fourth Amendment's cost calculus.

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[188] *See* TYLER, WHY PEOPLE OBEY, *supra* note 21, at 58–59 (exploring the relation between willingness to obey the law and the perception of law enforcement legitimacy); Tyler, *Legitimacy*, *supra* note 21, at, 315–16; *see also* Schulhofer et al., *supra* note 21, at 350–51 (finding that intensive law enforcement "weaken[s] police legitimacy, and undermine[s] voluntary compliance").

[189] Because of the dynamic of citizen–police encounters, and because of the state's role in criminal law enforcement, the Fourth Amendment's regulatory role in guiding police is unavoidable. *See* Amsterdam, *supra* note 50, at 377–80. Whether and to what extent it imposes duties or provides protections to citizens or police is a different matter of distribution and perspective. *See, e.g.*, Reich, *supra* note 31, at 1161–62 (describing a series of demeaning police encounters).

[190] *See, e.g.*, DWORKIN, *supra* note 15, at 147 ("Our constitutional system rests on a particular moral theory, namely, that [individuals] have moral rights against the state."); *see also* Richard H. Fallon Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 61 (1997) (suggesting that "[t]he indispensable function of constitutional doctrine . . . is to implement the Constitution," which establishes rights and structure).

B. Seeing Through the Police Officer's Eyes

In *Scott v. Harris*, the Court quite literally took the perspective of law enforcement when it held that no reasonable jury could find that police acted unreasonably.[191] When the car Victor Harris was driving was observed travelling eighteen miles per hour over the speed limit on a Georgia highway, a deputy sheriff attempted a routine traffic stop. But Harris did not stop, leading to a high-speed chase that ended when Officer Scott rammed Harris's car with his police vehicle, causing a serious accident that rendered Harris a quadriplegic. Harris sued claiming that Scott's actions were an unjustified use of deadly force against a speeding motorist.[192] Under a qualified-immunity standard, the Eleventh Circuit had agreed with the lower court that there were issues to be tried before a jury concerning the reasonableness of the officer's actions in the situation.[193] The Supreme Court reversed, noting that a video recording of the chase provided an "added wrinkle in this case," and that "[t]he videotape quite clearly contradicts the version of the story told by the respondent and adopted by the Court of Appeals."[194]

Appending the police-cruiser video of the chase to the opinion, the Court proclaimed, "We are happy to allow the videotape to speak for itself."[195] The viewer is invited to see the case from the perspective of the police giving chase, the very perspective the Court adopted, even though judges at both lower courts had seen things differently.[196] Justice Scalia wrote that "what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."[197] Because the police perspective was so overwhelming to Justices on the Supreme Court, it was inconceivable that they could adopt the perspective of the recalcitrant driver whose "version of events is so utterly discredited by the record that no reasonable jury could have believed him."[198] Although lower court judges as well as Justice Stevens saw alternative perspectives, the Court proclaimed

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191 550 U.S. 372, 386 (2007).

192 *Id.* at 374–75.

193 Harris v. Coweta Cnty., 433 F.3d 807, 821 (11th Cir. 2005).

194 *Scott*, 550 U.S. at 378.

195 *Id.* at 378 n.5.

196 *See Harris*, 433 F.3d at 815–16 ("[Respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians . . . ." (citations omitted)).

197 *Scott*, 550 U.S. at 380.

198 *Id.*

that "[t]he videotape tells quite a different story."[199] In this way, subsequent analysis of the reasonableness of the deputy sheriff's actions seems to be less a matter of judgment about disputed facts than a deduction from axiomatic premises that the video was said to make certain.

Purporting to weigh the costs of both possible actions—requiring police to let the driver continue unharmed to be arrested later or allowing them to use deadly force—the Court claimed that it was the driver "who intentionally placed himself and the public in danger,"[200] a view that stops just short of saying that he has "only [himself] to blame"[201] for his injuries. Again, adopting the clarity of the video evidence from the police perspective as the basis for its judgment, the Court explained:

> Although there is no obvious way to quantify the risks on either side, it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.[202]

In a choice between different forms of disorder—allowing the lawbreaker to go temporarily free or using deadly force—the Court adopted the perspective of the police and invited the viewer to do the same. In doing so, the Court also adopted an approach to the standard governing use of force in which "all that matters is whether [the officer's] actions were reasonable," where reasonableness is determined not from an objective perspective of events, but from the police perspective alone.[203]

The choice of framing supports a particular weighing of social costs. On the Court's measurement, the general threat the fleeing car posed to the public produced greater social cost than did the specific harm (or potential

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[199] *Id.* at 379. The Court went on to explain:

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up.

Id. at 379–80.

[200] *Id.* at 384.

[201] Kentucky v. King, 563 U.S. 452, 470 (2011).

[202] *Scott*, 550 U.S. at 383–84.

[203] *Id.* at 383. In this way too, the Court did not apply the standard applicable to deadly force from *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) ("[S]uch [deadly] force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."). *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1133–40 (2008) (discussing the relation between *Garner* and *Scott*).

death) that Officer Scott's actions imposed on Harris.[204] Moreover, as the Court explained, police acted to protect innocent bystanders from Harris's reckless actions, making "it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability."[205] In choosing to facilitate deadly force, the Court considered only the specific harm that might befall a specific individual, ignoring the possibility that a more permissive approach might have significant social ramifications.

The actual story in *Scott* is far more complex than a single perspective, suggesting that the Court's objective was not to invite consensus on the Hollywood-style reading we should all adopt when viewing the video but to construct a normative case for looking at the video from the perspective of the police. Empirical evidence, not to mention the views of the lower courts as well as the dissenting Justice Stevens, implies that the video does not "speak for itself" to show the reasonableness of the police action in this case.[206] Seeing is filtered through cultural frames, expectations, and the limited optical view of the camera.[207] Curiously, if the video evidence speaks for itself, it does so according to the Court through the frame of fictional Hollywood portrayals, requiring the viewer to see the film within a particular genre.[208] But to say that the viewer has to place the film within a fictional genre to best understand what it "most closely resembles" belies the claim that it speaks for itself.[209] It must be mediated. Fictional framing reinforces the police-perspective framing, inviting the viewer to place the events within

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[204] *Scott*, 550 U.S. at 379 n.6 (stating that in comparison to high-speed emergency vehicles, society "need not (and assuredly does not) accept a similar risk posed by a reckless motorist fleeing the police"). The Court also characterized respondent's actions as an "extreme danger to human life." *Id.* at 383.

[205] *Id.* at 384.

[206] *See* Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 864–79 (2009); Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 VAL. U. L. REV. 1, 3–4 (2013) ("[C]ourts and legal actors lack a critical vocabulary of the visual, and without visual literacy, they are more likely to be unduly credulous in the face of images.").

[207] On cultural framing as a form of cognitive bias, see Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 883–85 (2012).

[208] *See* Peter Brooks, Scott v. Harris: *The Supreme Court's Reality Effect*, 29 LAW & LITERATURE 143, 147–48 (2017). For a review of case law on the use and admissibility of film as evidence, see Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 501–02 (2004). *See also* Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, 91 JUDICATURE 180, 182 (2008) (discussing the problems with the Court treating the *Scott* video evidence as "truthful, unbiased, objective, and unambiguous").

[209] *See* Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1321–30 (2018) ("The *Scott* Court fundamentally misunderstood video and video evidence. Video does not possess a singular meaning or tell a singular story to all viewers . . . .").

a cops-and-robbers dynamic in which the police inevitably prevail.[210] Notably, the Court does not attempt or invite consideration of the events from the point of view of Harris.[211]

Such framing is normative as well. By arguing that the video speaks for itself, that it utterly discredits other perspectives, and that it makes clear the public dangers Harris posed, the Court presents the police perspective as the only proper one through which to view the events. In this way, for the video to speak for itself is for the video to speak from the perspective of police on behalf of a particular weighing of social costs. This choice of framing is not neutral. It affects outcomes.[212] Nonetheless, it is consistent with the Court's overall orientation to Fourth Amendment rights as facilitating police practice from the perspective of law enforcement interests.

Reform attempts to make policing more visible, and thereby more accountable, through implementation of body-worn cameras confronts similar framing problems.[213] With the use of the dashboard camera in *Scott*, one approach is to think that more of such video evidence will be of use to judicial proceedings and public accountability. One issue that recurs with the many occasions in which police use deadly force is the lack of video evidence of events that would be available for official review or for public reassurance.[214] In an attempt to make police feel that their actions are subject to monitoring, some advocate the use of body-worn cameras as a way of providing video evidence of police practice that would facilitate accountability.[215] If police had worn cameras in Ferguson, Missouri when

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[210] On the importance of framing, see Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCH. 341, 343–44 (1984); and Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453 (1981).

[211] *See* Adam Benforado, *Frames of Injustice: The Bias We Overlook*, 85 IND. L.J. 1333, 1360–63 (2010).

[212] *See id.* at 1347–51; Kahneman & Tversky, *supra* note 210, at 343–44; Kahan et al., *supra* note 206, at 883–87 (discussing how groups' different understandings of background social reality frame their understanding of the facts of the case and their viewing of the video).

[213] *See* Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 U.C. DAVIS L. REV. 897, 921–26 (2017) (discussing the convergence of interest groups advocating use of police-worn body cameras); *see also Department of Justice Awards over $20 Million to Law Enforcement Body-Worn Camera Programs*, DEP'T JUST. (Sept. 26, 2016), https://www.justice.gov/opa/pr/department-justice-awards-over-20-million-law-enforcement-body-worn-camera-programs [https://perma.cc/7279-RLYQ].

[214] *See* Wasserman, *supra* note 209, at 1358–62. The *Washington Post* compiles data on police shootings across the country. *Police Shootings Database 2015–2022*, WASH. POST (June 29, 2022), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/WLZ9-Z57Z].

