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Contraband Immunity: Updating Amsterdam, LaFave, and White's "Use Exclusion" Proposal to Limit Police Pretext

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Contraband Immunity: Updating Amsterdam, LaFave, and White's "Use-Exclusion" Proposal to Limit Police Pretext

Brian J. Foley*

ABSTRACT

For decades, legal scholars have struggled with the problem of pretextual searches and seizures. These are defined as police using their power to stop or search or arrest for one crime, usually a minor crime, as a means of triggering the ability to search, without probable cause, for evidence of other crimes. That is, police might stop a person in order to conduct a Terry frisk, or arrest a driver for speeding in order to conduct a search-incident-to-arrest or an inventory search. Police may conduct them hoping to "get lucky" and find evidence of criminality. In short, when used pretextually, protective searches amount to discretionary searches unsupported by probable cause – precisely the government oppression that the Fourth Amendment was framed to protect citizens against. The United States Supreme Court, however, has made pretextual searches permissible under the Fourth Amendment as a result of its unanimous decision in Whren v. United States, 517 U.S. 806 (1996), which held that the subjective motivations of police are irrelevant as long as their conduct is objectively reasonable; therefore, reasonable suspicion of any crime will suffice to

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support a stop, and probable cause regarding any crime will suffice to support search or arrest.

*This Article argues that the Court should consider limiting this massive discretion by resurrecting an idea mentioned briefly in articles written almost 40 years ago by three leading criminal procedure scholars -- but which seems to have been forgotten. In the 1970s, Anthony Amsterdam, Wayne LaFave, and James White argued that courts should exclude evidence found in police protective searches that goes beyond the sort of evidence the Supreme Court envisioned police seizing when it created the search incident to arrest, Terry, and inventory search exceptions to the Fourth Amendment requirements of a warrant and probable cause. The concept received no attention beyond a harsh critique by the late James Haddad, who labeled the idea "use-exclusion." Haddad relied on the specter of a murderer achieving an "immunity bath" as a result of police stopping him for a routine traffic violation when he happens to have his victim's body in his car. The scholarly conversation appears to have ended there. Other scholars focused instead on limiting police power to arrest, a battle they lost when the Supreme Court held in 2001 that police could arrest for any crime, even minor, fine-only, non-jailable offenses, such as failure to wear a seatbelt. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). By that time, however, Amsterdam, LaFave, and White's idea seemed to have been lost.*

This Article argues that use-exclusion, with some minor modification, provides an effective response to the problem of pretextual arrests and searches. This Article calls the new concept "contraband immunity," which would require courts to exclude evidence police find in protective searches that is mere contraband unrelated to the crime of arrest. The exclusion would prevent only a prosecution for a possession crime; if police found evidence that could be linked to a crime beyond the mere possession of contraband, the evidence would not be excluded under the contraband immunity doctrine. The doctrine would limit pretextual stops and arrests because police would no longer have this incentive to arrest for minor violations. Contraband immunity is the most effective way to limit police discretion and accommodate the concerns that led to the creation of protective searches: officer safety and preservation of evidence.

As when Amsterdam, LaFave, and White proposed use-exclusion, the prevailing exclusionary rule jurisprudence would make it difficult to apply contraband immunity. If a more expansive use of the exclusionary rule is not adopted, contraband immunity nevertheless could be implemented by state courts or by legislation. Contraband immunity also suggests a paradigm for limiting prosecutions for evidence found as a result of the post-9/11 increase in surveillance.

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INTRODUCTION

The ability of police to engage in pretextual searches and seizures has long vexed citizens, delighted police and prosecutors, and perplexed many legal scholars, lawyers, and judges who have opposed it. In 1996, the United States Supreme Court came down fully on the side of police rather than civil liberties, holding that, under the Fourth Amendment, a police officer's subjective motivation is irrelevant in a variety of discretionary encounters with citizens, as long as there is objective evidence supporting the officer's actions.¹ Five years later, the Court ruled that police may arrest anybody they wish, as long as there is probable cause that the person committed a crime, extending even to mundane traffic offenses.² Police who want to search a suspect but lack probable cause to do so have the incentive and ability to arrest the suspect – usually for minor traffic offenses – precisely in order to trigger broad search-incident-to-legal-arrest (SILA) and inventory-search powers.³ The debate over the legality of pretext appeared to be over.

A premise of this Article is that the Court would limit police pretext and abusive use of protective search doctrines if it could, but that it has been unable to do so because of its desire not to create undue limitations on police investigation and officers' ability to protect themselves during encounters with suspects. Thus, the Court has created, in many instances, "bright line rules" for police to follow, rules of easy application that release police "in the midst and haste of a criminal investigation"⁴ from the requirement of considering the suspect's civil rights.⁵ These rules, however, have the unfortunate collateral effect of

¹ *Whren v. United States*, 517 U.S. 806, 813-14 (1996) (discussing traffic stop).

² *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001). The Court created a minor limitation that arrest for crimes less than felonies must have been committed in the officer's presence. *Id.* at 354.

³ See e.g., *Colorado v. Bertine*, 479 U.S. 367, 375-76 (1987) (concluding that police having broad discretion about which cars to impound - and then subject to inventory search according to standardized procedure - does not violate the Fourth Amendment).

⁴ *Illinois v. Gates*, 462 U.S. 213, 235 (1983) (quoting *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). See also *Atwater*, 532 U.S. at 347 ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.").

⁵ See generally Brian J. Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 MD. L. REV. 261 (2010).

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routinely violating citizens' civil rights.⁶ There is some evidence to support this premise. The Court recently, in *Arizona v. Gant*, limited the SILA doctrine in the automobile context, no longer letting police search passenger compartments almost as a matter of right.⁷

Another premise is that even if the Court is not interested in limiting pretext, it should be.⁸ Fourth Amendment doctrines have been misused such that an animating principle of the amendment, that citizens should not be subjected to search and seizure merely at the whim of a government official, has been violated.⁹ Police in the United States have achieved the dubious posture of what James Otis famously warned against when discussing the general writs of assistance used by the British against the American colonists: "It is a power that places the liberty of every man in the hands of every petty officer."¹⁰ If the Court can find a way to ensure that this principle is *not* violated, it should, especially if it still protects officer safety and protects and preserves evidence.¹¹

This Article argues that the Court should consider limiting this massive discretion by applying an idea mentioned briefly in articles written almost 40 years ago by three leading criminal procedure scholars - - but which seems to have been forgotten. In the 1970s, Professors Anthony Amsterdam, Wayne LaFave, and James White proposed related

⁶ See *Atwater*, 532 U.S. at 347. Or at least the citizens' interests that are *supposed to be* protected by those rights. For example, rather than force police to determine whether it is appropriate to arrest a subject, the Court created a rule that police may simply, for any reason, arrest a person who has committed a crime, even a minor traffic offense. See Foley, *supra* note 5, at 280-82. The Court has preferred bright-line rules in Fourth Amendment cases, which prevent police and the courts from ever considering whether police could have avoided infringing on protected interests. *Id.*

⁷ *Arizona v. Gant*, 239 S.Ct. 1710, 1718-19 (2009).

⁸ See Steven A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 134 (2003) ("The Supreme Court's tolerance of pretext searches and seizures may well provide more deference to law enforcement than any civilized system should. The result may be to provide too much discretion to law enforcement and to intrude unnecessarily upon the privacy of less powerful members of society."); Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 YALE L.J. 1072, 1076 (2007) ("[I]his turning of a blind eye to the problem of pretext represents a doctrinal wrong turn.").

⁹ Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1076 (2011) (reviewing WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-1791 (2009)) ("The Fourth Amendment was adopted because the Framers experienced the suppression of liberty that came with discretionary searches and seizures. They knew that the privilege from unreasonable searches and seizures was essential to a free society.").

¹⁰ James Otis, *Against Writs of Assistance* (Feb. 1761), in 2 *THE WORKS OF JOHN ADAMS* 524 (Charles Francis Adams ed., 1850).

