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Eviction and Exclusion: An Argument for Extending the Exclusionary Rule to Evictions Stemming from a Tenant's Alleged Criminal Activity

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I. INTRODUCTION

Eviction is a pervasive feature of life for people living in poverty in America. Its impact on black women has been prominently likened to the impact of mass

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incarceration on black men.[1] Eviction precipitates a wide range of severe, negative consequences for its victims. It "increases material hardship, decreases residential security, and brings about prolonged periods of homelessness; it can result in job loss, split up families, and drive people to depression and, in extreme cases, even to suicide."[2] Further, eviction's consequences are self-reinforcing, as even a single eviction "decreases one's chances of securing decent and affordable housing, of escaping disadvantaged neighborhoods, and of benefiting from affordable housing programs."[3]

Evictions were at one point a rare occurrence in American cities.[4] But in recent decades, evictions have become increasingly and troublingly common.[5] Though evictions in each state or locality are governed by distinct local procedures and laws, such differences have generally not affected the nationwide character of the expanding eviction phenomenon.[6] Since many evictions stem from tenants' alleged criminal activity, the loss of one's home has become a common collateral sanction of arrest or incarceration.[7] This increase in evictions—especially from public and subsidized housing—based on criminal activity emerged at least in part from a deliberate crime control strategy initiated by police and related actors.[8]

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1. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 98 (Broadway Books, 2016).

2. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. OF SOC. 88, 91 (2012) (citations omitted).

3. *Id.*; *see also* Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 13–14 (2015) ("The fallout from eviction can cause an abundance of collateral damage in the long-term. Even at the outset, the events leading to eviction cause turmoil, such as conflict with the landlord, multiple court appearances, looming uncertainty of the outcome, and the stressful moments during physical removal."); Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 317 (2015) ("[E]viction may not simply drop poor mothers and their children into a dark valley, a trying yet relatively short section along life's journey; it may fundamentally redirect their way, casting them onto a different, and much more difficult, path.").

4. *See* DESMOND, *supra* note 1, at 3.

5. *See id.* at 4; *see also* Sarah Holder, *Where Evictions Hurt the Most*, CITY LAB (Oct. 30, 2017), https://www.citylab.com/equity/2017/10/where-evictions-hurt-the-most/544238 [http://perma.cc/H2G7-AE3Y] ("The scope [of evictions] . . . is wide, and growing: One in five renters recently struggled or were unable to pay their rent, and 3.7 million renters nationwide have experienced an eviction in their lifetime as a renter."); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 62 (2016) ("Baltimore City courtrooms evict between six and seven thousand households each year. In New York City, three to four hundred housing court judgments are entered on a typical day. In Chicago, more than 31,000 eviction cases are filed every year. Over 16,000 adults and children are evicted in Milwaukee yearly.").

6. *See* Jen Kinney, *The U.S. Metros Hit Hardest by Rising Eviction Rates*, NEXT CITY (Dec. 13, 2016), https://nextcity.org/daily/entry/report-eviction-rates-housing-affordability [http://perma.cc/6F6M-SVSY].

7. J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 47 (Fall 2009) ("The loss of a family's home as a result of an arrest or incarceration is a tragically common event.").

8. *See* Justin Ready, Lorraine Green Mazerolle & Elyse Revere, *Getting Evicted from Public Housing: An Analysis of the Factors Influencing Eviction Decisions in Six Public Housing Sites*, 9 CRIME PREVENTION STUD. 307, 309–11 (1998); Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 166–68 (1991) ("These actions illustrate a federal proclivity for addressing the drug crisis by increasing penalties and reducing procedural protections.");

But unlike other crime control strategies, evictions are not subject to the same suite of procedural safeguards that protect the accused from police misconduct in criminal cases.[9] Among other things, hearings may be as short as two minutes, the pleading requirements for landlords may be minimal, and defendants are often *pro se*.[10] This is in contrast to criminal cases, where the defendant has, among other things, the "right[s] to counsel . . . , to a speedy and public trial by an impartial jury, . . . to be informed of the nature and cause of the accusation, . . . to be confronted with witnesses against him and to have compulsory process for obtaining witnesses in his favor."[11]

Nonetheless, some safeguards that originated in the criminal law may be applicable in limited civil contexts. One such safeguard is the exclusionary rule, which "generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights."[12] Courts have struggled with determining the proper civil contexts for extensions of the exclusionary rule, and the Supreme Court has expressed substantial skepticism about expanding the scope of its civil role.[13] But courts have largely not addressed the applicability of the exclusionary rule in eviction proceedings, and those that have addressed the question have arrived at divergent conclusions. Further, judicial treatment of the matter has often been cursory or, as this Note will argue, based on an unduly constrained view of the relevant history and case law.