[215] *See* Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. REV. 1639, 1643 (2018); Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1422 (2018) (considering potential symbolic, behavioral, and informational benefits); Stephen E.

they shot Michael Brown, advocates lament, the public would have a better picture of events to assess Officer Wilson's claim to have acted in self-defense.[216] Critics of body-worn cameras, by contrast, argue that they are not a panacea. The critics focus on the limited reliability of the camera in fast-moving circumstances, its manipulability by police, and the difficulties of gaining public access to footage, among other problems.[217]

Without wading into the thick of this controversy, note that like the dashboard camera in *Scott*, the video evidence will always come from the perspective of police. Ironically, the very mechanism that might provide a basis for accountability and reform itself risks reinforcing the policing perspective. Video evidence also risks misuse and becomes a further tool through which government surveillance can invade the privacy of ordinary citizen activities.[218]

As a counterweight, the proliferation of third-party video surveillance of police makes possible alternative perspectives that can provide some balance to the policing perspective.[219] With the widespread availability of

Henderson, *Fourth Amendment Time Machines (and What They Might Say About Police Body Cameras)*, 18 U. PA. J. CONST. L. 933, 970 (2016) ("[G]iven the myriad benefits of tamper-resistant, always-on officer recording . . . it seems such recording is worth the privacy cost . . . [which] means police should record.").

[216] Fan, *supra* note 215, at 1653–55; Max Ehrenfreund, *Body Cameras for Cops Could Be the Biggest Change to Come Out of the Ferguson Protests*, WASH. POST (Dec. 2, 2014, 8:39 AM), https://www.washingtonpost.com/news/wonk/wp/2014/12/02/body-cameras-for-cops-could-be-the-biggest-change-to-come-out-of-the-ferguson-protests/ [https://perma.cc/UR6T-BT67]; German Lopez, *Police Body Cameras, Explained*, VOX (Aug. 22, 2016, 3:05 PM), http://www.vox.com/2014/9/17/6113045/police-worn-body-cameras-explained [https://perma.cc/RPF8-TGBM].

[217] *See* Elizabeth E. Joh, *Beyond Surveillance: Data Control and Body Cameras*, 14 SURVEILLANCE & SOC'Y 133, 136 (2016) ("[I]n the rush to respond to calls for greater police accountability, many American police departments lack consistent, clear, or—in some cases—any, formal policies regarding how to control that data. Without clear limits, body-worn cameras may become just another tool for law enforcement rather than a mechanism for police accountability."); Kami N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 988 (2016); Howard M. Wasserman, *Moral Panics and Body Cameras*, 92 WASH. U. L. REV. 831, 833 (2015) ("While body cameras are a good idea and police departments should be encouraged and supported in using them, it is nevertheless important not to see them as a magic bullet. The public discussion needs less absolute rhetoric and more open recognition of the limitations of this technology."); Robinson Meyer, *Body Cameras Are Betraying Their Promise*, ATLANTIC (Sept. 30, 2016), https://www.theatlantic.com/technology/archive/2016/09/body-cameras-are-just-making-police-departments-more-powerful/502421 [https://perma.cc/K3D4-M6MA]; Louise Matsakis, *Body Cameras Haven't Stopped Police Brutality. Here's Why*, WIRED (June 17, 2020, 12:41 PM), https://www.wired.com/story/body-cameras-stopped-police-brutality-george-floyd [https://perma.cc/LV5F-LVAG].

[218] *See* Kami Chavis Simmons, *Body-Mounted Police Cameras: A Primer on Police Accountability vs. Privacy*, 58 HOW. L.J. 881, 889 (2015).

[219] *See* Fan, *supra* note 215, at 1642–43 ("[P]eople and the police are recording each other from all directions, making everyone at once surveilled and surveillor."); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407 (2016).

technology through smartphones to record publicly observed activity, any person can become a videographer of police conduct. Without citizen surveillance, to cite only one example of too many, the public would not have the horrifying evidence of the police conduct that led to George Floyd's death.[220] In this way, third-party surveillance and the proliferation of perspectives provides one possible way that citizens can become the surveillants.[221] The availability of multiple perspectives, however, can only be an episodic and contingent addition to the increasingly regularized use of police-worn cameras. Through the use of body-worn cameras, the policing perspective risks remaining dominant, even if at times contestable from alternative perspectives on the same events.

Privileging the police perspective pervades the Court's Fourth Amendment jurisprudence. In this respect, using the dashboard camera or the body-worn camera allows the policing perspective to "speak for itself" within Fourth Amendment jurisprudence. The Court already sees its primary task as facilitating policing practice through conduct rules that leave some constitutional harms without a remedy, as we have seen. The body-worn camera establishes expectations based on perspective that will further facilitate the Court's jurisprudential orientation.

When crafting Fourth Amendment rules that govern citizen–police encounters, the choice of perspective matters for the ability of citizens to vindicate their rights. Citizens must often navigate complex interactions with police subject to constitutional rules designed from the police perspective, not from that of citizens who seek to invoke their Fourth Amendment rights. Apart from any video record, citizens must confront police in a variety of unfamiliar circumstances that make it difficult to know what their constitutional rights are, especially in situations when police seek consent to conduct a search or ask questions. From the citizen's perspective, the nuances of Fourth Amendment doctrine will be unknown in attempting to determine whether an officer's request is really a polite command ("may I see your license and registration please" during a traffic stop) or a genuine request which the citizen may refuse ("may I look around inside your car" when otherwise lacking Fourth Amendment grounds to do so).[222] The lack of

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[220] *See* Audra D.S. Burch & John Eligon, *Bystander Videos of George Floyd and Others Are Policing the Police*, N.Y. TIMES (Nov. 24, 2021), https://www.nytimes.com/2020/05/26/us/george-floyd-minneapolis-police.html [https://perma.cc/75F9-FAHW].

[221] *See* Fan, *supra* note 215, at 1643.

[222] *See* Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (reviewing empirical studies showing that "the extent to which people feel free to refuse [an officer's request] to comply is extremely limited under situationally induced pressures"); *see also* Florida v. Bostick, 501 U.S. 429, 434 (1991) ("So long as a reasonable person would feel free 'to

clarity from the citizen perspective is an advantage for police, who can exploit their position of authority to obtain consent to search where they would otherwise fail to meet the relevant Fourth Amendment standard of probable cause or reasonable suspicion.

With this asymmetry in mind, the Court could craft rules from the citizens' perspective to empower them to vindicate their constitutional rights. Yet the Court explicitly refuses to do so. Indeed, the Court "has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search."[223] In another case, the Court deemed it "unrealistic" to require state police to inform a motorist that he was free to leave at the end of a traffic stop that evolved into what the Court judged to be a consensual encounter.[224] Although the precise nature of the encounter can only be clear from the police officer's perspective, the Court refused to require officers to make evident to a citizen what their constitutional rights are in the situation.[225]

The combined trends of emphasizing remedial deterrence as the goal of excluding evidence and attention to the police perspective as the means of evaluating factual circumstances mean that judges play a diminished role in supervising police practice through constitutional norms. By encouraging police to seek consent to engage in searches in situations otherwise governed by the Fourth Amendment, the Court places more burdens on individuals to protect their own rights. Unable to discern when a request for a search is really a polite command or when one is free to decline police requests, or when one is otherwise free to go about one's business ignoring police

disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required." (quoting California v. Hodari D., 499 U.S. 621, 628 (1991))).

[223] United States v. Drayton, 536 U.S. 194, 206 (2002); *see also* Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 738 (2000) ("[T]he Court made 'voluntariness' a placeholder for an analysis of the competing interests of order and liberty . . . .").

[224] Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) ("[S]o too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."); *see also* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 915 (2009) (criticizing judicial reliance on "common sense" projections of how persons might feel or respond to particular circumstances, as a Justice's common sense may differ from that of a member of the general public).

[225] After the police killing of an unarmed teenager in Ferguson, Missouri, the President's Task Force on 21st Century Policing recommended precisely what the Supreme Court refuses to require as a matter of Fourth Amendment reasonableness: "Law enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse when there is no warrant or probable cause." OFF. OF CMTY. ORIENTED POLICING SERVS., FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 27 (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf [https://perma.cc/RB5N-BK7Z].

overtures, the individual must bear the entire burden of any mistaken perception of the social situation unsupported by later judicial determinations. In this way, reliance on new technologies such as body-worn cameras will not assist citizens in knowing what they are entitled to do when confronting police, serving to reinforce the policing perspective, not to protect individual rights.

C. The Equilibrium Equation

If Fourth Amendment rules are adopted in order to advance "the virtue of providing clear and unequivocal guidelines to the law enforcement profession,"[226] then the Court must adjust the guidelines as new technologies and circumstances arise to which the Fourth Amendment applies. Making rule adjustments in order to maintain a particular level of policing, one scholarly view argues, requires a process of "equilibrium adjustment," whereby the Court constantly adjusts the relative balance between police power and personal privacy to maintain a kind of rough original equilibrium.[227] Social developments and technological change disrupt this Fourth Amendment equilibrium on this view, forcing the Court to alter the rules to maintain or "restore the prior equilibrium of police power" as a corrective mechanism.[228]

This theory both describes and justifies existing doctrine, while also exemplifying a particular way of thinking about the Fourth Amendment—from the perspective of police power—that exacerbates the problem of social cost.[229] The normative goal of equilibrium adjustment is "to maintain police

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[226] California v. Acevedo, 500 U.S. 565, 577 (1991) (internal quotation marks omitted) (quoting Minnick v. Mississippi, 498 U.S. 146, 151 (1990)); *see also* Arizona v. Roberson, 486 U.S. 675, 682 (1988)) (noting the aim of providing clear guidelines for law enforcement).

[227] Kerr, *supra* note 29, at 487–90. As the equilibrium theory explains, it is the police who must be granted relaxed standards in order to keep up with social use of technology, not innocent individuals and communities whose privacy must be protected against police use of such technology. For criticism of such approaches, see Sklansky, *supra* note 29, at 235–37 (explaining the alternative "principle of conservation of privacy" whereby "we strive to maintain a cumulative level of privacy comparable to that existing at the time the Fourth Amendment was drafted"); Christopher Slobogin, *An Original Take on Originalism*, 125 HARV. L. REV. F. 14 (2011) (arguing that the equilibrium-adjustment theory "does not easily explain many of the Court's cases, nor does it help address the most difficult Fourth Amendment issues facing the Court today"); Neil Richards, *The Third-Party Doctrine and the Future of the Cloud*, 94 WASH. U. L. REV. 1441, 1486 (2017); and Jonathan Mayer, *Government Hacking*, 127 YALE L.J. 570, 655 (2018) ("[E]quilibrium adjustment is not just indeterminate, but also prone to leading courts astray.").