¹¹ See *United States v. Robinson*, 414 U.S. 218, 251-52 (1973) (Marshall, J., dissenting).

ideas that were later labeled “use-exclusion.”¹² The idea was that courts should exclude evidence found in protective searches that goes beyond the sort of evidence the Supreme Court envisioned police seizing when it created the search incident to arrest, *Terry*, and inventory search exceptions to the Fourth Amendment requirements of a warrant and probable cause.¹³ The concept received little or no attention beyond a harsh critique by the late James Haddad (who coined the term “use-exclusion”).¹⁴ Haddad raised the specter of a murderer achieving an “immunity bath” as a result of police stopping him for a routine traffic violation when he happens to have his victim’s body in his car.¹⁵ The scholarly conversation appears to have ended there. Indeed, Haddad wrote, “Because of the deserved reputation of its supporters, the use-exclusion proposal merits serious discussion in any full treatment of pretext issues.”¹⁶ Other scholars addressing pretext, however, focused instead on limiting police power to arrest, a battle they lost when the Supreme Court decided *Atwater v. City of Lago Vista* in 2001.¹⁷ By that time, however, use-exclusion seemed to have been forgotten.

¹² See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 437-39 (1974); Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 156-57 (1974); James B. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 209-16 (1974). N.B.: at times in this article, my use of the concept of search incident to arrest is a proxy for these other sorts of searches.

¹³ See Amsterdam, *supra* note 12; LaFave, *supra* note 12; White, *supra* note 12.

¹⁴ James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 206-10 (1977) [hereinafter Haddad, *Well-Delineated Exceptions*] (coining this term); see also James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 647-49 (1985) [hereinafter Haddad, *Another Viewpoint*]. In this article, I will focus on Haddad’s lengthier critique in his 1977 article, which is mostly repeated in the 1985 article. Haddad pointed out in his 1985 article that there had not been any discussion of use-exclusion since his 1977 article, and that he had found no courts adopting it. *Id.* at 648 & n.38. Haddad noted,

Because of the deserved reputation of its supporters, the use-exclusion proposal merits serious discussion in any full treatment of pretext issues. Curiously, in their efforts to establish a comprehensive approach, neither Professor Burkoff nor Professor LaFave has commented upon the proposal. In 1977 I criticized this approach for reasons that justify only a footnote here in the absence of any new commentary in recent years. Courts have not adopted this approach even though, in some cases, it makes as much sense as the more popular approach [case-by-case adjudication].

Id. at 648-49.

¹⁵ See Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 206-10.

¹⁶ Haddad, *Another Viewpoint*, *supra* note 14, at 648-49 nn.37 & 38.

¹⁷ See generally *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

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After describing use-exclusion, I will argue that the idea, with minor modification, provides an effective response to the problem of pretextual arrests and searches. I call the modified idea “contraband immunity.” Contraband immunity would require exclusion of mere contraband found by police in protective searches if the contraband is unrelated to the crime that triggered the initial arrest. The immunity would prevent only a prosecution for a possession crime; if police found evidence that could be linked to a crime beyond the mere possession of contraband, the evidence would not be excluded. This doctrine would help limit pretextual stops and arrests because police would lack incentive to arrest for a traffic violation simply hoping to “get lucky” by, say, finding illegal drugs. Contraband immunity is an effective way to limit police discretion and accommodate the concerns that led to the creation of protective searches: officer safety and preservation of evidence.

I. PRETEXT: THE PROBLEM THAT PERSISTS

In the past three decades, the Supreme Court has developed a jurisprudence of search and seizure that permits police – using a bit of ingenuity – to conduct a full body and automobile search of practically anybody.¹⁸ This is because of the Court’s 2001 decision in *Atwater* that police may arrest anybody they wish for a mundane traffic offense.¹⁹ In that case, a police officer arrested a “soccer mom” for a mere seatbelt violation.²⁰ The Court upheld the arrest and refused to draw any lines based on the officer’s need to arrest (such as to ensure the driver would show up for trial), or the severity of the crime, or even if the crime itself was not a jailable offense.²¹ Given the myriad of traffic laws that can be violated easily and even unknowingly by drivers, or the fact that police only need allege that a driver has, say, failed to signal a turn or exceeded

¹⁸ That police can abuse these powers is not news to police departments. See *United States v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) (“There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search.”).

¹⁹ *Atwater*, 532 U.S. at 323. Gail Atwater has been called a “soccer mom.” See, e.g., Leonard M. Niehoff, *Read All About It: Supreme Court Cracks Down on Soccer Moms*, MICH. B.J., Aug. 2001, at 76, available at <http://www.michbar.org/journal/pdf/pdf4article313.pdf>.

²⁰ *Id.* at 323-24.

²¹ *Id.* at 346-50.

the speed limit or rolled through a stop light or gone over a yellow line, it is fair to say that anyone getting behind the wheel of a car subjects him or herself to full custodial arrest and search incident to that arrest at the whim of police.²²

And so the litany commonly uttered by criminal procedure professors: police may search a person incident to arrest for weapons and for evidence relating to the crime for which the person is arrested, regardless of whether police have probable cause or even reasonable suspicion to find these things.²³ The search includes a full body search as well as search of the area immediately surrounding the suspect, the “wingspan” or “grab area.”²⁴ In the automobile context, that generally means the passenger compartment. The search of an automobile, after the Court’s 1981 decision in *New York v. Belton* and until *Gant* in 2009, was a search of the passenger compartment to find weapons.²⁵ The Court’s rationale for allowing these searches is officer safety and preservation of evidence.²⁶ No probable cause is necessary: these searches have been treated as routine and reasonable.²⁷

In *Gant*, the United States Supreme Court put the brakes on SILA in the automobile context by limiting the search of the automobile

²² Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 420-21 (2004) (“Current Fourth Amendment law conditions the use of the primary mode of personal transportation in this country on liability to arbitrary arrest and search. This is wrong.”). On police merely *saying* someone committed an offense, see ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 239 (3d ed. 2007) (“Police lying, after all, is a phenomenon sufficiently common to have been given its own name: ‘testilying.’”).

²³ For an in-depth discussion of the SILA standard, see generally Scott R. Grubman, *Bark with No Bite: How the Inevitable Discovery Rule Is Undermining the Supreme Court’s Decision in Arizona v. Gant*, 101 J. CRIM. L. & CRIMINOLOGY 119, 121-57 (2011) and James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417 (2007).

²⁴ *Chimel v. California*, 395 U.S. 752, 763 (1969).

²⁵ *New York v. Belton*, 453 U.S. 454, 457 (1981).

²⁶ *Id.* at 464. Notably, the evidence sought to be preserved is the evidence of the crime the suspect is being arrested for. See *United States v. Robinson*, 414 U.S. 218, 251-52 (1973) (Marshall, J., dissenting). This limitation is often elided in Supreme Court decisions and indeed was elided by the majority in *Robinson*, making it appear that the power to preserve evidence might be more extensive than it is, *id.*, despite that such an extension is illogical, given the lack of probable cause police have for finding any evidence beyond that related to the crime the suspect is arrested for. In *Gant*, the Court actually included this limitation about the evidence in its holding. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009).

²⁷ See, e.g., *Belton*, 453 U.S. at 457 (1981). See also Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

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to when police reasonably believe they will find weapons or evidence of the crime for which the arrest is made.²⁸ However, police can circumvent those limitations by impounding the car and subjecting it to an inventory search: a full search of the car, trunk, and any containers, ostensibly to protect the driver's property interest.²⁹ Even if a police officer violates *Gant*, a court can apply the "inevitable discovery" exception to the exclusionary rule, concluding that the police would have found the evidence inevitably in an inventory search.³⁰ Any evidence seized in these searches is in plain view and is therefore legally seized and can be used as the basis of a prosecution.³¹ So a speeding stop can become the basis for a drug conviction automatically because the officer has full discretion in (1) pulling over the car where the driver has violated any traffic law and (2) deciding whether to arrest the driver for the offense.