This Note examines the applicability of the exclusionary rule in eviction proceedings that are based on a tenant's alleged criminal activity. Part II begins by laying out the development of the exclusionary rule, its application in civil contexts, and state courts' limited forays into the question whether to apply the rule in eviction proceedings. Part III examines the history of evictions as a law enforcement tactic, including the extent of punitive motivation underlying the development of the relevant laws as well as the history of collaboration among law enforcement, housing authorities, and other relevant entities. Finally, Part IV considers several arguments for the application of the exclusionary rule to eviction proceedings that are based on a tenant's alleged criminal activity, at least where the eviction implicates a requisite degree of state involvement.

Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 118–19 (2013); *see also infra* Part III.

9 . *See* Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty? Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F. L. & SOC. CHANGE 1, 13 (2016).

10. *See* Gold, *supra* note 5, at 62–66.

11. United States v. Wade, 388 U.S. 218, 226–27 (1967).

12. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359 (1998).

13. *See infra* Section II.B.

II. THE EXCLUSIONARY RULE AND CIVIL PENALTIES

The exclusionary rule, first announced in *Weeks v. United States*,[14] "is a judicially created remedy designed to safeguard Fourth Amendment rights."[15] It "was adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'"[16]

In general terms, the exclusionary rule requires "the exclusion of unconstitutionally seized evidence" in criminal proceedings.[17] Initially, the rule applied only to the admission in federal criminal proceedings of evidence impermissibly obtained by federal agents. But in a series of decisions, the Supreme Court expanded the rule to encompass the use of evidence impermissibly seized by state and local actors in federal proceedings[18] and the use of all impermissibly seized evidence in state proceedings.[19]

In incorporating the protections of the exclusionary rule to the states, the Court in *Mapp v. Ohio* discussed the purposes of the rule in light of its Fourth Amendment origins.[20] It noted that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[21] Though the Court in *Mapp* highlighted other justifications for the exclusionary rule—including judicial integrity[22] and privacy[23]—it has since generally moved away from all justifications other than deterrence. In *United States v. Calandra*,[24] the Court noted that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim," and that its purpose, instead, "is to deter future unlawful police conduct."[25]

Following these decisions, the Court has subsequently pursued two largely separate paths in considering the exclusionary rule's application in limited civil contexts. This Note sets forth each of those approaches in turn.

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14. 232 U.S. 383 (1914).

15. United States v. Calandra, 414 U.S. 338, 348 (1974).

16. *Id*. at 347.

17. Mapp v. Ohio, 367 U.S. 643, 663 (1961) (Black, J., concurring).

18. *See generally* Elkins v. United States, 364 U.S. 206 (1960).

19. *See Mapp*, 367 U.S. at 655.

20. *See id*. at 656.

21. *Id*. (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).

22. *See id*. at 659. But note that judicial integrity might nonetheless play a role in assessing the interests affected by application of the exclusionary rule in a particular case. *See infra* note 148 and accompanying text.

23. *See Mapp*, 367 U.S. at 660.

24. United States v. Calandra, 414 U.S. 338 (1974).

25. *Id*. at 347. Scholars have, however, criticized this shift. *See, e.g.*, David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 2–3 (2013) ("Th[e] deterrence-only approach ignores or rejects more principled justifications that inspired the [exclusionary] rule at its genesis and have sustained it through the majority of its history and development." Further, "deterrence considerations are conceptually insufficient by themselves to justify core components of the Court's Fourth Amendment exclusionary rule doctrine.").

A. The Janis Balancing Test

Though the exclusionary rule was once grounded in a wide array of concerns including judicial integrity and privacy, any argument for extending the scope of the rule's application must now grapple with the modern Court's comparatively single-minded focus on the rule's deterrent potential. The question of the exclusionary rule's purposes was central to the Court's analysis in *United States v. Janis*,[26] its first opportunity to consider the application of the rule to purely civil cases. In *Janis*, the Court declined to extend the exclusionary rule to proscribe the admission of evidence "seized by a state criminal law enforcement officer in good faith."[27] In that civil case to recover unpaid taxes stemming from the defendant's illegal bookmaking activity, the police had seized the challenged evidence pursuant to a deficient but facially valid warrant.[28]