[228] Kerr, *supra* note 29, at 487.

[229] For mixed support for this approach, see Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1339–45 (2012); and Matthew Tokson, *The Emerging Principles of Fourth Amendment Privacy*, 88 GEO. WASH. L. REV. 1, 11 (2020) (noting that "such equilibrium adjustment likely does play a general role in many Fourth Amendment contexts").

power in response to changing facts,"[230] not to maintain the degree of privacy necessary for the people to be free from arbitrary government intrusion and essential to practices of self-government.[231] This normative purpose, however, reinforces the problematic orientation of Fourth Amendment doctrine as principally focused on facilitating the effective administration of law enforcement, not on protecting privacy.[232]

If the goal of equilibrium adjustment is to maintain a status quo distribution of police power relative to a criminal's capacity to exploit social and technological change, then the price of that stability is the accretion of additional policing power over everyday citizens. This equilibrium fails to account for the innocent citizens now subject to more requests for consent searches, greater risk of being stopped and frisked, pervasive surveillance of their third-party data, inquiries at checkpoints, and many other policing practices that intrude on everyday life.[233] Prior to the development of the automobile, police had limited means of transportation. Even if police could have availed themselves of the full investigatory toolkit authorized by the *Gant* automobile exception (using pretext to stop a vehicle; question its occupants; seek consent to engage in a search; and use a flexible probable cause standard as a basis for searching the vehicle, its inhabitants, and the contents of their belongings) the equilibrium adjustment would look entirely different than it does today, when police can rove around a city with ease.[234] It is not plausible to think that a policing institution engaged in such activities in some founding-era original equilibrium. At each stage of technological progress, the exposure of the public to lower-cost, more-pervasive police

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[230] Kerr, *supra* note 29, at 489.

[231] Justice Scalia, by contrast, articulates an originalist claim in terms of privacy, seeking to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." United States v. Jones, 565 U.S. 400, 406 (2012); *see also* Sklansky, *supra* note 29, at 235 (explaining the "principle of conservation of privacy" whereby "we strive to maintain a cumulative level of privacy comparable to that existing at the time the Fourth Amendment was drafted").

[232] *See also* Richards, *supra* note 227, at 1486 ("[A]t a descriptive level, Equilibrium-Adjustment Theory focuses on the power of the state rather than the civil liberties of the people the government is entrusted with serving.").

[233] *See* California v. Acevedo, 500 U.S. 565, 579–80 (1991) (allowing police to search containers in a car without a warrant based on a probable cause standard); Wyoming v. Houghton, 526 U.S. 295, 300 (1999) (reiterating that no warrant is required for police to search belongings in a car); Ohio v. Robinette, 519 U.S. 33, 39–40 (1996) (stating that police can request consent for searches after a traffic stop citation is complete without informing detainees that they are free to go).

[234] *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (first articulating the automobile exception); *Acevedo*, 500 U.S. at 579 (expanding the automobile exception to include containers in an automobile); *see also* Sarah A. Seo, *The New Public*, 125 YALE L.J. 1616, 1647 (2016) ("By midcentury . . . the governance of automobility had amounted to more than bureaucratic inconveniences for drivers. Public rights to the automobile had served as the handmaiden to a new kind of society that seemed less bound by law and more subject to the whims of police discretion").

surveillance increases.[235] There has been no equilibrium adjustment for the more dispersed social costs communities incur.

Equilibrium theory represents a particularly salient example of how the policing perspective pervades not simply the Court's approach to the Fourth Amendment but also normative scholarly commentary. Equilibrium theory turns the Supreme Court into an adjustment bureau whose purpose is to maintain police power, not to protect constitutional rights nor to consider the social costs of rules that produce privacy losses in relation to technological changes. In this way, both practice and theory provide justifications for adopting the police perspective, which has the effect of employing the Fourth Amendment to empower police rather than to protect the privacy of "the People" both as individuals and as political sovereigns.[236] This policing perspective leads the Court to make social cost calculations that fail to account for actual social cost.

Fourth Amendment rights, therefore, are underinvoked in addition to being underenforced.[237] Their invocation—because of the burden shift occasioned by the Court's adoption of a policing perspective—is itself fraught with risk for the individual who might err, for example, in invoking a right to ignore. When an individual seeks to hold police to account for unconstitutional actions through civil suits, the Court likewise, as we have seen, both underenforces constitutional rights and alters the meaning of those rights in relation to their everyday application. If the first line of defense for individual rights is the individual herself—either during the encounter with police or after the fact—then there will be fewer rights invoked and therefore more police practices that exceed limits that a rights-protective perspective might otherwise constrain.

III. THE COST OF COST AVOIDANCE: ON RECALCULATING FOURTH AMENDMENT REMEDIES

What the Court leaves unexplained is: If society has an interest in avoiding letting lawbreakers go free, why does society not also have an equal or greater interest in protecting individual privacy and dignity—an interest that lies at the heart of the constitutional right the Fourth Amendment

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[235] Professor Jonathan Mayer makes a similar point, arguing that "judicial adoption of equilibrium adjustment risks a 'ratchet-up effect' for warrantless surveillance capabilities. For each new technology that criminals adopt to conceal evidence, law enforcement can deploy a novel investigative technique that circumvents the criminal technology without being subject to heightened procedural protections." Mayer, *supra* note 227, at 657.

[236] *See* Crocker, *supra* note 38, at 354–71.

[237] *See infra* Section III.A.

protects?[238] Moreover, when the Court withholds a remedy for illegal police conduct, it is committing a judicial act of letting a lawbreaker go free as well. Why does the Court gesture expansively, albeit imprecisely, at the "heavy toll" that "society at large" bears when the Court applies the exclusionary rule,[239] but not even acknowledge that society likewise suffers costs, though in need of suitable articulation, when law enforcement officers act illegally?

Although *Mapp v. Ohio* first articulated deterrence as one of the values that the exclusionary rule would support, the Court in later cases like *Herring* has treated it as the sole value.[240] The Court in *Mapp*, no doubt, explained that the exclusionary rule removes an incentive for law enforcement to conduct searches in violation of the Fourth Amendment.[241] But the stakes of official illegality are also systemic and concern fundamental values. "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."[242]

The exclusionary rule does more than just deter: it supports systemic values of judicial integrity, as the Court explained in *Terry v. Ohio*, by preventing courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."[243] Moreover, the rule encourages "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system."[244] By claiming that the Fourth Amendment protects values that should be incorporated into the fabric of policing practices as a systemic matter of constitutional governance, the Court has recognized that any social costs relevant to imposing the exclusionary rule have to be measured by more than deterrence effects. Rules designed to avoid social costs have structural effects on the nature of the constitutional governance Americans will have.

Because social costs occur no matter how the Court conceptualizes the central Fourth Amendment purpose, and thus the scope of the exclusionary rule, accountability for wrongdoing—for either form of illegality—will inevitably be incomplete. To use evidence obtained by illegal conduct allows official illegality to have effect within the criminal justice system, and to suppress the evidence allows individual criminality to go unpunished. Either

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[238] *See* Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (recognizing the "inestimable right of personal security").

[239] Davis v. United States, 564 U.S. 229, 237 (2011).

[240] Mapp v. Ohio, 367 U.S. 643, 656 (1961); Herring v. United States, 555 U.S. 135, 144 (2008).

[241] *Mapp*, 367 U.S. at 656.

[242] *Id.* at 660.

[243] 392 U.S. at 13; *see also Mapp*, 367 U.S. at 659 (holding that the exclusionary rule upholds "the imperative of judicial integrity" (quoting Elkins v. United States, 364 U.S. 206, 222 (1960))).

[244] Stone v. Powell, 428 U.S. 465, 492 (1976).

approach influences practice in light of constitutional meaning while at the same time reflexively constituting that meaning. Emphasizing deterrence and instrumental rationality, however, does not account for the social meaning police illegality has in everyday citizen–police relations and more broadly its effect on citizen views of governing authority.[245] Constitutional governance does not entail perfect judicial enforcement of protected rights, leaving gaps between citizen expectations and policing prerogatives. Social costs are therefore unavoidable. The central question however is how to calculate these costs—what to include and what to leave as is. The answers to these questions, as we have seen, depend on the perspectives the Court adopts in light of the remedial doctrines it creates.

A. Rights Remediation and Constitutional Meaning

An important theoretical issue structures how to think about the practical problem of the Fourth Amendment's social cost: how to understand the relationship between the meaning of the right and the availability of a remedy. Perfect remedial enforcement might be neither desirable nor possible, but imperfect enforcement can also produce substantial social costs. To acknowledge that there are underenforced constitutional rights is not simply to make a claim about rights essentialism.[246] No doubt, on a more robust view of Fourth Amendment rights, the Court's approach in qualified-immunity and exclusionary-rule cases leaves constitutional rights violations without a remedy and therefore underenforces the Constitution.[247] But to acknowledge this dynamic need not commit one to claiming that the rights–remedy gap is entirely the work of some conception of a "platonic ideal" of

[245] *See generally* Tyler, *supra* note 37 (discussing the role of the fairness of legal processes in molding public behavior); Delgado, *supra* note 37 (noting that a loss of faith in the fairness of legal processes has shaped public behavior towards law enforcement); *see also* Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 369–71 (2010) (asserting that "deterrence and legitimacy [are] rival explanations for cooperation with the police").

[246] One approach to the rights–remedy gap is to begin with a conception of the right formed independently of its practical implementation or remedial possibilities—what Levinson calls "rights essentialism." *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 870–72, 924–25 (1999); Jeffries, *supra* note 155, at 112–13.