The power of this search tool for criminal evidence is amplified by the fact that the Court refuses to consider an officer's subjective motivation for the initial decision to make a traffic stop³² or to arrest the driver.³³ This motivation has been deemed irrelevant under the Fourth Amendment.³⁴ As long as there is objective evidence that probable cause exists for any crime, including an insignificant traffic offense, the officer can stop and arrest the driver. It does not matter that the officer was not actually concerned about the traffic offense and, in actuality, stopped the driver so that he could arrest him in order to search him incident to the arrest in the hope of finding, say, cocaine. In *Whren*, it did not matter to the Supreme Court that the officers were actually drug squad officers, not traffic cops, and that drug squad officers rarely, if ever, pulled over drivers for traffic violations.³⁵ The tail wags the dog, and there are serious

²⁸ *Gant*, 129 S. Ct. at 1714. The Court stated that it was not overruling *Belton*. *Id.* at 1722 n.9. *But see id.* at 1727 (Alito, J., dissenting) (stating that *Belton* had been overruled).

²⁹ *See Colorado v. Bertine*, 479 U.S. 367, 372 (1987). Whether an inventory search actually protects a driver's property interest is questionable, given that police, if they wished to steal something, simply could leave it off of the inventory list given to the driver.

³⁰ Grubman, *supra* note 23, at 162-69. Grubman argues that courts should not apply the inevitable discovery exception to violations of *Gant* but rather should protect *Gant* by distinguishing between primary evidence that is seized as a direct result of a violation of *Gant* and secondary evidence, which comes as a derivative result of that violation. *Id.* This view coheres somewhat with use-exclusion or my contraband immunity proposal, but, as will become clear below, it does not go as far.

³¹ *See Horton v. California*, 496 U.S. 128, 136-40 (1990).

³² *See Whren v. United States*, 517 U.S. 806, 813-14 (1996).

³³ *See Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

³⁴ *Whren*, 517 U.S. at 813.

³⁵ *Id.* at 815.

infringements of Fourth Amendment interests whenever a man or woman is subjected to a full custodial arrest.³⁶

So an officer who has a mere hunch such as a belief not even arising to the level of reasonable suspicion, or even no suspicion at all, can wait until a person he wants to search gets behind the wheel of his car and drives – there soon will be a reason to pull him over. Or an officer who sees a man of a particular race and decides that men of that particular race are more likely than men of other races to possess crack cocaine could stop the man for crossing the yellow line simply to arrest him and then search him incident to that arrest. The Fourth Amendment is not violated as long as there is objective evidence that the driver has committed a crime, any crime.³⁷ Although what I have just described is an equal protection violation,³⁸ such a violation is almost impossible to prove.³⁹ So for all intents and purposes, police are free to pursue racist or other unconstitutional motivations.⁴⁰ Indeed, “the liberty of every man [is now] in the hands of every petty officer.”⁴¹

Although the United States Supreme Court has swept the problem of pretext under the rug by making it irrelevant under the Fourth Amendment and practically impossible to prove under the Fifth and Fourteenth Amendments, the Court should revisit the big picture of what it has wrought through a number of small brush strokes of cases and curb the discretion of petty officers. After all, curbing such discretion was the primary intent of the Amendment’s framers.⁴²

II. A CONVERSATION THAT ENDED TOO SOON: FOUR LEADING SCHOLARS DISCUSS THE USE-EXCLUSION APPROACH TO ENDING PRETEXT

The idea of preventing search-incident-to-arrest, inventory search, and frisk power from pretextual use by excluding evidence found

³⁶ See *Atwater*, 532 U.S. at 371 (O’Connor, J., dissenting) (discussing various inconveniences and indignities associated with arrest).

³⁷ See *id.* at 348-49.

³⁸ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

³⁹ Tracey Maclin, *United States v. Whren: The Fourth Amendment Problem with Pretextual Traffic Stops*, in WE DISSENT: TALKING BACK TO THE REHNQUIST COURT 90, 116-118 (Michael Avery ed., 2009).

⁴⁰ See *id.*

⁴¹ Otis, *supra* note 10.

⁴² Maclin & Mirabella, *supra* note 9, at 1075.

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“serendipitously”⁴³ was raised in scholarly journals almost 40 years ago and given the name “use-exclusion” by James Haddad.⁴⁴ Discussion of use-exclusion was short-lived, and scholars were apparently distracted by their ultimately ill-fated focus on limiting arrest power.⁴⁵ The time is ripe to reconsider this idea, because, with some tweaking, it can help limit pretextual searches and seizures.

A. Professor Amsterdam’s Approach

At the end of his seminal 1974 article, *Perspectives on the Fourth Amendment*, Anthony Amsterdam proposed a way of limiting *Terry* frisks.⁴⁶ Amsterdam criticized the “atomistic” view of the Fourth Amendment that had led the Supreme Court to refrain from using the exclusionary rule to prevent use of evidence police gained through conduct that itself did not violate the Fourth Amendment and contrasted it with a “regulatory” view that would focus more broadly and flexibly on police procedures.⁴⁷

The problem that Amsterdam addressed, albeit briefly in just three pages, was that a proper *Terry* frisk that accidentally turned up evidence beyond weapons – the only permissible object of a *Terry* frisk – legitimizes the discovery of the evidence. After all, the police had done nothing wrong.⁴⁸ The *Terry* doctrine, about five years old when Amsterdam wrote his article, allows police to seize a citizen briefly (the Court called the seizure a “stop”) and search the person for weapons as a

⁴³ LaFave, *supra* note 12, at 156.

⁴⁴ Haddad, *supra* note 14, at 204.

⁴⁵ Ill-fated, of course, thanks to *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁴⁶ Amsterdam, *supra* note 12.

⁴⁷ Amsterdam wrote,

My second question is whether the [Fourth A]mendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct. Does it safeguard *my* person and *your* house and *her* papers and *his* effects against unreasonable searches and seizures; or is it essentially a regulatory canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures? Plainly, the Supreme Court is operating on the atomistic view, although it has never discussed the issue. . . . Why does it not speak of "the people" as in "We the People" or -- since I am driving at the point that the amendment's purpose may be squarely to control the police -- as in "Power to the People"?

Id. at 367. He later argued that this atomistic view is “too narrow.” *Id.* at 432.

⁴⁸ *Id.* at 439.

way of protecting the officer (the Court called the search a “frisk”).⁴⁹ *Terry* stops and frisks were seen as less serious intrusions on Fourth Amendment interests,⁵⁰ and police were permitted to conduct them on less suspicion than probable cause: the Court called it “reasonable suspicion.”⁵¹ The officers may find other evidence in “plain view” (or “plain feel”), an exception to the exclusionary rule, because police were legitimately intruding in the first place.⁵² Amsterdam argued that courts nevertheless must apply the exclusionary rule to exclude such evidence and regulate the police from overreaching.⁵³ The seizure of evidence beyond weapons exceeded the *Terry* frisk doctrine’s reason for being.⁵⁴

B. Professor LaFave’s Approach

Professor Wayne LaFave, arguably the leading scholar on the Fourth Amendment, picked up Amsterdam’s approach the same year in discussing searches incident to legal arrest.⁵⁵ Like Amsterdam, LaFave discussed the approach in just a few pages; he labeled it “the serendipity doctrine”⁵⁶ and said that it was better than an approach allowing police to seize, and prosecutors to use, any evidence that police find during a routine SILA:

To the contrary, I would say that it is precisely where police investigative techniques are susceptible of use to make unwarranted intrusions which the courts cannot distinguish from "closely similar" warranted intrusions, that a flexible administration of

⁴⁹ *Terry v. Ohio*, 392 U.S. 1, 9 (1968).

⁵⁰ *Id.* at 26-27.

⁵¹ *Id.* at 27.

⁵² Amsterdam does not articulate this exactly. That said, the focus should be on what the police are legitimately intruding to do.

⁵³ Amsterdam wrote:

To the contrary, I would say that it is precisely where police investigative techniques are susceptible of use to make unwarranted intrusions which the courts cannot distinguish from "closely similar" warranted intrusions, that a flexible administration of the exclusionary rule is desperately needed to keep police powers within the confines of their justifications.