The Court's decision hinged on a balancing of the rule's deterrent effect with the social harm threatened by its application, and principally rested on two bases. First, officers and the police department are sufficiently punished and deterred by the exclusion of evidence from any criminal trial, as "the entire criminal enforcement process, which is the concern and duty of these officers, is frustrated."[29] Any marginal deterrent effect of a secondary proceeding, like an action for unpaid taxes, is thus negligible. Second, contrasting the *Janis* case before it with some lower courts' extensions of the rule into civil cases, the Court noted that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign."[30] Such an "intersovereign" use of illegally-obtained evidence might occur where, for instance, the federal government in an immigration proceeding seeks to use evidence illegally obtained by local police in a routine search. Under the Court's reasoning, a judge's choice to frustrate the federal government's immigration action is unlikely to have a significant effect on the motivations and behavior of the local government's officers who committed the Fourth Amendment violation. Such intersovereign violations are thus less likely to merit the civil application of the exclusionary rule than are intrasovereign violations. Taken together, these observations led the Court to conclude that the deterrent effect of applying the rule could not outweigh the "substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence."[31]

Since *Janis*, the Court has continued to apply a similar balancing test and has maintained its skepticism towards extending the exclusionary rule into civil domains—though it has notably been consistent in its refusal to disclaim outright

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26. United States v. Janis, 428 U.S. 433 (1976).

27. *Id*. at 434.

28. *Id*.

29. *Id*. at 448.

30. *Id.* at 458.

31. *Id*. at 448–49. This is, naturally, the invariable social cost involved in applying the exclusionary rule—that the exclusion of evidence may prevent a wrongdoer from being properly punished.

the possibility of such an extension. In *INS v. Lopez-Mendoza*, the Court next considered whether to admit in an immigration proceeding evidence obtained pursuant to an unlawful arrest, and again declined to extend the exclusionary rule to cover such a circumstance. As in *Janis*, the Court engaged in a generalized balancing test, noting that "[w]hile it seems likely that the deterrence value of applying the exclusionary rule in deportation proceedings would be higher than it was in *Janis*, it is also quite clear that the social costs would be very much greater as well."[32] The Court emphasized several factors in finding any deterrent effect substantially diminished. First, it was unlikely that evidence obtained in the arrest would actually be necessary to the ultimate proceeding, since the identity and alienage of the individual subject to deportation proceedings were non-suppressible and, taken together, sufficient to warrant removal.[33] Second, because exceedingly few individuals challenge their deportations, and even fewer raise evidentiary concerns in such challenges, officers are unlikely to contemplate such challenges in managing their own conduct.[34] Finally, "the INS ha[d] its own comprehensive scheme for deterring Fourth Amendment violations . . . ."[35] As to the broader social cost, the Court noted that suppressing essential evidence in a deportation proceeding, unlike in other criminal (or even civil) contexts, constitutes present acquiescence to *ongoing* illegal activity, rather than merely a decision not to punish a discrete past transgression.[36]

More recently, the Court in *Pennsylvania Board of Probation and Parole v. Scott* summarized, in declining to extend the exclusionary rule to a parole revocation proceeding, its limited approach to applying the exclusionary rule in civil cases: "[B]ecause the [exclusionary] rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its 'substantial social costs.' Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."[37]

The Court has not foreclosed further applications of the exclusionary rule in civil cases, but it has made clear that any argument for such extension will face substantial judicial skepticism. Principally, it will need to overcome the Court's wariness of applying the rule to intersovereign violations of the Fourth Amendment and its belief that exclusion of the evidence from criminal cases provides sufficient deterrence—chiefly because the criminal case represents the more substantial penalty, and the penalty officers and departments have in mind when establishing policy and conducting searches.

Though the Supreme Court has not had occasion to detail a more precise list of relevant factors for the *Janis* balancing test, lower federal courts and state courts have done so. Several state and lower courts have analyzed whether to apply the exclusionary rule in various tax proceedings and have formulated multi-factor tests. For instance, the Sixth Circuit in *Wolf v. Commissioner of Internal Revenue*

32. INS v. Lopez-Mendoza, 468 U.S. 1032, 1042 (1984).
33. *Id*. at 1043.
34. *Id*. at 1044.
35. *Id.*
36. *Id*. at 1046.
37. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 362–63 (1998).

set forth five relevant factors: (1) "the nature of the proceeding," (2) "whether the proposed use of unconstitutionally seized material is intersovereign or intrasovereign," (3) "whether the search and the secondary proceeding were initiated by the same agency," (4) "[a]ny indication of an explicit and demonstrable understanding between the two law enforcement bodies," and (5) whether the civil proceeding was within the "zone of primary interest" of the officers conducting the search.[38] Focusing on this last factor, the Court determined that a proceeding to recover unpaid taxes on illegal drug transactions was too remote from the "zone of primary interest" of the narcotics agent who had seized the drugs for application of the exclusionary rule to be an effective deterrent.[39] In a similar case, a Texas state appellate court added to this list "the nature of the search"—that is, whether the search was warrantless or facially legitimate.[40] There, the court applied the exclusionary rule to a similar tax proceeding, distinguishing *Wolf* by noting that the government entities—law enforcement and the Comptroller—in the case before it were "statutory[ily] linke[ed]," that the officers' search had been warrantless, and that the act at issue "only taxe[d] illegal conduct" (unlike the tax provision at issue in *Wolf*).[41]