[247] *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (explaining how institutional concerns can leave constitutional rights underenforced); *see also* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655–58 (2005) (distinguishing the Court's articulation of the Constitution's operative propositions, which tell actors what they may do, from its articulation of the rules to enforce the operative requirements); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 90–95 (2000) (explaining how over- and underenforcement occurs through gaps between constitutional text and judicial doctrine).

rights that the Court fails to uphold.[248] Rather, by the Court's own approach, the remedy and right are mutually implicated. The one informs the meaning of the other. This rights-dynamic relation means that by deciding on a remedy, the Court constructs the practical meaning of the right. Conversely, by urging a more robust rights-protective meaning, dissenters and scholars urge a shift in the practical meaning of the right towards a different conception of its relation to police practice.[249]

For the Court, social cost is the mediating concept between the right and the remedy. In this rights–remedies relation under the Fourth Amendment, the Court uses social cost as a way of shaping the remedy, and in turn the available remedy shapes the meaning of the right. So, the Court is not rights-essentialist, but remedy-centric and police-facilitative when it comes to the constitutional meaning of the Fourth Amendment, mediated by the import it places on avoiding substantial social costs. And to the extent that this meaning depends on a conception of social cost that remains loose and undefined, Fourth Amendment rights are shaped by a concept without definite content. The Court has never undertaken the task of explaining what counts as social cost and how to measure it. This approach is bad news for citizens who want to know both what rights they have and whether the judiciary stands ready to enforce them. But it does not have to be.

If rights and remedies are understood to be in a pragmatic relation, then alternative cost determinations become possible that in turn shape the practical meaning of the underlying Fourth Amendment rights.[250] Perhaps more than in the case of an idealized conception of a constitutional right, this more flexible approach requires careful attention to particulars. This dynamic can have the negative possibility that the meaning of the right becomes a calcified version of the doctrine designed to protect it.[251] But it

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[248] *See, e.g.*, DWORKIN, *supra* note 15, at 82–84 (distinguishing principle from policy); Fallon, *supra* note 190, at 59 n.19 (distinguishing constitutional meaning from constitutional implementation); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 53 (1979) (advocating structural litigation as a means of protecting "the true meaning of . . . constitutional value").

[249] Such a shift is to be distinguished from the minimalism advocated by scholars such as Professor Cass Sunstein. *See generally* Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) (advocating narrow and shallow constitutional decisions); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998) (criticizing Dworkinian moral readings of the Constitution).

[250] In this regard, Professor John Jeffries Jr. argues that a right–remedy gap can facilitate constitutional change. Jeffries, *supra* note 155, at 98 ("[D]octrines that deny full individual remediation reduce the cost of innovation, thereby advancing the growth and development of constitutional law" by lowering the cost of change.).

[251] *See* Roosevelt, *supra* note 247, at 1652 ("This mistaken equation of judicial doctrine and constitutional command tends to warp doctrine, frequently at significant cost to constitutional values . . . .").

can also make possible the creation of new constitutional meanings. Under a flexible, pragmatic approach, a constitutional right does not have a meaning independent from the dynamics of practical implementation and articulation through which the Court fashions remedies.[252] In this case, the justifications for avoiding social costs become all the more important because of their primary effects on the underlying meaning and scope of Fourth Amendment privacy.

If avoiding social cost is a goal, and thinking about social cost requires thinking holistically or systemically about the deterrent effects on police practice—which, the Court worries, might lead to suboptimal amounts of policing thereby harming society—then the Court should also stand ready to think holistically and systemically about the effects of rights violations on the political community. The idea of social cost appears to be about the effects on the political community in which choices have already been made concerning law, policy, and enforcement. When the Court leaves a rights violation without a remedy in order to prevent a citizen lawbreaker from going free, it purports to uphold values on which the political community has already decided through its choice of criminal prohibitions and law enforcement.[253] A decision to avoid allowing a citizen lawbreaker to go free is also a decision to free an official lawbreaker. We need not be rights essentialists to see that when the Court leaves illegal police conduct unpunished, it risks altering—or even debasing—the constitutional values to which the political community is also committed as a matter of fundamental law.

The Court spends very little effort analyzing the impact of its decisions on constitutional values such as privacy, focusing instead on the effects of its decisions on police practice.[254] If the Court creates doctrine in order to promote underlying constitutional values, then its exclusionary-rule doctrines—focused on avoiding substantial social costs through the vindication of constitutional rights—provide decision rules for law enforcement officers that are unmoored from the constitutional meanings

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[252] *See generally* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (explaining how judicial interpretation of constitutional protections in criminal procedure creates a disconnect between law enforcement, who focus on the impact of violating constitutional rights, and the general public, who focus on the rights themselves).

[253] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4–5 (1997).

[254] *See, e.g.*, Thornton v. United States, 541 U.S. 615, 623 (2004) (neglecting to discuss privacy in the majority opinion); Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016) (discussing the attenuation doctrine as basis for not applying the exclusionary rule without considering privacy interests).

they are meant to preserve.[255] These decision rules are not principally aimed at creating or preserving constitutional values such as privacy or individual liberty that the Fourth Amendment protects. Rather, they are aimed at a wider conception of optimal public policing and thereby at facilitating government practice through "readily administrable rules" and the like.[256] In this way, from an ideal privacy-protective perspective, the Court's approach not only fails to remedy harms to constitutional values the Fourth Amendment protects but also fails to account for them.

This failure to account for harms to constitutional values arises not only because the Court adjusts a decision rule to avoid the social costs of overprotecting the right, but because the Court often does not account for the effects of its decisions on the meaning and scope of Fourth Amendment rights.[257] There may indeed be good reasons to pursue the cost savings and social benefits that misaligning decision rules and protected rights achieves.[258] And indeed, at times the Court's qualified-immunity standard sounds in this reasoning, seeking to avoid the more trivial litigation of relatively minor incidents of negligent constitutional violations. On this rationale, tort remedies might best be reserved for reckless police conduct in order to avoid the costs that excessive overenforcement would create.

It is difficult, however, to credit this reasoning if the Court loses sight of the right altogether. In order to make a claim about overenforcement, the Court would need to perform a more precise accounting of the values left unprotected than it does when it makes circular claims, as it did in *Kentucky v. King*, that "[t]his holding provides ample protection for the privacy rights that the Amendment protects."[259] In this case, in which evidence was not suppressed when police forcibly entered a home under a claim of exigency without a warrant and without knocking and announcing, the Court's claim of "ample protection" is delivered alongside little or no protection for privacy rights. Such empty claims fail to provide any account of the meaning

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[255] *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004); Roosevelt, *supra* note 247, at 1655 (detailing a theory that in many doctrinal areas the decision rules "separate" from constitutional operative positions).

[256] Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

[257] *See* Jeffries, *supra* note 140, at 262–64 (suggesting a standard of "clearly unconstitutional" rather than "clearly established" in qualified-immunity cases to better protect constitutional meaning).

[258] *See, e.g.*, Fallon, *supra* note 155, at 967 ("[I]t is fallacious to maintain that the Supreme Court should not, as a general matter, take social costs into account when defining constitutional rights. Nor is it specifically objectionable for the Court to take cognizance of the social costs of constitutional tort litigation.").

[259] Kentucky v. King, 563 U.S. 452, 469 (2011); *see also*, Crocker, *supra* note 30, at 718 (discussing why this phrasing would be consistent with the Amendment protecting no privacy rights).

of Fourth Amendment rights in the contexts of citizens' lives and encounters with police.

A claim that social cost mediates between right and remedy therefore requires careful analysis of the meaning and calculation of social cost.[260] It might be beneficial to give meaning to more broadly construed rights with incomplete remedies, perhaps as a way of maintaining an expressive dimension to a desired normative ordering of constitutional rights.[261] Admitting that perfect rights enforcement is unrealizable and undesirable, we might view remedial deviation as inevitable and beneficial.[262] Even so, there would have to be a robust attempt to articulate the content of these rights even in the judicial decisions that limit their remedial protection because of the worry about excess social costs. In this regard, the Court's incantation of social cost when narrowing the exclusionary rule and when expanding qualified immunity is entirely insufficient.

Social cost sounds like a calculus but is perhaps more accurately a semantics—a way of explicating constitutional meaning in light of social facts salient to the Court's interpretive priorities. We know that the Court counts underenforcement of criminal law, police hesitancy, and diversion of police resources all as relevant social costs that weigh against more robust rights protections. But we do not know the scale on which these costs are calculated, nor any of the particulars about how to weigh privacy intrusions against incremental effects of potential criminal law underenforcement or police overdeterrence.

The debate between the majority and the dissent in *Utah v. Strieff* illustrates this indeterminacy between semantics and calculus. From the beginning, the majority explains that the Court has established a number of exceptions to applying the exclusionary rule because "the significant costs of this rule have led us to deem it 'applicable only . . . where its deterrence benefits outweigh its substantial social costs.'"[263] A law enforcement officer had illegally stopped and detained Strieff, gathered his identification and

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[260] *See, e.g.*, Fallon, *supra* note 155, at 939 ("Sometimes we may be best off, on balance, with relatively expansive definitions of rights but with limitations on damages remedies that would make those rights' social costs inordinately large.")

[261] *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); RAINER FORST, NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION 55–57 (2018). *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995) (exploring the relationship between social meanings and the broad construction of rights in accordance with these meanings).

[262] *See* Fallon, *supra* note 155, at 968 ("[I]t may sometimes be better to have more broadly defined rights with a set of partially incomplete remedies than to have individually effective remedies for every constitutional violation."); Jeffries, *supra* note 155, at 87–90.

[263] Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)).

sought information about any outstanding warrants that might exist. Finding one, the officer arrested Strieff and conducted a search incident to arrest that discovered illegal narcotics.[264]

Even though the stop and subsequent discovery of an outstanding traffic violation were based on illegal police conduct, the Court nonetheless applied its attenuation doctrine to hold that the discovery of a valid arrest warrant was an intervening event between the initial illegality and the subsequent discovery of evidence.[265] Because the causal chain was attenuated, the Court concluded that the exclusionary rule did not apply. This attenuation doctrine applies because of the need to avoid the "substantial social costs" of excluding evidence without any discussion of the constitutional values at stake in the decision. Moreover, the Court concluded that there was no "purposeful or flagrant" illegality, but rather an isolated instance of negligence.[266] In the Court's view of police practice, application of the attenuation doctrine to such illegal stops is unlikely to incentivize police to make use of this new application of the doctrine to go fishing for outstanding warrants. Since the officer's conduct was not "wanton," Justice Thomas reasoned for the Court, and since the exclusionary remedy for Fourth Amendment violations imposes high social costs, the implied cost calculus weighed against imposing a rights-based limit on official illegality. Absent from the majority's opinion is any consideration of the actual social costs on which its opinion is premised.