Amsterdam, *supra* note 12, at 439.

⁵⁴ *Id.*

⁵⁵ LaFave, *supra* note 12; see also Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 91 (1969).

⁵⁶ LaFave, *supra* note 12, at 156.

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the exclusionary rule is desperately needed to keep police powers within the confines of their justifications.⁵⁷

LaFave concluded,

[T]here is much to be said for excluding evidence other than weapons obtained incident to a traffic arrest, given the inherent difficulties in separating those searches which are in fact lawful from those which are not.⁵⁸

LaFave stated that some people might find this approach “strong medicine.”⁵⁹ He moved on to suggest another alternative to avoiding pretext: ensure that there was a proper basis for the arrest.⁶⁰

There has been surprisingly little treatment of the serendipity doctrine. The doctrine may not have gained traction in part because the Court, seven years after LaFave’s article (and Amsterdam and White’s articles), in *Belton*, adopted verbatim a countervailing approach that LaFave famously (infamously?⁶¹) suggested in that same article: police carrying out SILA in the automobile context should be required only to follow a bright line rule allowing them, without suspicion, to routinely search the entire passenger compartment.⁶² According to LaFave, this

⁵⁷ *Id.* at 157.

⁵⁸ *Id.* at 157.

⁵⁹ *Id.* at 157.

⁶⁰ *Id.* at 157. This idea of limiting police discretion to arrest is, of course, now a dead letter after *Atwater*, decided almost 30 years after LaFave’s article. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁶¹ Professor LaFave wrote that he disagreed with the Court’s holding in *Belton* as going too far, see Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307, 324-334 (1982), but wryly said that he would not ask the Court to “give back” his quoted language, and that he would not say “I ‘misspoke myself’ and that the statement is now ‘inoperative’”; instead, LaFave said he remained a proponent of bright line rules in what he deemed appropriate situations, such as in *Robinson*. *Id.* at 334.

⁶² *New York v. Belton*, 453 U.S. 454, 458 (1981). The Court in *Belton* quoted LaFave:

Yet, as one commentator has pointed out, the protection of the Fourth and Fourteenth Amendments “can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.” This is because “Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate police in

approach makes sense because police are not able to make the fine distinctions necessary to cabin a particular search.⁶³ The fact remains, however, that the Court actually could make such distinctions and apply the exclusionary rule in such cases. But given that the exclusionary rule has come to be understood as having a primary purpose of deterring police⁶⁴ and, in a way, punishing them for misconduct, the idea that the exclusionary rule could be applied when police have acted reasonably (this is how the Court has framed SILA) and done nothing wrong or illegal may seem inapt to many lawyers. In any event, scholars moved on to the idea of limiting arrest power.⁶⁵

C. Professor White's Approach

Similarly, Professor James White argued that SILA is a protective search that should be “subject to the principle of general justification and to suspension of the plain view rule.”⁶⁶ Under White's idea, the officer can search, but the evidence cannot be used against the person in a criminal trial.⁶⁷ This regime would be easy for courts to administer, because *post hoc* efforts to try to weigh the dangers the officer faced do not have to be carried out.⁶⁸

Although there would be costs in suspending the plain view rule, “[suspending] it would provide a way, however imperfect, to regulate the otherwise uncontrolled power” of SILA.⁶⁹ White stated that “this does seem a rather obvious way to reconcile the urgent and legitimate demands of the officer that he be able to take what steps he thinks

their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be ‘literally impossible of application by the officer in the field.’”

Id. (quoting LaFave, *supra* note 12, at 141-42).

⁶³ LaFave, *supra* note 12, at 141-42.

⁶⁴ *Davis v. United States*, 131 S. Ct. 2419, 2426-27 (2011).

⁶⁵ *See, e.g.*, Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989).

⁶⁶ White, *supra* note 12, at 209.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 210.

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necessary to protect himself from harm, with the very real fear that this power will be abused.”⁷⁰ This limitation would “remov[e] the incentive for improper searches.”⁷¹

White noted likely objections. One would be that the rule would not prevent an officer motivated to search a person for reasons other than finding incriminating evidence (albeit by pretext). That is, an officer might search someone “out of curiosity, or a desire to harass, or to find some item – contraband or stolen goods which he could, under existing law, retain for destruction or return to the proper owner even if the search was illegal.”⁷² In cases where such incentives could not be removed, White explained, it would be possible for the aggrieved person to file a civil suit against the officer.⁷³

Another objection would be that the rule fails to protect the privacy of the person searched.⁷⁴ The search is done, privacy is invaded: the bell cannot be un-rung. White responded:

Fourth Amendment privacy ought not to be regarded as a kind of virginity that is preserved intact, or, by definition, utterly gone. It is a way of regulating a relationship between a citizen and his government. . . . I think it can properly be said that the kind of “intrusion” against which the Fourth Amendment was primarily addressed was not a single but a double one: first, the forced entry and rummaging through one’s effects; second, the seizure of one’s possessions and their use against one, in a forfeiture or criminal proceeding.⁷⁵

Professor White noted that although there was not “solid Supreme Court authority for” his proposal, the Court could “adopt it without substantial interference with the Fourth Amendment tradition. . . . [T]his principle might be the best way to give real force to the most important strains in that tradition.”⁷⁶

⁷⁰ *Id.*

⁷¹ *Id.* at 216.

⁷² *Id.* at 211.

⁷³ *Id.* at 215-16.

⁷⁴ *Id.* at 212-13.

⁷⁵ *Id.* at 213.

⁷⁶ *Id.* at 211. White noted that this approach had been suggested to apply to searches of air travelers. *Id.* (citing *United States v. Skipwith*, 482 F.2d 1272, 1280-81 (5th Cir. 1973) (Aldrich, J., concurring)). Also, undoubtedly, the important strain in the Fourth

D. Professor Haddad's Critique Ends the Conversation

The only meaningful scholarly treatment of the Amsterdam/LaFave/White approach was by the late James Haddad. In a 1977 article, he addressed judicial approaches to limiting the pretext problem, which he described as “the use of the fourth amendment doctrines as a guise for discovering criminal evidence where those doctrines were not approved for such purpose.”⁷⁷ He addressed SILA, stop and frisk, and inventory searches.⁷⁸ Borrowing from Amsterdam, Haddad explained there were essentially four ways courts could respond to claims of pretext. First, courts “can uphold use of power under the doctrine but exclude from a criminal trial all evidence discovered where such discovery was not within the doctrine’s ‘reason for being.’”⁷⁹ Second, “it can uphold the doctrine but exclude from a criminal trial any evidence discovered where such discovery was not within the doctrine’s ‘reason for being’ if the possibility for such discovery motivated the officer’s use of authority under the doctrine.”⁸⁰ Third, the court could “uphold the doctrine and admit all evidence discovered as long as the officer, whatever his motivation, obeyed the letter of the law.”⁸¹ Fourth, the court “can eliminate the doctrine or narrow its application so as to reduce the possibility of sham.”⁸²

Haddad recommended that courts make the “hard choice” between the third and fourth options.⁸³ (And we know that option three has prevailed.) Haddad went on to address the first method at length, stating, “My greatest concern, however, is that courts should not use the first method, which I call ‘use-exclusion’”⁸⁴ -- the proposal he attributed to Amsterdam and LaFave. Haddad argued that it was “neither theoretically sound nor politically feasible”⁸⁵ and gave several grounds of opposition. First, the costs would be too high, “partly because of the derivative evidence consequences.”⁸⁶ Second, it would “attenuat[e] the

Amendment tradition White is alluding to is the prohibition against discretionary searches by petty officers lacking probable cause. See Otis, *supra* note 10.

⁷⁷ Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 205.

⁷⁸ *Id.*

⁷⁹ *Id.* at 205-06.

⁸⁰ *Id.* at 206.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 207.