At least one court has focused especially on both the motivations of police officers and the organizational structure and priorities of their police departments. In *Tirado v. Commissioner of Internal Revenue*—another case concerning unpaid taxes on illegal activities—the Second Circuit suggested that the key question on the issue of deterrence is whether "the particular challenged use of the evidence is one that the seizing officials were likely to have had an interest in at the time—whether it was within their predictable contemplation and, if so, whether it was likely to have motivated them."[42] In its gloss on *Janis*, the *Tirado* court also suggested that the Supreme Court likely would have invoked the exclusionary rule "if evidence had shown that . . . the police had planned their search in conjunction with, or received encouragement beforehand from, the IRS, or that the police had realized during the search that the IRS would be interested in their discoveries."[43] The court further observed that "[a]ny indication of an explicit and demonstrable understanding between the two law enforcement bodies would be decisive."[44] In so reasoning, the Second Circuit expressly rejected an approach that hinges on whether proceedings are initiated by agents of the same sovereign.[45]

38. Wolf v. Comm'r, 13 F.3d 189, 194–95 (6th Cir. 1993).
39. *See generally id*.
40. Vara v. Sharp, 880 S.W.2d 844, 850 (Tex. App. 1994).
41. *Id*. at 852.
42. Tirado v. Comm'r, 689 F.2d 307, 311 (2d. Cir. 1982).
43. *Id*. at 312.
44. *Id*.
45. *Id*.

B. Plymouth Sedan and Quasi-Criminal Sanctions

In a largely separate line of cases, the Supreme Court has analyzed whether to extend the exclusionary rule to civil cases on the basis of whether such civil penalties are "quasi-criminal" and not based on the balancing approach of *Janis*. In *One 1958 Plymouth Sedan v. Pennsylvania*, the Court extended the exclusionary rule to apply in civil forfeiture cases, reasoning that "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal."[46] Relying on earlier precedent from *Boyd v. United States*, the Court reasoned that forfeiture proceedings are "quasi-criminal," as their object is "to penalize for the commission of an offense against the law."[47] In reaching that conclusion, the Court relied in part on its observation that a forfeiture "can result in even greater punishment than the criminal prosecution."[48]

In contrast, the Court in *United States v. Ward*, though not specifically focusing on the exclusionary rule, also relied on *Boyd* in holding that a civil penalty for failing to report the discharge of oil into navigable waters was not quasi-criminal for purposes of applying the procedural guarantees of criminal prosecutions.[49] In so holding, it emphasized another relevant factor from *Boyd*: whether the penalty at issue has a "correlation to any damages sustained by society or to the cost of enforcing the law."[50] If not, such arbitrariness suggests that the penalty may in fact be quasi-criminal.[51] The Court also noted the relevance of whether the applicable statute characterizes the penalty as civil or criminal, suggesting the question might be resolved by reference to whether the civil penalty is implemented in a statute containing corresponding criminal penalties.[52]

Though the Court has more recently reaffirmed the holding of *Plymouth Sedan*,[53] its decision in *United States v. Ursery* suggests that the scope and power of that holding may nonetheless be more circumscribed than would be apparent from *Plymouth Sedan* considered alone. In *Ursery*, the Court considered whether civil forfeiture proceedings entitled a property claimant to protection under the Double Jeopardy Clause. It concluded that a claimant was not so entitled because

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46. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965) (quoting Boyd v. United States, 116 U.S. 616, 633–34 (1886)).

47. *Id.* at 700.

48. *Id*. at 701.

49. United States v. Ward, 448 U.S. 242, 253–54 (1980).

50. *Id*. at 254.

51. This factor is, however, a bit puzzling—after all, we ordinarily demand (or at least strive for) proportionality in the criminal law to a greater extent than in the civil arena. *Cf., e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment."). One possible explanation is that the Court in *Ward* was principally drawing a contrast with forfeiture—which is, more than almost any other sanction, arbitrary and unbound by proportionality in its impact—rather than with the criminal law as a whole.

52. *See* Ward, 338 U.S. at 254.

53. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture." (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 696 (1965)).