Writing for herself and Justice Ginsburg in dissent, Justice Sotomayor took the social cost calculation seriously. First, she called attention to the costs that *Mapp v. Ohio* first identified that occur when the state exploits illegally obtained evidence.[267] Second, Justice Sotomayor examined the social and political circumstances: Utah has over 180,000 warrants in its database, providing ample reasons for a police officer—now protected by attenuation—to go fishing for a traffic warrant. As the dissent argues, the warrant check was not an intervening event, but "was part and parcel of the officer's illegal expedition for evidence in the hope that something might turn up."[268] Indeed, it is standard procedure in the Salt Lake City Police Department to stop individuals, obtain identification, and check for outstanding warrants.

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[264] *Id.* at 2060.

[265] *Id.* at 2061–63.

[266] *Id.* at 2062–64 ("For the violation to be flagrant, more severe police misconduct is required than the mere absence of proper cause for the seizure.").

[267] *Id.* at 2065 (Sotomayor, J., dissenting).

[268] *Id.* at 2066 (internal quotation marks omitted) (quoting Brown v. Illinois, 422 U.S. 590, 605 (1975)).

As Justice Sotomayor's dissent details, such procedures are common across the nation.[269] If any substantial number of such stops target individuals without reasonable suspicion, then the social costs of police illegality are both widespread and invisible within the majority's doctrinal approach. Not only does the Court incentivize police to engage in illegal practices, secure in the knowledge that a successful warrant check will attenuate the legal consequences of their actions, but "[w]e also risk treating members of our communities as second-class citizens."[270] Moreover, the distributional effects on equal citizenship of allowing police to engage in warrant-fishing expeditions will not always be equally targeted according to race and class.[271] As Justice Sotomayor observed, "it is no secret that people of color are disproportionate victims of this type of scrutiny."[272] In this way, the social costs will not be distributed evenly across communities, which can create divergent perceptions of the adequacy and constitutionality of policing practices.

Because of the kinds of widespread social costs the attenuation doctrine entails—itself a doctrine about how not to enforce a remedy for a constitutional violation—and because the Court makes no attempt to incorporate them into any understanding of the exclusionary rule's costs, the rights–remedy gap is not a product of calculation. It is the result of normative commitments. What is salient for the Court is minimizing the costs to policing and thereby facilitating the fulfillment of arrest warrants, no matter the manner in which they were discovered.[273]

In structuring the citizen–police encounter, only a "purposeful or flagrant violation" rises to the level of a cognizable Fourth Amendment violation when other factors exist to attenuate the very meaning of the right. At least when it comes to the Fourth Amendment, the meaning of the right

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[269] *Id.* at 2069.

[270] *Id.*

[271] *See* Devon W., Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L, REV. 946, 964–74 (2002); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 772–74 (2012); *see also* Kahan & Meares, *supra* note 162, at 1176–77 (arguing that policing components should be balanced by citizens, not judges, because they face "a heightened risk of criminal victimization"). *See generally* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1998) (describing the disproportionate impact of Fourth Amendment underenforcement along class and racial lines).

[272] *Strieff*, 136 S. Ct. at 2070.

[273] On the importance of normative commitments to evaluating policing practice, see Harmon, *supra* note 271, at 790. She notes: "Effective governance of the police requires a normative framework for assessing whether constitutionally permissible policing practices properly balance efficacy against individual and social harms." *Id.*

is what it does to structure a political community's interactions with law enforcement authority.[274] As Justice Sotomayor argues in *Strieff*:

> By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.[275]

So while the majority in *Strieff* nominally grants that there is an underlying rights violation, the meaning of Fourth Amendment protected privacy—its role in structuring the everyday political lives of citizens—plays no role in the analysis. The Court construes social cost to encompass only those costs of police and criminal law underenforcement, not the underenforcement of Fourth Amendment rights. The majority and dissent differ over how to calculate social costs, with only the latter undertaking an effort to recognize the comprehensive effects of authorizing a systemically employed policing practice.

Even though on closer inspection social cost becomes a semantics through which the Court gives salient priority to policing practices over rights-violations, the doctrinal concept remains available as a source of calculation, as the dissents in *Strieff* illustrate.[276] The narrowness of the Court's approach also belies the importance of analyzing social cost with greater accuracy. Fourth Amendment rights are held by "the people," suggesting that the rights in question are constitutive of a political community that is itself sovereign over incidental exercises of policing power.[277] The issue of social cost is thus not merely about underenforcement

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[274] This realization is apparent in Justice Sotomayor's approach to the Fourth Amendment. *See Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) ("I would add that unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name."); United States v. Jones, 565 U.S. 400, 416 (Sotomayor, J., concurring) (explaining that "by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track—[GPS monitoring] may 'alter the relationship between citizen and government in a way that is inimical to democratic society'" (quoting United States v. Cuevas-Perez, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring))); Tracey L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 532–35 (2014); Crocker, *supra* note 30, at 702–14.

[275] *Strieff*, 136 S. Ct. at 2070–71 (Sotomayor, J., dissenting).

[276] *Strieff*, 136 S. Ct. at 2073–74 (Kagan, J., dissenting) (arguing that the Court's opinion increases "[t]he officer's incentive to violate the Constitution").

[277] *See* Herring v. United States, 555 U.S. 135, 151–52 (2009) (Ginsburg, J., dissenting) ("Protective of the fundamental 'right of the people to be secure in their persons, houses, papers, and effects,' the Amendment 'is a constraint on the power of the sovereign, not merely on some of its agents.'" (first quoting U.S. CONST. amend. IV; and then quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting))).

of a right against a particular individual, but the constitution of the political community. The core question of social cost for the political community becomes how to understand social cost more comprehensively, and to make clear why it matters.

B. Inverting Broken Windows and the Social Cost of Insecurity

As a matter of internal criticism or critique, the Court's focus on the social costs of the exclusionary rule creates the doctrinal opening to provide a more accurate and comprehensive accounting for social cost. Because the Court makes social cost relevant to the meaning and scope of the Fourth Amendment, the critical task is to explain how social cost accounting can be used to make visible the unseen costs to the justice system from low-level, yet systemic, unconstitutional police behavior. In this way, social cost accounting can be viewed as the inversion of order-maintenance policing.

In pursuit of order-maintenance policing, the Court adopted a flexible approach to enable greater police discretion aimed at maintaining social order over low-level street crime.[278] The motivating idea behind broken-windows policing was that by maintaining the social order against relatively minor crime, police could establish norms of law abidingness within communities that would forestall cycles of increasing crime.[279] In order to facilitate more proactive policing practices, the Court needed to relax enforcement of Fourth Amendment rules, and police needed to transgress constitutional limits in discretionary practice aimed at achieving greater social benefits from increased crime control and legal-norm compliance.

Social cost accounting has an inverse logic. In pursuit of a more accurate cost accounting, the Court would acknowledge as legally relevant, and thereby make visible, the costs suffered by communities by low-level law enforcement criminality. And by adopting a less flexible approach to Fourth Amendment rules, the Court would force police to internalize constitutional norms as constitutive features of their practices, thereby

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[278] *See* Terry v. Ohio, 392 U.S. 1, 11–12 (1968); *Strieff*, 136 S. Ct. at 2063–64; Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 185 (2004).

[279] Wilson & Kelling, *supra* note 30, at 32 ("A piece of property is abandoned, weeds grow up, a window is smashed. Adults stop scolding rowdy children; the children, emboldened, become more rowdy. Families move out, unattached adults move in . . . . Fights occur. Litter accumulates."); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997) ("Cracking down on . . . visible signs of disorder may be justified on this ground, since disorderly behavior and the law's response to it are cues about the community's attitude toward more serious forms of criminal wrongdoing."); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 806 (1998) ("By shaping preferences for crime, accentuating the perceived status of lawbreaking, and enfeebling the institutions that normally hold criminal propensities in check, disorderly norms create crime."); WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS 65–84 (1990).

protecting communities from more pervasive law enforcement illegality. If broken-windows policing is structurally about the disorder that comes from minor criminality, then similar structural effects should follow from the kind of disorder produced by minor criminality when conducted by police.[280] Pervasive minor police criminality from underenforced constitutional violations has large aggregate effects, producing an overall climate among communities.

But unchecked systemic illegality will also sometimes irrupt into major instances of criminality, as George Floyd's and Breonna Taylor's deaths illustrate. This dynamic is the inversion of the broken-windows logic, whereby policing itself produces the social disorder.[281] But unlike citizen-produced social disorder, a police-created legal disorder reflexively risks undermining not only legal legitimacy, but also the structural relations of democratic government.[282] A legal community that tolerates pervasive police criminal wrongdoing signals a lack of attachment to its own basic

[280] In general, choice of level policing and type of policing—order maintenance, etc.—produces different systemic effects which, at any given time, citizens are tempted to treat as inevitable or natural. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 90–92 (2001). Within these choices, however, there are discretionary opportunities for police tactics to include copious illegality and abuse, as the case of Baltimore exemplifies. C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 5 (Aug. 10, 2016); Radley Balko, *An Interview with the Baltimore Cop Who's Revealing All the Horrible Things He Saw on the Job*, WASH. POST (June 25, 2015, 5:35 PM), http://www.washingtonpost.com/news/the-watch/wp/2015/06/25/an-interview-with-the-baltimore-cop-whos-revealing-all-the-horrible-things-he-saw-on-the-job [https://perma.cc/3JK6-MDVP].

[281] Although there are reasons to doubt the empirical foundations of broken-windows policing, the correlative concern over inverted broken windows relies on different contextual basis. *See* HARCOURT, *supra* note 30, at 88–89. First, unlike ordinary crime, where the concern is not that one cracked window leads to very many broken windows, the inverted logic applied to police is that one act of illegality—stops without reasonable suspicion increase because police have incentives to break the law—will lead to systematic perpetration of acts of similar kind. Communities can expect a lot more of the same kind of illegality. *See Strieff*, 136 S. Ct. at 2073–74 (Kagan, J., dissenting) (arguing that the Court's opinion will create more police illegality). But second, following broken-windows logic, it is reasonable to believe that police illegality and unaccountability at the street level regarding stops and seizures, for example, will lead to greater forms of illegality that result in more police brutality and death. This logic is not a slippery slope, but a causal consequence of the legal community's toleration of illegality and approval of unaccountability. For the expectation of Fourth Amendment jurisprudence is that police will employ investigatory practices unless explicitly prohibited by enforceable constitutional rules. *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 649–50, 657–64 (2021) (demonstrating that *Whren v. United States*, which held that pretextual stops do not violate the Fourth Amendment, produces more traffic stops of persons of color). Indeed, the implication of qualified immunity is that police will not be deterred from effective enforcement activities unless there is a factually precise precedent proclaiming otherwise.