⁸⁶ *Id.*

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relationship between misconduct and exclusion”⁸⁷ and would “breed disrespect for the judiciary.”⁸⁸ Third, it was “such a radical approach that even a zealous advocate would employ the method sparingly,”⁸⁹ against only those police practices the advocate disliked and “would gladly see eliminated altogether.”⁹⁰ For example, a jurist who did not like SILA but had no opposition to inventory searches or *Terry* frisks would argue that it applies to SILA but not to inventory searches or *Terry* frisks. This third objection seems *ad hominem*, and I do not propose limiting the idea only to doctrines I dislike, so I will address Haddad’s first and second objections.

Haddad’s main objection was grounded in the venerable argument based on the idea that the exclusionary rule may exact too high of a cost by excluding relevant incriminating evidence – especially where police did nothing wrong (in the sense of not breaking the law).⁹¹ “Consider, for example, a rule which permitted inventory searches but excluded from a criminal trial, without regard to the officer’s good faith, any evidence derived from an inventory search.”⁹²

Haddad noted that most of the time, nothing would be found in such searches; sometimes, however, police might find marijuana or even “the corpse of a homicide victim.”⁹³ The loss to police of that evidence would be compounded by the derivative evidence rule, a rule Haddad suggested use-exclusion advocates might have overlooked.⁹⁴ This rule prohibits not only use of the evidence seized but also any use of evidence derived from the seized evidence.⁹⁵ Police cannot proactively work around that rule: “unlike its fifth amendment analogue, fourth

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* Recall that Haddad wrote his critique before the Supreme Court created the good faith exception to the exclusionary rule in 1984, though more limited than the exception envisioned. *See generally* *United States v. Leon*, 468 U.S. 987, 902 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

⁹³ Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 207.

⁹⁴ *Id.* White appears to have overlooked the derivative evidence rule as well. *See* Haddad, *Another Viewpoint*, *supra* note 14, at 648 n.35 (discussing White, *supra* note 12). Haddad’s view that fruits really cannot be admissible if the evidence they were derived from is tainted, *see* Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 207 n.83, appears to be an overstatement, at least in light of subsequent case law. *See e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (“Exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence.”).

⁹⁵ *See Kastigar v. United States*, 406 U.S. 441 (1972) (describing “use and derivative use immunity”).

amendment use-exclusion does not lend itself to the institutionalization of procedures which can safeguard a prosecution from taint.”⁹⁶ That is, even if a police officer found a body and somehow, to safeguard a prosecution for murder, kept it secret from detectives investigating a murder, a court’s mandating such “secret-keeping . . . would create enormous public outrage.”⁹⁷ “The use-exclusion method would thus attach an unknown but potentially enormous price to the officer’s decision to conduct an inventory search, or to utilize any other fourth amendment power not designed for the discovery of criminal evidence.”⁹⁸ “It would present law enforcement with difficult choices,”⁹⁹ such as between frisking or not frisking and curbing or not curbing an automobile driven by a traffic offender.¹⁰⁰ Haddad even raised the idea that a murderer who is arrested for a minor traffic offense while driving with the body of the murder victim in the car would receive “an immunity bath.”¹⁰¹

III. PICKING UP THE CONVERSATION: HOW USE-EXCLUSION, SLIGHTLY MODIFIED, AND RECAST AS “CONTRABAND IMMUNITY,” CAN HELP PREVENT POLICE PRETEXT

A. Responding to Haddad

Haddad’s article seems to have ended the short life of “use exclusion” in the scholarly literature about the Fourth Amendment. The discussion of pretext over the next several years focused on limiting a police officer’s power to arrest,¹⁰² a debate that the Supreme Court ended in *Atwater* in 2001.¹⁰³ However, the idea of use exclusion is appealing, because it would limit the application of SILA, inventory, and *Terry* to their purposes. And while it appears Haddad’s objections were never addressed in scholarly literature, there are several responses to them.

The first response is a general one to the idea that losing evidence of criminality is a “cost” of the exclusionary rule that ought to

⁹⁶ Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 207-08.

⁹⁷ *Id.* at 208.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 209.

¹⁰² *See, e.g.*, Salken, *supra* note 65.

¹⁰³ *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001).

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be considered. Much has been said of this, so I will make just a few points. First, the fact that not all evidence of criminality will be discovered by police is a price of living in a free society instead of in a police state. This price is implicit in the Fourth Amendment (and in others, such as the Fifth and Sixth). So Haddad's claims of "cost" ring hollow – especially given that he does not meaningfully consider the related gain in privacy rights.¹⁰⁴ The discovery of criminal evidence as a result of a SILA, frisk, or inventory is highly unlikely and merely a bonus when it does happen. If it is not the purpose of the doctrines, and if the doctrines essentially allow suspicionless searches that can be abused in this way, then tweaking the doctrines to limit this collateral damage on civil liberties – in a way that doesn't negatively affect the doctrine's actual purpose – should not be seen as a "cost." We need to see these serendipitous discoveries for what they are: the rare, "happy accident" resulting from *unnecessary, widespread collateral damage* to civil liberties, here, the right to privacy.¹⁰⁵ People are arrested and have their person and belongings rummaged through by a police officer merely hoping to find something incriminating. We do not, for example, generally allow police to make suspicionless searches of people's homes, cars, and persons simply because police *might* find evidence. But such suspicionless searches result when police have full discretion to arrest anyone who commits, or is alleged to have committed, a minor traffic violation.

The second response is that the scenario that seems to draw most of Haddad's attention – that a murderer driving around with evidence of

¹⁰⁴ The privacy interest is often undervalued. As Justice Stevens wrote in his dissenting opinion in a police DUI roadblock case:

The most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures. Although the author of the opinion does not reiterate his description of that interest as "diaphanous," the Court's opinion implicitly adopts that characterization. On the other hand, the Court places a heavy thumb on the law enforcement interest by looking only at gross receipts instead of net benefits. Perhaps this tampering with the scales of justice can be explained by the Court's obvious concern about the slaughter on our highways and a resultant tolerance for policies designed to alleviate the problem by "setting an example" of a few motorists.

Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 473 (1990) (Stevens, J., dissenting) (citation omitted).

¹⁰⁵ Samuel D. Warren & Louis J. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). This article has been described as having "framed the discussion of privacy in the United States throughout the twentieth century." Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1100 (2002).

the crime might become immune from prosecution¹⁰⁶ – is unlikely. The overwhelming majority of drivers who commit traffic violations are not murderers, and any who actually are murderers generally will not be carrying evidence of the murder in their cars. And any of those who do have such evidence probably would not be stopped at the particular time when they are transporting it. Rules should not be built to meet the exceptional circumstance. Rather, rules should be tailored to allow for exceptions in appropriate cases.

The third response is that Haddad ignored the likely *dynamic* result of adoption of a use-exclusion doctrine: police would no longer arrest *in order to* search incident to that arrest (or in order to inventory the car). Rather, they would lack incentive to do so, given that most of the time, anything they might find would be excluded.¹⁰⁷ One could argue that a major reason police arrest drivers for traffic violations is precisely *in order to* search, without probable cause, for any possible evidence of criminal activity that police could not otherwise access. That is the whole idea of pretext. So if police stop a person for a traffic violation, and the person has evidence of criminality hidden in the car, police will not learn of that evidence, because they will *lack incentive to arrest the driver as a way of being able to search*. If the evidence is in plain view to the officer who made the traffic stop, that would be a different matter.

These responses show how Haddad's fear of an "immunity bath" is unreasonable. Without the incentive of finding evidence, it is unlikely that police would bother stopping the unbeknownst-to-them murderer for a minor traffic violation. We can even take Haddad's critique a step further (and I write this somewhat tongue-in-cheek) and imagine a murderer who drives around with his victim's corpse in the trunk and violates traffic rules precisely *in order to* get arrested and searched, so that he may gain immunity. This fictional murderer will be disappointed, however, when police merely write him a ticket or let him off with a warning. If the murderer continued driving around with the body in an ongoing quest for immunity, the body would decompose. (And if it does, the police officer would smell it (plain smell exception) and would have

¹⁰⁶ Haddad used an actual case that he argued to help make the point, but the case considered a rare situation. See Haddad, *Well-Delineated Exceptions*, *supra* note 14 at 208 (1977) (discussing *People v. Speck*, 41 Ill. 2d 177 (1968) and explaining that the prosecution could not introduce into evidence the gun that defendant had apparently used to threaten murder victims before he tied them up and killed them – the gun had been obtained during a wholly unrelated investigation).