"*in rem* civil forfeitures are neither punishment nor criminal for purposes of the Double Jeopardy Clause."[54] *Plymouth Sedan* is mentioned only in passing in Justice Kennedy's concurrence, where he notes that it contains language suggesting "civil *in rem* forfeiture is [ ] punishment of the wrongdoer for his criminal offense," though both his concurrence and the majority opinion reject that conclusion.[55]

One interpretation of the apparent tension between *Plymouth Sedan* and *Ursery* is that "quasi-criminal" sanctions are not automatically entitled to the full suite of criminal protections—and that *Ursery* does not, in fact, challenge the core holding of *Plymouth Sedan*: that quasi-criminal sanctions are entitled to protection under the exclusionary rule.[56] In fact, *Ward* provides some support for this understanding. There, the Court expressly acknowledged that whether a facially civil sanction is essentially criminal in nature is a distinct inquiry from whether that penalty is *quasi*-criminal.[57] In light of the *Ward* Court's bifurcated analysis, the diverging degree of protection outlined in *Ursery* is readily intelligible. One explanation for this difference—that is, the Court's greater generosity in extending the exclusionary rule than other similar constitutional protections—may be the distinct origins of the exclusionary rule. While other protections—like the protection from double jeopardy—emerge *directly* from the Constitution's text,[58] the exclusionary rule serves only as an instrumental means of securing constitutionally-defined ends.[59] It is not itself directly imposed by the Constitution's text. Thus, it may not be constrained by the textual boundaries that limit other protections to only criminal cases. Rather, the exclusionary rule's protections extend to any instance where its application would further the constitutional aims that provide its underlying basis.

On the other hand, such an instrumental or consequentialist justification for the continued viability of *Plymouth Sedan* raises new questions. It reveals some of the ambiguity surrounding the theoretical underpinnings of the quasi-criminal approach and surrounding the relationship between *Plymouth Sedan* and the Court's apparent commitment to a deterrence-based approach. One promising explanation may be that quasi-criminal cases reflect a class of disputes with especially high deterrent potential.[60] Indeed, the Sixth Circuit in *Wolf* seemed to

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54. United States v. Ursery, 518 U.S. 267, 292 (1996) (internal quotation marks omitted).

55. *Id*. at 293.

56. *See, e.g.*, Commonwealth v. 605 Univ. Drive, 104 A.3d 411, 457 (Pa. 2014) ("However, despite characterizing forfeiture proceedings as 'in their nature criminal' for these particular aspects of the Fourth and Fifth Amendments, the U.S. Supreme Court has rejected the argument that the full panoply of rights afforded to a criminal defendant apply to forfeiture proceedings, reasserting that such proceedings are civil.").

57. *See* Ward, 448 U.S. at 251.

58. *See* U.S. CONST. amend. V.

59. *See supra* text accompanying note 37.

60. *See* Christine L. Andreoli, Note, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence*, 51 FORDHAM L. REV. 1019, 1028 (1983) ("By extending the rule to quasi-criminal actions, the Plymouth Court determined that the deterrent value of exclusion in quasi-criminal cases is substantial.").

adopt just this reasoning.[61] Alternatively, it may be that the persistence of *Plymouth Sedan* reflects a continued—though diminished—judicial commitment to safeguarding interests like judicial integrity and privacy, which the Court once expressly considered as part of its exclusionary rule doctrine, but which have more recently fallen by the wayside. This ambiguity is likely a significant culprit behind courts' timidity in further extending the approach of *Plymouth Sedan*.

Nonetheless, lower courts attempting to navigate this uncertain terrain have, as a general matter, treated *Plymouth Sedan* as good law despite *Ursery*. However, lower courts have simultaneously recognized the Court's thorough skepticism of declaring other civil sanctions to be "quasi-criminal," or broadening the implications of such a finding. For instance, the Court of Appeals of Maryland found that "*Plymouth Sedan* remains applicable" despite *Ursery*, noting that "[e]leven of the thirteen United States Courts of Appeals have interpreted *Plymouth Sedan* to stand for the proposition that the exclusionary rule applies to civil *in rem* forfeitures" and that "courts in thirty-four states have" concluded the same.[62] Some states, though, have taken a more negative view of *Plymouth Sedan*'s continued relevance. Consider, for instance, the view of the Texas Supreme Court: "[T]he legal and jurisprudential landscapes have changed significantly since *Plymouth Sedan* . . . , weakening some of the opinion's underpinnings . . . . T]he Court has abandoned the old, reflexive application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits."[63]

This mixed reception suggests the following conclusion: *Plymouth Sedan* is probably good law, but to be most persuasive, an argument that a civil penalty is "quasi-criminal" for purposes of applying the exclusionary rule should have two features. First, the argument should attempt to draw a tight parallel to the Court's prior extension of the exclusionary rule, in light of both the underdevelopment of the independent test and courts' skepticism of further extensions of the rule's application. Second, to the extent the argument engages in application of a "quasi-criminality" test, the argument should focus on *Ward*'s more specific test, rather than on the more generalized *Plymouth Sedan* approach. That is because *Ward*

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61. *See* Wolf v. Comm'r, 13 F.3d 189, 194 (6th Cir. 1993) ("[T]he question whether or not application of the exclusionary rule will deter future violations will depend primarily on the nature of the proceeding." (citing One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965)).