[282] *See* Sklansky, *supra* note 157, at 1702–03; Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1830 (2015); Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–1801 (2005); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057–58 (2017).

commitments, which reflexively undermines the constitutional basis of its own normative order. In this way, through choice of Fourth Amendment enforcement priorities, we choose our forms of disorder as well as the normative orders by which we organize social and political life.[283]

Because democratic life also requires security in order to protect the public spaces in which the ideal of democratic deliberation can occur, it is tempting to argue for a normative order that prioritizes policing as a way of facilitating the enjoyment of other political and civil rights. Indeed, Professors Ian Loader and Neil Walker argue that we cannot fully enjoy any of our other civil liberties if we are made insecure by crime in our community, for "security is a valuable public good, a constitutive ingredient of the good society," which the state is obligated to provide.[284] On this view, security is also a right that functions as a necessary condition for the enjoyment of other rights.[285]

If Loader and Walker are correct, then the critical task is not to advocate eliminating the police, as some in the wake of George Floyd's murder have at least rhetorically claimed,[286] but to establish more robust legal norms that become constitutive of policing practice.[287] But absent the instillment of constitutive norms that make the provision of true security (bodily and otherwise) the default response of police, violations of life and liberty at the hands of police will continue to occur. They will operate on the doctrinal algorithm that the Court has written—one with disparate and deadly impacts.

One hurdle, however, is that we can't have constitutive norms of this kind if the Supreme Court is at war with constitutional rules and remedies, believing its task is to facilitate a particular historically contingent program and theory of policing that broken-windows community policing represents. But no matter the current trends, we should not forget that the Fourth Amendment aims to protect a right of the people to be secure from the exercise of state power that policing represents, even if policing seeks to

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[283] *See, e.g.*, Crocker, *supra* note 30, at 701 (arguing that "[d]ivergent views on constitutional meaning can order alternative social and political practices by making available particular ways of exercising the role of citizen or police").

[284] IAN LOADER & NEIL WALKER, CIVILIZING SECURITY 7 (2007).

[285] As the philosopher Henry Shue puts the point: "No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right." HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 21–22 (1980).

[286] Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition [https://perma.cc/62KJ-255L].

[287] LOADER & WALKER, *supra* note 284, at 195–233.

protect the people from private assertions of power through criminal acts.[288] With both security and liberty at stake, constitutional rules establish necessary conditions for the possibility of minimizing the social costs of both over- and underpolicing. In order to protect all of the people's rights, including their rights to security, the Court must adhere to the constitutional expectation of its own doctrinal analysis—that the social costs both of overpolicing and underenforcing constitutional norms will also count in the overall calculation.

This analysis views the Court's role in articulating the constitutional meanings of Fourth Amendment rights as a necessary condition for enjoying both rights to security and liberty.[289] Focusing on policing's role in maintaining community safety, Professor William Stuntz has argued that the proper level of policing is tethered to the level and kind of criminality that a community seeks to avoid, so that when the threats change, so too must the application of legal limitations on policing practice.[290] Increasing the restrictions constitutional rules create on policing practices, he argues, thereby increases the social costs of fighting crime.[291]

This dynamic looks to be a zero-sum rights–security tradeoff. Inverted broken-windows logic recognizes, however, that communities can be made insecure from both private and police criminality. But there is a key difference in the nature of the two kinds of insecurity. Unlike private criminality, policing illegality—tolerated by underenforced constitutional rules—has the power to create reflexive constitutional norms that define a policing regime's self-understanding of its powers and limits. Policing illegality thereby creates both physical and normative insecurity. Rather than a tradeoff, judicially tolerated police illegality makes us both less free and less secure.[292] To avoid descending into a Pareto inferior position whereby

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[288] *See, e.g.*, Rubenfeld, *supra* note 180, at 131 (asking "whether the search-and-seizure power the state has asserted could be generalized without destroying the people's right of security"); *see also* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2146 (2002) ("[T]he 'rights' vision of Fourth and Fifth Amendment law rests on an implausible assumption: that people care a lot about assaults and invasions by the police but care little about similar assaults and invasions by private parties.").

[289] Tweaking the tension between lawfulness and legitimacy, where police must practice the former to have the latter, Professor Tracey Meares argues by contrast that we need to focus more on rightful policing and less on the lawfulness of policing. Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1865–66 (2013). Rightful policing recognizes the discretionary elements of contextual fairness and procedure that exist apart from law. *Id.* at 1866.

[290] Stuntz, *supra* note 288, at 2147 ("[I]f serious crime rises, police authority ought to increase, and if serious crime falls, it ought to decrease.").

[291] *Id.* at 2148–49.

[292] For an analogous argument in the national security context, see DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 17 (2007).

everyone's social welfare is worse off than it should be, any analysis of social cost requires accounting for the systemic effects of Fourth Amendment rules governing both the practice of policing and the constitutional norms of the polity. Abandoning a narrow, police-facilitative approach to social cost thus promotes a right to security alongside other civil rights and liberties that the Fourth Amendment represents.

If we examine the narrowness of the Court's reasoning in cases like *Herring*, a police-centric calculation of costs has not always been the Court's principal focus. Concern for what the Court cannot see by focusing only upon the case before it once motivated the construction of Fourth Amendment doctrine. As Justice Jackson observed in a different era:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence . . . . I am convinced that there are[] many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.[293]

These are the effects on the everyday lives, which can be quite expansive in terms of possible job loss, reduction in social status, damage to one's sense of civic equality, and the like.[294] Americans choose a public policy that entails a certain approach to policing, and the Supreme Court sets the rules that enable particular policing practices, though the effects are experienced more like tragic choices—choices for which most do not wish to take responsibility.[295] When the rules require flagrant constitutional violations in order to merit remedy, or when the Court focuses on the social costs of underpolicing and not the social costs to the political community, then there

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[293] Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting); *see also* Harris v. United States, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting) ("To sanction conduct such as this case reveals is to encourage police intrusions upon privacy . . . . [I]t is important to remember that police conduct is not often subjected to judicial scrutiny."); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 343 tbl.6 (2004) (reporting findings of large numbers of unconstitutional searches in everyday police practice).

[294] *See* Reich, *supra* note 31, at 1172 ("The good society must have its hiding places—its protected crannies for the soul.").

[295] *See* Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL'Y 363, 366–68, 375 (2004) ("Discretionary policing involves a tradeoff—a tradeoff that we make with full knowledge. The most important thing in the public policy debates, then, is to decide, with eyes wide open and brutal honesty, how much unconstitutionality we are prepared to live with . . . ."). *See generally* CALABRESI & BOBBITT, *supra* note 57 (originating and framing the concept of tragic choices as a problem of scarce resources).

will be unquantified, yet substantial, unseen social costs.[296] Whether these are the social costs that count towards the Court's calibration of tolerable rights violations and required remediation is a central question for the meaning of the Fourth Amendment.

C. The Practical Effects of Uncalculated Costs: Community Costs and Black Lives Matter

The case of Breonna Taylor, whose death at the hands of police in March 2020 produced protests and social unrest, is illustrative of the uncalculated social costs police practices, such as reliance on no-knock warrants, produce.[297] Having obtained a no-knock search warrant, officers from the Louisville Metro Police Department entered Taylor's apartment as part of a narcotics investigation that also involved Kenneth Walker, who was also staying at her apartment.[298] Thinking intruders were entering, Mr. Walker fired his weapon once in warning, whereupon the entering officers returned fire, hitting Ms. Taylor six times and killing her.[299]

Law enforcement officers obtained the no-knock warrant under claims that were likely insufficient to support such a warrant under Supreme Court precedent in *Richards v. Wisconsin*, which held that there was no blanket narcotics investigation exigency that would justify no-knock entries.[300] The warrant affidavit's basis for seeking permission for a no-knock entry involved boiler-plate language about the nature of narcotics investigations of

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[296] *See* Steiker, *supra* note 252, at 2468–71; Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970) ("[T]he Supreme Court simply never gets to see many of the police practices that raise the most pervasive and significant issues of suspects' rights.").

[297] *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/N5W5-EXUK]; Darcy Costello & Tessa Duvall, *Minute by Minute: What Happened the Night Louisville Police Fatally Shot Breonna Taylor*, USA TODAY (May 15, 2020, 9:45 AM), https://www.usatoday.com/story/news/nation/2020/05/15/minute-minute-account-breonna-taylor-fatal-shooting-louisville-police/5196867002/ [https://perma.cc/4GGQ-SE8A].

[298] *See* Radley Balko, *The No-Knock Warrant for Breonna Taylor Was Illegal*, WASH. POST (June 3, 2020, 4:35 PM), https://www.washingtonpost.com/opinions/2020/06/03/no-knock-warrant-breonna-taylor-was-illegal/ [https://perma.cc/YMP3-VYDE]; David Alan Sklansky & Sharon Driscoll, *Stanford's David Sklansky on the Breonna Taylor Case, No-Knock Warrants, and Reform*, STAN. L. SCH. (Sept. 28, 2020), https://law.stanford.edu/2020/09/28/stanfords-david-sklansky-on-the-breonna-taylor-case-no-knock-warrants-and-reform/ [https://perma.cc/T3F5-SZPL]; Jemele Hill, *Stop Calling Breonna Taylor's Killing a 'Tragedy,'* ATLANTIC (Sept. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/09/tragedy-means-blaming-black-people/616528/ [https://perma.cc/3YMQ-8KJ6].

[299] Sklansky & Driscoll, *supra* note 298.