¹⁰⁷ See White, *supra* note 12, at 216. Haddad later credited Professor White with having come up with the idea that use-exclusion could reduce or eliminate police incentive to search pretextually. Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 638 n.35.

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probable cause to search. So the immunity-shield seeking driver/murderer would confound himself.¹⁰⁸) Or, if the driver somehow tried to draw the officer's attention toward, say, the trunk, that action might create probable cause for a search, or it might be taken as creating consent. So, there will be no real immunity bath in most cases.

However, Haddad's point cannot be dismissed entirely. What if police engage in an appropriate arrest and carry out SILA and inventory for appropriate reasons and find evidence of a murder?¹⁰⁹ Assume, for example, that the driver is drunk and driving recklessly and police stop him, arrest him, and the police search of the passenger compartment, assuming that they are properly looking for weapons or have reasonable belief that they may find an open container of alcohol, as *Gant* would permit,¹¹⁰ turns up the severed head of a murder victim. Or assume that police impound the car and inventory it. There is no pretext involved, and police have otherwise done nothing wrong. If the DUI arrest forced the driver/murderer to be immune from a prosecution for murder, our system would be a laughingstock.¹¹¹

Haddad failed to move beyond his objection, and other scholars similarly failed, or perhaps had no response. (Or they simply focused on the direction that discussions of limiting pretext had taken at the time, such as limiting arrest power.¹¹²) Rather than building rules around this unlikely event, as Haddad proposed, an exception should be made to allow exclusion to be applied judiciously and flexibly¹¹³ rather than as a blunt, all-or-nothing tool. Therefore, what follows is a tweaking of Amsterdam, LaFave, and White's "use-exclusion" doctrine into what I call "contraband immunity."

B. Contraband Immunity

We can start updating use-exclusion by taking the perhaps unconscious suggestion from Haddad's label literally and consider conferring *only* use immunity, not *use-and-derivative immunity*. Haddad is clearly discussing use-and-derivative immunity when he talks about an

¹⁰⁸ Again, I make this point somewhat facetiously.

¹⁰⁹ Of course, the police officers' reasons are irrelevant for the purpose of the Fourth Amendment. *See, e.g., Whren v. United States*, 517 U.S. 806, 813-14 (1996) (discussing traffic stop); *Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (discussing arrest).

¹¹⁰ *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (search for evidence related to crime of arrest is allowed if the officer reasonably believes she will find it).

¹¹¹ *See* Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 207.

¹¹² *See* Salken, *supra* note 65.

¹¹³ LaFave, *supra* note 12, at 157.

“immunity bath.”¹¹⁴ Creating an exception for this distinction would provide a good balance between police safety and civil liberties. For example, a traffic arrest for speeding that turns up a bag of marijuana in the passenger compartment would not lead to a prosecution for drug possession. Under one approach, the police, while having the power to protect themselves by searching for weapons, might be required to turn a blind eye to whatever else they found. (Or, of course, a court would.) Under another approach, police might confiscate the drugs, which could lend some benefit to society in that the drugs would be removed from the street.¹¹⁵ This confiscation would offset some of the loss-of-evidence cost of exclusion/immunity. Indeed, many of the major Fourth Amendment cases in the SILA context involved convictions for minor possession cases that turned on contraband found in the SILA.¹¹⁶

But I am proposing use-immunity only for minor contraband found in protective searches. Thus, if police found a bale of marijuana or a suitcase full of cocaine, they would be free to investigate drug smuggling and a possible link to a drug ring. Similarly, if police found a severed head or bloody shirt, or an apparent victim of kidnapping, they would be free to investigate.

With that said, police and prosecutors might still encounter difficulty with their inability to use, in any prosecution, the severed head or the bale of marijuana. So here is a second tweak: I am not proposing use immunity strictly but rather would apply it to prevent prosecutions for simple possession of contraband. Perhaps we could call it “contraband immunity.” Police would then be able to investigate the murder if they, in a rare encounter, serendipitously found a body. They could investigate the drug dealer if, in that rare encounter, they serendipitously found a half-ton of cocaine.

Major criminals would not go unpunished; only the minor ones would. This would be a victory for civil liberties, and the cost would be minimal. Police likely would refrain from arresting merely in order to carry out protective searches – that is, police would recognize that the minute odds of finding a severed head or kilo of cocaine are not worth

¹¹⁴ Haddad, *Well-Delineated Exceptions*, *supra* note 14, at 209.

¹¹⁵ *But see* White, *supra* note 12, at 213 (discussing forfeiture of property gained as a result of such a search as a possible abuse).

¹¹⁶ *See, e.g., Gant*, 129 S. Ct. 1710 (possession of a cocaine and possession of drug paraphernalia); *New York v. Belton*, 453 U.S. 454 (1981) (possession of cocaine and marijuana); *United States v. Robinson*, 414 U.S. 218 (possession and facilitation of concealment of a cigarette package of heroin found in pocket). *See generally* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001).

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the hassle and paperwork of a traffic arrest. Police would also likely realize there would be little gain if they were required to let the person go (whom they cannot prosecute for minor possession) or even if they could just confiscate any contraband they might find;¹¹⁷ after all, there would be no credit for a prosecution. Citizens would overall undergo fewer unnecessary (pretextually-motivated) arrests.

Although this approach, in which a criminal would go unpunished, might be distasteful to “law-and-order” critics, it is important to recognize that police (and prosecutors) already turn a blind eye to many crimes.¹¹⁸ Why not turn a blind eye if doing so provides police legitimate¹¹⁹ power to protect themselves? Police also have discretion whether to arrest, and prosecutors have discretion whether to prosecute. A good example of police and prosecutors turning a blind eye to minor drug possession is where police in recent years have stood by and watched marijuana-legalization protesters light up marijuana cigarettes and pipes in public squares annually on April 20 at 4:20 p.m.¹²⁰ Although this is protest, one could argue quite convincingly that the use of marijuana is *not* a protected First Amendment right, even if it is smoked as protest. In the grand scheme of things, this limitation on the evidence serendipitously found pursuant to a doctrine that was created to protect police officers is not a great loss to society. The argument that minor drug possession must be prosecuted is also weakened by the fact that some states have decriminalized possession of less than an ounce of

¹¹⁷ However, Professor White characterized forfeiture as a wrong. White, *supra* note 12, at 213.

¹¹⁸ See, e.g., Gene Johnson, *Legalizing Marijuana: Washington Law Goes into Effect, Allowing Recreational Use of Drug*, HUFFINGTON POST (Dec. 6, 2012), http://www.huffingtonpost.com/2012/12/06/legalizing-marijuana-washington-state_n_2249238.html (describing Seattle police choosing not to arrest individuals celebrating passage of the Colorado initiative legalizing marijuana by smoking in public, despite that the law had yet to take effect and smoking in public would still be illegal under the new law). And of course prosecutors – and even the President – may decide not to prosecute particular crimes, especially simple drug possession. See *Obama: Feds Shouldn't Target Recreational Pot Users in Colorado, Washington*, CHI. TRIB. (Dec. 14, 2012), <http://www.chicagotribune.com/news/chi-obama-marijuana-20121214,0,4218324.story>.

¹¹⁹ The pretextual use of protective searches is illegitimate.