62. One 1995 Corvette v. Mayor of Baltimore, 724 A.2d 680 (Md. 1999); *see also* State v. Nunez, 129 N.M. 63, 82–83 (N.M. 1999) ("In New Mexico, this 'quasi-criminal' characterization of civil forfeitures was adopted from *1958 Plymouth*, and has become a fixture of our jurisprudence."); Commonwealth v. 605 Univ. Drive, 104 A.3d 411, 424 (Pa. 2014) (noting the continued applicability of *Plymouth Sedan* despite finding forfeiture proceedings civil for purposes of determining the proper rules of procedure).

63. State v. One 2004 Lincoln Navigator, 494 S.W.3d 690, 697–98 (Tex. 2016) (internal quotation marks and citation omitted); *see also* People v. $180,975 in U.S. Currency, 734 N.W.2d 489, 493 (Mich. 2007) ("[W]hile *One 1958 Plymouth Sedan* has not been overruled and, thus, is still applicable, several subsequently decided cases indicate that the underpinnings of *One 1958 Plymouth Sedan* have been weakened."); State v. One 1990 Chevrolet Corvette, 695 A.2d 502, 507 (R.I. 1997) (suggesting, in dicta, that *Plymouth Sedan* "is of dubious authority in light of *Ursery*").

presents the best explanation of precisely how the Court has limited its holding in *Plymouth Sedan* (if it really has).

C. State Courts' Analyses of the Exclusionary Rule in Eviction Proceedings

Several state courts have specifically addressed the application of the exclusionary rule in the eviction context and have reached differing conclusions. Some courts have disposed of the issue without engaging in much analysis at all. For instance, the Connecticut Supreme Court resolved one case involving an eviction based on illegal drug activity discovered pursuant to an illegal, but facially valid, search warrant on the basis that the warrant itself was sufficient to secure any deterrence-related objectives of the rule.[64] The Massachusetts Supreme Judicial Court also quickly ruled in favor of a housing authority where it concluded that a search was in fact lawful, but noted in dicta that the eviction "statute's impact on the ousted tenant is similar to that of the forfeiture proceeding in *One 1958 Plymouth Sedan*."[65] The District of Columbia Court of Appeals also summarily rejected a request to extend the rule to cover a "private civil dispute" that entirely lacked state involvement, reasoning that application of the rule to such a context would not deter future Fourth Amendment violations.[66] That court emphasized the absence of any "showing of complicity and benefit to government officers flowing from the litigation."[67]

New York, Illinois, and Minnesota courts have addressed the matter in greater detail and reached contrary conclusions. In *Tejada v. Christian*, one New York court extended the exclusionary rule to forbid the introduction of evidence, which had been illegally seized by Housing Authority Police, in an eviction proceeding against a tenant in public housing.[68] The court based its conclusion on two observations. First, that "the [Housing Authority] should not be permitted to avail itself of the fruits of its unlawful activity in order to impose sanctions."[69] And second, that "[t]he grant of suppression would also deter future misconduct on the part of the Housing Authority police officers, who are aware that an unlawful arrest of a tenant may well lead to the commencement of eviction proceedings by their employer."[70] The court did not analyze whether the eviction might be considered a quasi-criminal sanction under *Plymouth Sedan*.

In contrast, the Illinois court in *U.S. Residential Management and Development, LLC v. Head* refused to extend the rule's application in an eviction

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64. Hous. Auth. of Stamford v. Dawkins, 686 A.2d 994, 996–97 (Conn. 1997). This conclusion follows naturally from United States v. Janis, 428 U.S. 433, 434 (1976), as that case concerned precisely this situation: where an allegedly illegal search was conducted pursuant to a facially valid warrant. *See supra* note 26 and accompanying text.

65. Boston Hous. Auth. v. Guirola, 575 N.E.2d 1100, 1104 (Mass. 1991).

66. Youssef v. United Mgmt. Co., 683 A.2d 152, 156 (D.C. 1996).

67. *Id.*

68. Tejada v. Christian, 422 N.Y.S.2d 957, 960 (N.Y. App. Div. 1979).

69. *Id.*

70. *Id.*

proceeding initiated against a public housing tenant by a property management company charged with managing city housing.[71] The court determined *both* that evictions were not quasi-criminal under *Plymouth Sedan*[72] and that application of the rule would not generate sufficient deterrence to justify application of the rule under *Janis*.[73] As to the first issue, the court reasoned that, unlike the act at issue in *Plymouth Sedan*, "the focus of the [eviction] Act is not to punish defendant, but rather to set forth a mechanism for the peaceful adjudication of possession rights."[74] It also rejected the suggestion that the harshness of a punishment alone renders a civil penalty quasi-criminal.[75]