[300] 520 U.S. 385, 393 (1997) (holding that "Wisconsin's blanket rule impermissibly insulates these cases from judicial review").

the kind that the Court had rejected in *Richards*.[301] For without some more specific showing about the particularities of an individual search, the idea that searches in narcotics investigations incur risks justifying no-knock entries would render no-knock entries reasonable for all such searches as a class—a proposition the Court rejected.[302] Despite this likely constitutional deficiency, the Court's analysis in *Hudson v. Michigan* makes such distinctions irrelevant in practice, because police have every incentive to enter unannounced whether armed with a no-knock warrant or entering in violation of the rule.[303]

If, as the Court reasons, the social costs are all on the side of curtailing police practice, not on community harms, then police have every incentive to expand the use of such entries without fear of losing evidence through exclusion. Were it not for the tragedy that followed law enforcement's entry in this case, Americans would not know about Ms. Taylor, and the practice of no-knock entries would go largely unnoticed to those outside of communities often subject to them. The lack of broader acknowledgment in the less tragic but more frequent cases, however, does not mean that the social cost is low.[304]

After George Floyd was killed by police while in custody in Minneapolis in May 2020,[305] widespread protests followed in cities across the country, where the combined frustration at cases like Ms. Taylor's and Mr. Floyd's deaths demonstrated that communities which are subject to threat of police violence or no-knock entries suffer widespread social costs too.[306] These costs are borne not only by individuals who suffer tragic deaths

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[301] *See id.* at 394; United States v. Banks, 540 U.S. 31, 35–36 (2003); Balko, *supra* note 298; Ray Sanchez, *Laws Ending No-Knock Warrants After Breonna Taylor's Death Are 'a Big Deal' but Not Enough*, CNN (Oct. 10, 2020, 6:03 AM), https://www.cnn.com/2020/10/10/us/no-knock-warrant-bans-breonna-taylor/index.html [https://perma.cc/669K-KSCF]; Nicholas Bogel-Burroughs, *Louisville Officer Who Shot Breonna Taylor Will Be Fired*, N.Y. TIMES (Apr. 16, 2021), https://www.nytimes.com/2020/12/29/us/louisville-officer-fired-jaynes-breonna-taylor.html [https://perma.cc/B4VP-SYLJ].

[302] *Richards*, 520 U.S. at 393.

[303] *See supra* notes 81–87 and accompanying text.

[304] Permissive background rules allowing everyday police activity such as arrests also increase the possibility of legal use of deadly force. As Professor Harmon notes, "[R]ecent high-profile killings by police officers underscore that every arrest involves a confrontation between a suspect and a police officer that can go badly awry. Once a police officer attempts an arrest, he is authorized to use force, sometimes deadly force, to enforce that decision." Harmon, *Why Arrest?*, *supra* note 16, at 315.

[305] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/C5TE-TK2M].

[306] Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html [https://perma.cc/KN6Q-S4ZN]; Helier Cheung, *George Floyd Death: Why US Protests Are So Powerful This Time*, BBC NEWS (June 8,

from police actions that qualified immunity shields but also by individuals and their communities who are subjected to similar illegality that remains less visible because it is less tragic. The aggregate costs of relatively minor constitutional violations that the Court does not enforce can be quite large for the communities who suffer them and can shape the public life of individuals in ways that affect not only their persons, but their political lives as well.[307] Nonetheless, these are costs that the Court imposes upon communities through its choice of default constitutional rules and its choice of qualified-immunity standards. These choices articulate what counts as reasonable police conduct in particular situations as well as what counts as cognizable constitutional claims for remedies to illegal police conduct.

To treat Black Lives Matter protests in the wake of the shooting of Michael Brown in Ferguson, Missouri or in the wake of Officer Chauvin's murder of George Floyd in Minneapolis as isolated events is to miss the movement's motivation.[308] The aggregation of small-scale police illegality immune to civil damages or the exclusionary rule is like the aggregation of small-scale illegality that broken windows represents. Both are capable of irrupting into a significant event such as the public murder of an unarmed citizen by a police officer but are also otherwise capable of defining the daily experience in a community.

Black Lives Matter protests invoke an inverse broken-windows logic. In order to prevent the deaths by police of persons like Breonna Taylor, we must address everyday unconstitutionality at its source—the constitutive failure of police to embody constitutional norms and to engage in practices that comply with constitutional rules despite the limited availability of constitutional remedies for those harmed. As a social movement, Black Lives Matter encompasses a wide set of claims and concerns about racial and social justice. But the occasion for its call for a reformed democratic politics begins with Fourth Amendment doctrines that leave constitutional harms unremedied in individual cases but are nonetheless capable of producing

2020), https://www.bbc.com/news/world-us-canada-52969905 [https://perma.cc/6CC5-265G]; Elaine Godfrey, *The Enormous Scale of This Movement*, ATLANTIC (June 7, 2020), https://www.theatlantic.com/politics/archive/2020/06/protest-dc-george-floyd-police-reform/612748/ [https://perma.cc/TCT4-U6SW].

307 *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 178–220 (2010) (analyzing the total community costs of systemic racial inequality in the administration of criminal justice).

308 *See* Jordan T. Camp & Christina Heatherton, *Introduction: Policing the Planet*, *in* POLICING THE PLANET: WHY THE POLICING CRISIS LED TO BLACK LIVES MATTER 1, 6 (Jordan T. Camp & Christina Heatherton eds., 2016); Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 6, 2016), https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed [https://perma.cc/5FN2-6JKA].

substantial aggregate harm.[309] Elsewhere in constitutional doctrine, the Court establishes the equal dignity of all persons to be free from the stigmatizing effects of illegal use of state power, which the targeting of communities for particular kinds of policing freed from strict adherence to constitutional norms exemplifies.[310] When it comes to the Fourth Amendment's role—even on the Court's own police-centric perspective—whether the Court dials up or down the level of scrutiny of the episodic events that create claims for evidence exclusion has aggregate effects through the systemic use of everyday police tactics.

What is the aggregate social cost of lives erroneously cut short through ineffective de-escalation techniques, overly aggressive policing, overuse of no-knock warrants, and related practices?[311] Aggregating these other costs would permit a more accurate accounting of total costs. Without these, narrow judicial focus on the costs of exclusion to police as well as society's interest in criminal law enforcement can only be partial and incomplete. Scholars, for example, have been able to document the loss of trust in police and the effects on communities from street encounters.[312] Giving a precise account of these broader social costs—like the value of the lives cut short, or the impacts on freedom of movement as well as a sense of political inclusion—remains difficult, but no more so than the alternative social costs on which the Court relies, without quantification, in cases like *Herring* and *Hudson*. Relaxing constitutional standards in order to permit less fettered policing is not cost-free for either the individuals in communities subject to greater scrutiny or for the polity at large.

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[309] On the political implications for the movement, see BERNARD E. HARCOURT, CRITIQUE AND PRAXIS: A CRITICAL PHILOSOPHY OF ILLUSIONS, VALUES, AND ACTION 365–72 (2020).

[310] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (protecting a right to "dignity as free persons" on an equal basis); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right."); *see also* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) ("*Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty.").

[311] *See* Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1191–93 (2017) (analyzing the effects of permissive seizure rules on police violence).

[312] Tom R. Tyler, *Enhancing Police Legitimacy*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 84, 90 (2004); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 BOS. U. L. REV. 361, 366–68 (2001); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155, 191 (2009) ("[T]he knowledge that the police are permitted to participate in crime, even for justifiable ends, erodes public trust in the police."). *But see* Bell, *supra* note 282, at 2066–67 (arguing that legitimacy is not enough if communities are estranged from the law, believing that law itself works against them).

D. Calculating Total Social Costs and Constructing Constitutional Meaning

From the minor cases that do not ever reach the Court to the highly salient and visible cases that spark nationwide protests, the conduct of police in situations for which the exclusionary rule is said to offer too little deterrent benefit can produce both widely dispersed and tragically local costs that remain unacknowledged and uncalculated by the Court's social cost analysis. What produces this disconnect? How can this internal inconsistency in Fourth Amendment doctrine and meaning be overcome?

First, the Court needs a wider frame. As I have canvassed in the case law, the Court casts a narrow gaze when looking for costs and benefits of the exclusionary remedy. Finding merely negligent police conduct insufficient to warrant depriving the criminal justice system of the benefits of criminal prosecutions, the Court requires reckless police behavior before conceding that deterring similar behavior is required.[313] Such a high showing alone guarantees greater prevalence of negligent police conduct with harms that are likely to go without remedy. Employing a limited conception of social cost, moreover, the Court analyzes benefits entirely upon salutary effects on police behavior and costs entirely as losses related to criminal adjudication.

In failing to recognize the existence of social costs beyond those incurred by letting lawbreakers go free, the Court engages in what is the equivalent of Coasean half-measures.[314] The Court cannot begin to properly analyze doctrinal rules for distributing social costs and avoiding greater harms if it does not even notice the full range of costs its remedies (or lack thereof) impose, thereby failing to analyze the social situation as it actually exists. In order to make a rational calculation of how to assess social costs, the Court has to have in view the costs on each side of the ledger—the cost of letting the citizen lawbreaker go free and the cost of letting the illegal police conduct go without a remedy.

Second, to truly account for the full social cost of illegal police conduct, the Court must also consider alternative values and rights protected by the Fourth Amendment, particularly those that counter the Court's current police-practice focus. Having too narrow a conceptualization of social cost follows from the Court's overriding goal of regulating police practice through constructing Fourth Amendment meaning. Accounting for the social cost of allowing the individual lawbreaker to go free emphasizes the

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[313] *See* Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 2–3 (2012).

[314] Coase, *supra* note 42, at 43 (arguing "that the choice between different social arrangements for the solution of economic problems should be carried out in broader terms than this and that the total effect of these arrangements in all spheres of life should be taken into account").

instrumental rationality of the police perspective. Police must be empowered to maintain public order by preventing crime, or at least not constitutionally inhibited from doing so. From this perspective, constitutional provisions are not to be understood as opposing this instrumental rationality—they are designed to facilitate it.