¹²⁰ For an account of one such protest, see *Keene, Nh Marijuana Protest*, MARIJUANA.COM (Sept 25, 2009), <http://www.marijuana.com/threads/keene-nh-marijuana-protest.249777/>.

marijuana,¹²¹ and, more recently, a majority of citizens in two states voted for outright legalization.¹²²

Let us look at how such a “contraband immunity” scheme would work in practice. Officer Jones pulls over Dave Driver for speeding – and, indeed, Dave Driver *was* speeding. Dave Driver is black and fits the profile *du jour* of a drug dealer. There is no contraband or fruits or instrumentalities of crime in plain view. Officer Jones might suspect, based on a hunch – and even, perhaps, conscious or unconscious racism¹²³ – that there is cocaine or marijuana in the car. But what would be the gain in arresting Driver in order to carry out this search? Driver would have to have drugs in such an amount and/or have other items (a victim’s corpse?) that give police probable cause to believe that Driver is involved in something criminal beyond mere possession. Such odds seem low. Thus, in most cases, Officer Jones would not bother arresting Driver for speeding and therefore would not find drugs in his car. Although the officer is empowered to carry out searches at a whim (thanks to *Atwater*,¹²⁴ *Moore*¹²⁵ and *Whren*¹²⁶), under a contraband-immunity approach, the officer would lack *incentive* to carry out arbitrary

¹²¹ See, e.g., MASS. GEN. LAWS ANN. 94C § 32L (West 2008) (“[P]ossession of one ounce or less of marihuana shall only be a civil offense . . .”).

¹²² Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES (Nov. 7, 2012), http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html?_r=0 (“[V]oters in Colorado and Washington State made it legal to smoke pot recreationally, without any prescription or medical excuse.”). See COLO. CONST. art. XVIII, § 16 (Lexis, LexisNexis through constitutional and statutory amendments approved at the general election on November 6, 2012); Wash. Rev. Code § 69.50.4013(3) (West, Westlaw through all 2012 legislation and initiative measure 502, approved November 6, 2012).

¹²³ See Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL’Y 91, 100-102 (2007) (citing studies and reports about racist policing in New York City); Maclin, *supra* note 39, at 93-94 (discussing numerous studies confirming that police engage in racial profiling); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹²⁴ *Atwater v. Lago Vista*, 532 U.S. 318, 323 (2001) (holding that the Fourth Amendment is not violated by a warrantless arrest for a minor traffic offense).

¹²⁵ *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (holding that searches incident to warrantless arrests for crimes committed in the presence of an officer are Constitutional regardless of state laws restricting such arrests, and thus the exclusionary rule does not apply).

¹²⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the constitutional reasonableness of a traffic stop does not depend on the subjective motivations of the officer involved).

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searches. The only other incentive might be to harass.¹²⁷ Contraband immunity is not panacea for that but rather focuses on limiting arrests that are carried out in order to execute a suspicionless protective search. Limiting arrests carried out for other illegitimate reasons might require a reversal of *Atwater*.¹²⁸

Let's take another example outside of the realm of drug possession. What if the police find burglary tools? Well, there would be no prosecution for mere possession, but if the police then suspected the driver of having committed a burglary, the police could investigate. What if police found stolen property? There would be no prosecution for possession of stolen goods, but police could investigate and prosecute the driver for the theft that led to the goods being inside the particular car.¹²⁹

¹²⁷ It seems that harassment was the primary goal of the police officer in *Atwater*. White points out that this incentive cannot be controlled by use-exclusion but that a citizen might have other remedies. White, *supra* note 12, at 211. I can think of possibilities such as a section 1983 claim or a complaint filed with a body that oversees the police.

¹²⁸ For a discussion of how this case was wrongly decided, see Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 359 (2002), and Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 *IND. L.J.* 419, 458 (2002).

¹²⁹ This example responds to Haddad's attack on use-exclusion in his 1985 article, where he assumed that the discovery of burglary tools by police conducting a protective search in an arrest *for burglary* would foreclose any investigation of a burglary. Haddad, *Another Viewpoint*, *supra* note 14, at 648 n.35 (stating that White's view "led to a preposterous conclusion"). Of course, Haddad failed to consider the idea that I propose: not excluding derivative evidence.

Here, I should point out how Grubman's proposal for dealing with *Gant* violations that do not result in exclusion as a result of the inevitable discovery rule differs from use-exclusion and contraband immunity. See Grubman, *supra* note 23. See also *supra* note 30 and accompanying text. Use-exclusion and contraband immunity would exclude some evidence that is seized even if there were no violation of *Gant*. For example, use-exclusion excludes evidence if it is not within the purpose of the doctrine allowing the search. So even if the *Gant* search were proper, anything that is not a weapon or evidence related to the crime the suspect is arrested for would be excluded. Contraband immunity would prevent a prosecution for contraband even if the contraband were found during a proper *Gant* search, if the contraband were unrelated to the crime the driver is arrested for. But contraband immunity would permit the contraband to be used for another sort of prosecution, such as possession with intent to distribute, or if the contraband somehow tied the suspect to another crime. Grubman does not mention the use-exclusion discussion by Amsterdam, LaFave, White, and Haddad in his article. See Grubman, *supra* note 23.

C. A “Majestic View” of the Exclusionary Rule Probably Will be Necessary

The exclusionary rule poses a problem for implementing contraband immunity – just as it did for use-exclusion.¹³⁰ History, however, provides a basis for an interpretation of the exclusionary rule that would allow courts more flexibility in excluding evidence. Recently, Professor Scott Sundby and Lucy B. Ricca, Esq. building on Justice Ginsburg’s dissent in *Herring v. United States*,¹³¹ traced the development of the two competing views of the exclusionary rule, the “majestic” view and the “mere evidence” view (which prevails now).¹³² They explained the majestic view, which informed the Court’s earliest exclusionary rule cases:

[Th]e Court’s foundation cases sing the rule’s praises in unabashed terms. One could read these early cases and wonder how our system of justice would not crumble without the exclusionary rule to protect the judiciary’s dignity and to safeguard the liberties our forefathers fought for in the struggle against British tyranny.¹³³

They note that the mere evidence view, which requires the exclusion of evidence only where the police obtained it wrongfully and only where exclusion can deter police from such wrongdoing, was not part of those cases: “Remarkably, the question of the deterrent effect of the rule, which now even the dissenting justices in *Herring* concede as the ‘primary purpose’ behind the rule, is almost completely absent.”¹³⁴

The majestic view is likely what Professor LaFave had in mind when he wrote, in support of his serendipity doctrine, that “it is precisely where police investigative techniques are susceptible of use to make unwarranted intrusions which the courts cannot distinguish from ‘closely similar’ warranted intrusions, that a flexible administration of the exclusionary rule is desperately needed to keep police powers within the

¹³⁰ See LaFave, *supra* note 12, at 157.

¹³¹ *Herring v. United States*, 129 S. Ct. 695, 707 (2009).

¹³² Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH. L. REV. 391, 394 (2010).

¹³³ *Id.* at 393.

¹³⁴ *Id.*

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confines of their justifications.”¹³⁵ The Court could draw upon this idea in justifying contraband immunity if it wished.¹³⁶ It essentially did this in *Gant* because its ruling applied the exclusionary rule to limit SILA to its purpose.¹³⁷

If the Court wished to rely on the mere evidence/deterrence approach in applying contraband immunity, it probably could not. It could be argued that the deterrence of police misconduct – undetectable – would be achieved by excluding contraband for use in a mere possession prosecution.¹³⁸ The lack of incentive for police to seize the

¹³⁵ LaFave, *supra* note 12, at 157.

¹³⁶ See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 556 (1985) (“History shows that if doctrines and concepts are attacked long enough and hard enough they may begin to crumble. This article is an attempt to contribute to that effort . . .”). The Court has overruled lines of precedent to return to the original purpose of rules. See, e.g., *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause).

¹³⁷ *Arizona v. Gant*, 129 S. Ct. 1710, 1724 (2009) (upholding Arizona Supreme Court’s reversal of trial court’s denial of motion to suppress).

¹³⁸ As LaFave wrote,

If the fruits of an admittedly illegal search need not be suppressed where there would be a “minimal advance in the deterrence of police misconduct,” then why does it not follow that the exclusionary rule should be employed when the deterrence objective could be substantially advanced, without regard to whether it is certain there has been an illegal (*i.e.*, improperly motivated) search in the particular case?