As for deterrence, the *Head* court determined that "police officers were sufficiently 'punished' by the exclusion of evidence in criminal prosecutions" and that the central issue is whether the police department is or had been "improperly motivated to illegally seize evidence to benefit civil proceedings."[76] The court concluded that no improper motive existed, despite some evidence of cooperation between police and the housing authority.[77] Namely, the housing authority and police department in *Head* "were parties to an intergovernmental agreement" whereby the department "provided supplemental police services for" the authority's properties under a contract for "up to $6 million per year."[78] They also "shared information through established procedures about public housing residents who were arrested for committing drug-related crimes."[79]

One Minnesota court reached a similar conclusion in *Nationwide Housing Corporation v. Skoglund*, albeit in a case concerning a private landlord.[80] The court quickly disposed of the tenant's balancing test argument, noting that "the police have no stake in a private eviction proceeding between property management [ ] and a tenant."[81] As for the tenant's argument that an eviction is a "quasi-criminal" sanction, the court distinguished eviction proceedings from "quasi-criminal" civil forfeitures and implied-consent proceedings—contexts in which Minnesota courts do apply the exclusionary rule.[82] Forfeiture's purpose, in the *Skoglund* court's view, is to "penalize for the commission of an offense against the law."[83] And the revocation of a driver's license in an implied-consent proceeding is "typically associated with an arrest."[84] In contrast, "the purpose of an eviction action is to determine the right of present possession and to reinforce the public policy of

71. U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d 1, 2–3 (Ill. App. Ct. 2009).
72. *Id*. at 4–5.
73. *Id*. at 5–8.
74. *Id*. at 5.
75. *Id*.
76. *Id*. at 7.
77. *See* U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d 1, 7 (Ill. App. Ct. 2009).
78. *Id*. at 3.
79. *Id*.
80. Nationwide Hous. Corp. v. Skoglund, 906 N.W.2d 900, 905 (Minn. Ct. App. 2018).
81. *Id.*
82. *Id*. at 904.
83. *Id*.
84. *Id*.

preventing parties from taking the law into their own hands."[85] In its analysis, the court cited both *Head* and *Dawkins* with approval.[86]

III. A BRIEF HISTORY OF EVICTIONS AS A LAW ENFORCEMENT TACTIC

Evictions are today commonplace occurrences. But this was not always so.[87] The explosive growth of evictions is at least partly tied to the War on Drugs and to a web of policies and initiatives related to that war or to other similar crime-control strategies. This Part outlines those policies and initiatives as they played out and as they persist at the federal, state, and local levels, paying particular focus to features of that history most relevant to the legal factors identified in Part II.

A. Federal Background and History

The "drug-related eviction provision" in the Anti-Drug Abuse Act of 1988 required Public Housing Authorities (PHAs) "to include in their leases a condition that explicitly makes *any* drug-related activity . . . grounds for eviction."[88] That act included "hundreds of changes to federal criminal law"[89] aimed at advancing the War on Drugs. The approach inaugurated by the Anti-Drug Abuse Act of 1988 was extended in the 1990s by the Cranston-Gonzalez National Affordable Housing Act of 1990[90] and the U.S. Department of Housing and Urban Development (HUD) "One Strike" Policy in 1996.[91] The former "expand[ed] the authority and discretion granted to PHAs in the way households are terminated when the PHA suspects a family member or guest is engaging in 'drug-related criminal activity'" and also temporarily "prohibit[ed] a household from receiving public housing . . . if the household was previously evicted from public housing based on 'drug-related criminal activity.'"[92] HUD's One-Strike Policy—implemented through the Housing Opportunity Program Extension Act of 1996 and the Quality Housing and Work Responsibility Act of 1998—"encouraged PHAs to evict public housing residents who were suspected by PHAs of engaging in 'drug-related

85. *Id.*

86. *Id.*

87. Matthew Desmond, *Forced Out*, NEW YORKER (Feb. 8, 2016), https://www.newyorker.com/magazine/2016/02/08/forced-out [http://perma.cc/V95E-MQRT] ("Even in the most desolate areas of American cities, evictions used to be rare enough to draw crowds . . . These days, evictions are too commonplace to attract attention.").

88. Weil, *supra* note 8, at 161.

89. Stefan D. Cassella, *What You Need to Know about the Anti-Drug Abuse Act of 1988*, 35 PRAC. LAW. 71, 71 (1989).

90. Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101–625, 104 Stat. 4079 (codified as amended in scattered sections of 42 U.S.C.).