Even if Fourth Amendment rules sometimes curtail the means by which police may pursue their goals, under the instrumental approach the costs are to be minimized and no set of values and policing norms need be internalized.[315] The goal is to make Fourth Amendment rules easy for police in order to empower them. As the Court in *Kentucky v. King* makes clear, for example, police should not be forced to engage in "burdensome" formal constitutional procedures or have courts "unjustifiably interfere[] with legitimate law enforcement strategies."[316] Absent extreme conduct, the costs of everyday and ordinary police illegality must be borne by the citizens against whom they are perpetrated so that the Fourth Amendment can provide rules that facilitate—rather than inhibit—police power. In order to make their costs count, the Court must adopt new constitutional priorities that enable better cost accounting than the existing priority of regulating police provides.

Under the Court's current approach, the Court never focuses on what a citizen should expect of a law enforcement officer. The Court seldom emphasizes the duties police officers owe to tread cautiously in light of the rights of citizens at stake. Rather, the Court encourages police—under its qualified-immunity doctrine in particular—to always act unless the rule makes crystal clear that their actions are forbidden.[317] By contrast, an approach that adopts the citizen rights-holder perspective would require police to act in a way that anticipates the possibility that their actions might not only fail to comply with the letter of the law, but with the spirit of the law. By internalizing constitutional norms, it is possible to achieve Pareto superior outcomes—better law enforcement and better rights-protecting policing practices.

Third, as a corollary to shifting its perspectival priorities, the Court should recognize that its own role in establishing doctrinal rules has

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[315] *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 351 (2009) (constraining circumstances when police may search an automobile incident to arrest). Where the majority opinion emphasized the privacy interests, Justice Alito, writing in dissent, did not mention the concept at all, focusing instead on the need to provide clear rules for police and the expectations of searches incident to arrest that already existed in policing practice. *Id.* at 360–61 (Alito, J., dissenting). Minimal conduct rules are all that are needed on this perspective.

[316] 563 U.S. 452, 466–67 (2011).

[317] Anderson v. Creighton, 483 U.S. 635, 638 (1987).

implications not simply for police practice, but also for the lives of citizens.[318] The Court is not a neutral arbiter of constitutional value, but an active participant in establishing constitutional meanings that shape the experiences of individuals and communities through their interactions with alternative policing practices. One of the stated costs of a more robust exclusionary rule that the Court cites is the possibility that police would be timid in their investigation more so than the Constitution should require, thereby depriving the polity of reliable evidence of criminal wrongdoing. By prioritizing this consideration, the Court plays a role in shaping everyday street-level experiences.

One of the unrecognized costs of systemic policing practices that violate the Constitution is the related timidity citizens experience in their relation to government and community. Unconstitutional practices signal to some citizens that their rights do not matter and that their place within the polity is unequal. In this way, policing practices play a role in shaping the political community. Constitutional law is not a matter of arid and abstract principle but becomes a lived experience within communities who are subject, for example, to more widespread use of no-knock entries because the Court finds constitutional violations too attenuated to remedy.

A shift in perspective to ask how policing practices are experienced by individuals and communities brings into view different considerations. In her *Utah v. Strieff* dissent, for example, Justice Sotomayor has called for the Court to shift its Fourth Amendment perspective to take a wider view of the social costs and distributional effects of (illegal) policing practices on the political community.[319] For those harassed by these and other order-maintenance priorities, such as stop and frisks, who have engaged in no criminal wrongdoing and against whom no evidence is acquired, the exclusionary remedy does not matter even though social costs obtain.[320]

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[318] *See, e.g.*, Bell, *supra* note 282, at 2140 ("[P]olicing cases—more than others—send messages about social inclusion and, indeed, social citizenship."); Crocker, *supra* note 38, at 363–71 (analyzing the effects of Fourth Amendment doctrine on citizens' lives with the example of the interpretation of the Amendment's protection of houses); CROCKER, *supra* note 40, at 263 ("What it means to have a constitutional government is to be committed to governing within the terms and norms of a constitution. It means that these values, principles, and practices play a role in structuring how we think about and how we respond to the inevitable crises of human affairs.").

[319] 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting).

[320] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (holding that New York's stop-and-frisk practices violated the Constitution). These costs can be disproportionately borne by racial minorities. *See, e.g.*, I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 2–3 (2011) (observing that "[r]acial minorities face the double bind of being subject to both underenforcement and overenforcement" of criminal law); David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 43–44 (1994)

Abstract principles do not produce these costs. The Court's adoption of contingent perspectives that prioritize the police or that pursue undercalculated notions of equilibrium produces these costs. If the Court were to focus on the costs borne not just by persons made to feel less a part of the self-governing citizenry but also by those seeking to live their lives in freedom from "a too permeating police presence,"[321] then very different experiences of social and political life would follow.

Fourth, the Fourth Amendment's structural role in protecting a right of the people requires looking at the holistic effects of the rules the Court adopts.[322] As Justice Sotomayor notes in her *Strieff* dissent, the Court's exclusionary-rule doctrine affects the respect that self-governing citizens are owed by public officials.[323] When communities are targeted for stops and frisks, or made fearful of the risk of no-knock entries, their ability to experience the full and equal status as participants in democratic self-governance is harmed.[324] The role of police in a community is not simply a function of local democratic decision-making. Rather, the practice of policing within a community shapes democratic inclusion and participation by conferring or withholding respect and the liberty to go about daily activities free from police intrusion.

These effects on participation in turn reflexively inform the democratic legitimacy of local democratic decisions about the kinds of police practices a community will have. But at its most basic level, a Fourth Amendment-rights limitation on policing practice is a structural check on the power of government.[325] When the Court refuses to implement this structural check by withdrawing access to remedies for constitutional violations, then the relative power of government grows against the equally important power of the people to engage in self-government free from intrusion and

(arguing that *Terry*'s effects "most heavily burden members of minority groups, especially African-Americans"); Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1277 (1998) (explaining how *Terry* "authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide").

321 United States v. Jones, 565 U.S. 400, 416–17 (2012) (Sotomayor, J., concurring) (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).

322 *See* Crocker, *supra* note 38, at 354–71.

323 136 S. Ct. at 2069–71 (Sotomayor, J., dissenting).

324 *See, e.g.*, Sklansky, *supra* note 157, at 1771–74, 1797–99; BARRY FRIEDMAN, UNWARRANTED: POLICING WITHOUT PERMISSION 92–113 (2017).

325 *See, e.g.*, Crocker, *supra* note 168, at 215–220 (2020) (arguing that Fourth Amendment protections for the home play a structural role within the Constitution).

interference.[326] Thus, an accurate accounting for social cost must include the effects on constitutional structure.

No doubt, this is a big frame with inchoate costs. But given the fact that the broader social costs on which the Court already relies do not admit of definite calculation, the inchoate nature of this larger structural issue does not render it any less a constituent feature of social cost. Following Justice Sotomayor's leadership, acknowledging that violations of these structural features are a cost is a necessary condition for the possibility of developing a calculus that accounts for them.

CONCLUSION

When considering the appropriate remedy—or whether to impose a remedy at all—for Fourth Amendment rights violations, "[t]he problem is to avoid the more serious harm."[327] This question lies at the heart of social movements and critical calls for police reform.[328] It is also a central question of Fourth Amendment meaning. Under the Supreme Court's remedial doctrines, social cost is a central concept used to calibrate available remedies for law enforcement illegality.

But social cost relies on choices of perspective and judgments about what counts as salient harms that necessitate remedy. The result of prioritizing a policing perspective is to focus on the harms produced by imposing the exclusionary rule or civil liability on law enforcement's illegal acts. By contrast, the Court remains blind in its social cost calculations to harms imposed by unlawful police conduct upon broader communities as well as innocent individuals. Such blindness is a problem because it constructs constitutional meaning in a way that excludes much of what scholars and the public take the Fourth Amendment to mean through the values it protects. Harms that flow from those citizens who are law enforcement officers—those empowered with the authority to search, arrest, employ violence, and use deadly force—and that break the law may be particularly acute given the special role they play in political society. In this way, the Fourth Amendment also plays a structural role in separating

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[326] *See* Olmstead v. United States, 277 U.S. 438, 474–78 (1928) (Brandeis, J., dissenting); *cf.* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (making a similar point in the context of free speech and assembly).

[327] Coase, *supra* note 42, at 2.

[328] *See* Bell, *supra* note 282, at 2067 (analyzing "the real problem of policing: at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic"); Harmon, *Federal Programs*, *supra* note 16, at 873 (analyzing how federal "programs may make local policing seemingly cheaper for communities but less efficient overall by increasing collateral harm").

the powers and privacies of the people from the policing power of law enforcement.

By engaging in internal criticism of Supreme Court doctrine, this Article begins with the Court's own commitment to the analytic centrality of social cost. This commitment implies the necessity of providing a more accurate accounting for social costs as a constitutive element of Fourth Amendment rights protections. Having adapted the Fourth Amendment to modern policing practices, the Court cannot object to correcting an inaccurate social cost calculation because a social movement urges it to do so.[329] Calls for contemporary police reform must have their analogue in recognizing the necessity to recalibrate the social cost calculus the Court employs when constructing the meaning of the Fourth Amendment. Focusing only on the social cost of regulating police through constitutional remedies fails to account for the broader social costs that policing practices backed by judicial doctrine impose upon communities.

If social cost is relevant to the meaning and scope of the Fourth Amendment, as the Court instructs, then the problem is how to conceptualize and calculate the more dispersed harms that arise from systemic practices that violate the Constitution and invade privacy. This issue of calculation depends foremost on a prior issue of conceptual clarification concerning the nature of these harms and how they relate to constitutional meanings, thereby making it possible to confront the problem of social cost that Fourth Amendment doctrine presents. The issue of accurate calculation also requires actual calculation, rather than empty doctrinal incantations claiming that constitutional remedies produce social costs. Otherwise, the fundamental problem is that the Court nominally invokes a social cost calculation that fails to include all relevant costs, but in reality does not calculate anything at all.

[329] Many developments in constitutional law and doctrine are the product of social movement advocacy. *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1756, 1804–05 (2007) (charting changes to constitutional meanings entrenched through the historical accomplishments of We the People); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192 (2008) (arguing that "*Heller*'s originalism enforces understandings of the Second Amendment that were forged in the late twentieth century through popular constitutionalism"); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006) ("When [social] movements succeed in contesting the application of constitutional principles, they can help change the social meaning of constitutional principles and the practices they regulate.").