The answer some would give, I suppose, is that by hypothesis this approach would sometimes result in the exclusion of, say, heroin where there has in fact been no police wrongdoing in the particular case. But it must be remembered, as the Court acknowledged in *Calandra*, that the exclusionary rule “is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.” This would appear to be a long overdue recognition of a “regulatory” rather than an “atomistic” view of the Fourth Amendment. Under the former, “there is no necessary relationship between the violation of an individual’s fourth amendment rights and exclusion of evidence”; rather, the “exclusionary rule is simply a tool to be employed in whatever manner is necessary to achieve the amendment’s regulatory objective by reducing undesirable incentives to unconstitutional searches and seizure.” This being the case, there is much to be said for excluding evidence other than weapons obtained incident to a traffic arrest, given the inherent difficulties in separating those searches which are in fact lawful from those which are not.

LaFave, *supra* note 12, at 157 (footnotes omitted) (quoting *Calandra v. United States*, 414 U.S. 338, 348, 352 (1974) (first and second quotations) and *Amsterdam*, *supra* note 12, at 437-39 (subsequent quotations)).

evidence would deter pretextual conduct. Police who were not engaged in pretextual conduct would not be unduly punished by this exclusion, because they were never intending to find the contraband, anyway. They were merely intending to protect themselves and are permitted to do so. This argument is unlikely to win the day, however, because in some of the cases, police will have done nothing wrong in obtaining the evidence and will not have acted pretextually.¹³⁹ Without a change in the exclusionary rule doctrine, it seems that the only way to implement contraband immunity would be for state courts to implement it under their own exclusionary rules, Congress or legislatures to create such immunity, or for prosecutors or police departments to implement such a policy. These measures may seem unlikely in a “get tough on crime” political environment.

In any event, contraband immunity itself would not be hard to apply. Courts would not have to engage in analyzing police motives to ferret out pretext – an analysis the United States Supreme Court has deemed undesirable.¹⁴⁰ Courts would simply limit the evidence that may be admissible to the sorts of evidence that are within the doctrine’s purpose. This would result in fewer prosecutions beyond the prosecution for the traffic offense. However, the benefit to police is that if they arrest a driver or stop a person on the street, they can search the person to protect officer safety. That is already an intrusion into privacy that is unsupported by probable cause or a search warrant.¹⁴¹ Indeed, it is important to keep in mind that the Court was divided on whether to give police this power in the first place.¹⁴² The history of *SILA* shows that it was meant to be limited to a search for weapons and evidence of the crime of arrest, not a free-for-all.¹⁴³

¹³⁹ See *Herring v. United States*, 129 S. Ct. 695, 702 (“As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.”). See also *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (“Indeed, in 27 years of practice under *Leon*’s good-faith exception, we have ‘never applied’ the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.”).

¹⁴⁰ This is the result of *Whren*, discussed *supra*. However, there is a great deal of Supreme Court precedent specifically against police pretext. See *United States v. Robinson*, 414 U.S. at 248 (Marshall, J., dissenting).

¹⁴¹ Police are unable to carry out searches unsupported by probable cause other than under the rubric of special needs searches, which the Court has applied to, inter alia, DUI roadblocks. See, e.g., *Mich. Dep’t. of State Police v. Sitz*, 496 U.S. 444, 450-55 (1990).

¹⁴² See, e.g., *Robinson*, 414 U.S. 218 (6-3 decision).

¹⁴³ See *id.* at 250-51 (Marshall, J., dissenting).

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If contraband immunity were applied, courts would have to be vigilant. For example, in order to prevent contraband immunity in some cases, judges may be tempted to water down the probable cause standard in order to elevate evidence of petty crime that is found pursuant to SILA or inventory to something that can lead to an arrest. For example, a prosecutor might argue that what is normally seen as a personal use amount of marijuana now meets the probable cause standard for a charge of possession with intent to distribute charge. Legislatures might even lower the requisite amount, and courts then might have little ability to posit that the amount is too low to support such an inference, given the deference courts show legislatures in criminal law.¹⁴⁴ Or, police and prosecutors might try to weave imaginative webs, such as how a small amount of marijuana, combined with an address book (usually part of a cell phone these days), a car, and a few 20-dollar bills constitute probable cause for a drug dealing prosecution. Courts should guard against such efforts designed to limit the application of contraband immunity.

CONCLUSION: DOES CONTRABAND IMMUNITY SUGGEST A FRAMEWORK FOR THE POST-9/11 ERA?

The history of the last 40 years has shown that the Fourth Amendment's ability to serve as a reasonable brake on government search and seizure power has been weakened. Although my focus in this article is primarily on street encounters, the fact that the government has been practicing widespread surveillance in the name of preventing terrorism and prosecuting terrorists has given the government a free entry into all citizens' lives.¹⁴⁵ Reading emails, listening to phone calls, asking banks and other institutions to turn over financial information, and asking cellphone providers to turn over geographic information all give the government a perch from which its "plain view" -- and ability to rummage -- is, for all intents and purposes, all-seeing and all-knowing. Evidence can be found "serendipitously" all the time now.

¹⁴⁴ See, e.g., *Ewing v. California*, 538 U.S. 11, 24 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991); *Robinson v. California*, 370 U.S. 661, 666 (1962). See also Brian J. Foley, *Reframing the Debate over Excessive Sentences to Move Beyond the Eighth Amendment*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 10-18 (2012).

¹⁴⁵ David Cole, *Keeping Watch on the Detectives*, N.Y. REV. BOOKS, Dec. 22, 2011, available at <http://www.nybooks.com/articles/archives/2011/dec/22/keeping-watch-detectives/?pagination=false>.

It is unlikely that the government will cede this perch, given the insistence of its claims that such a perch is required to protect Americans' physical safety. It is more realistic, then, to limit what evidence the all-seeing government can use to prosecute a person. If citizens cede or appear to cede to government the power to access most of our basic information for the purpose of protecting us against terrorism (I am not convinced that this is necessary, but that is an argument for a different article), then the government should not be allowed to abuse that privilege. The analogy is one of consent. Similarly, if we allow police officers to search us to protect officers' safety, the government should not be allowed to abuse that privilege. Just as, if we allow police officers to make an inventory of all of the contents of our automobiles to purportedly protect our property interests, the government should not be allowed to turn that supposed serving and protecting into a weapon against us. This is a new view of the Fourth Amendment, perhaps, but it seems to be the only workable one now that the surveillance genie is out of the bottle.¹⁴⁶ The government has never been entitled to prosecute every crime it learns of. *How* officials learn of crimes is crucial; this is the animating principle of the Fourth, Fifth, and Sixth Amendments. In a free society, some crimes will go undetected, and some crimes that are detected will go unpunished, because sometimes doing so will protect values more important than convicting people of crimes.¹⁴⁷

In applying contraband immunity, our society would be one in which police will have knowledge of crimes they cannot prosecute. But this is the society the Constitution envisions. It is a world of open secrets. Better that than the open secret that pervades Fourth Amendment jurisprudence now: that police are arresting in order to search, that police are using doctrines beyond their reason for being, and that courts are allowing these abuses. That the Fourth Amendment is not being used to protect against the very wrong – discretionary searches by petty officers – that it was framed to protect against.

¹⁴⁶ See *id.* (discussing need for new view of privacy in era of government ability to use technology to infringe upon privacy). Cole writes, "These devices give the state the Orwellian ability to follow virtually every movement people make and their every keystroke at the computer. If, as the Obama administration would have it, the state can engage in such monitoring without first developing any objective basis for suspicion, privacy may become as 'quaint' and 'obsolete' as then White House counsel Alberto Gonzales once characterized the Geneva Conventions." *Id.*

¹⁴⁷ Perhaps anti-terrorism legislation could be written to include limits such as contraband immunity. Such might be the case if citizens expressed more political opposition to government surveillance and possibilities for its abuse.