91. *See* OFFICE OF DISTRESSED & TROUBLED HOUS., U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 96–16 (HA), "ONE STRIKE AND YOU'RE OUT" SCREENING AND EVICTION GUIDELINES FOR PUBLIC HOUSING AUTHORITIES (1996).

92. Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs"*, 5 U.C. IRVINE L. REV. 783, 790 (2015).

criminal activity' either on or off the public housing premises."[93] Both the law itself and President Bill Clinton's public statements directed PHAs to "vigorous[ly] enforce[ ]" the relevant existing laws[94] and "aggressively required" PHAs to evict tenants on drug-related grounds.[95] The effect of this approach was significant. In the six months following the adoption of the guidelines, the number of evictions increased nationally from 9,835 to 19,405—an 84% increase.[96]

While the policies of the 1990s—which remain in force today[97]—did not replicate the Anti-Drug Abuse Act of 1988's thorough entanglement of criminal and civil penalties, they retained its deeply punitive tone. HUD's own assessment of the policy began with a rather remarkable declaration from then HUD Secretary Andrew Cuomo:

> Make no mistake about it; in public housing, drugs are public enemy number one. We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers, who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. 'One Strike and You're Out' is doing just that.[98]

That report also specifically contemplated the need to "coordinat[e] efforts with local and State law enforcement agencies."[99] It further noted that "HUD has provided training and technical assistance on the strict terms and benefits of this policy to . . . police officers" [100] and that "PHA staff, local and State law enforcement officials, and judges all share an equal responsibility for enforcing One Strike."[101] Such coordination is reflected in the proliferation and continued existence of intergovernmental agreements between city housing authorities and police departments, which provide for extensive cooperation and coordination of activities.[102]

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93. *Id*.

94. Barclay Thomas Johnson, *The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 234, 235 (2001).

95. Goodridge & Strom, *supra* note 9, at 4 (providing general history).

96. *Id*.

97. Silva, *supra* note 92, at 788.

98 . U.S. DEP'T OF HOUS. AND URB. DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE "ONE STRIKE AND YOU'RE OUT" INITIATIVE, NAT. CRIM. JUST. REFERENCE SERV. (1997), https://www.ncjrs.gov/pdffiles1/Photocopy/183952NCJRS.pdf [http://perma.cc/L85U-SEHT].

99. *Id*. at vii, 21.

100. *Id*. at xx.

101. *Id*. at 21.

102. *See, e.g.*, Contract No. 11677, Intergovernmental Agreement between the City of Chicago and the Chicago Housing Authority to Provide Additional Police Services (Jan. 1, 2015) (on file with author); Memorandum of Agreement Between the Housing Authority of the City of Los Angeles and the Los Angeles Police Department (Jan. 1, 2015), http://perma.cc/K39Q-ZUWT; *Agreement between City of Fresno and Housing Authority of the City of Fresno* (July 1, 2011), https://www.fresno.gov/cityclerk/wp-content/uploads/sites/9/2016/10/HousingAuthorityProvidetwoPoliceOfficersFY12.pdf [http://perma.cc/5Q3A-8EXC]; *see also* U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d, 3 (Ill. App. Ct. 2009) (detailing provisions of intergovernmental agreement between the Chicago police

B. State and Local Background and History

The legal history of similar state and local policies, as well as officials' remarks about such policies, mirror the punitive structure and tone of the federal approach. Texas House Bill 2552—passed as recently as 2017—relates to measures that "address and deter certain criminal or other unlawful activity, including trafficking of persons, sexual offenses, prostitution, and activity that may constitute a public nuisance; increasing criminal penalties; creating a criminal offense."[103] Yet within that expressly criminal and punitive bill is a provision amending the state Property Code to provide private landlords with a right to evict a tenant if the landlord "reasonably believes" that the tenant is using the property for various prostitution-related purposes.[104] The bill also provides that a nuisance suit—ostensibly resulting from police-related activity—brought by a government attorney provides prima facie evidence that the tenant's right of possession has terminated.[105]

City officials' statements echo and reaffirm this historical and present intermingling of civil remedies and punitive municipal priorities. Los Angeles Mayor Tom Bradley declared in 1989: "We will not surrender one inch of our city to gangs and drug dealers. Any renter in the city should know: If you want to stay in your apartment, don't deal drugs. If you violate this simple rule, you will be evicted."[106] And in 1984, Chicago Mayor Harold Washington, "call[ed] for city departments and the Chicago Housing Authority [CHA] to join with the police department to disperse concentrations of gang members."[107] Correspondingly, "CHA authorities [were] instructed by the mayor to evict gang members and those providing them with a place to live."[108] More recently, the Mayor of Tampa announced his intention to strengthen the one strike policy, and the president of Tampa's housing authority remarked that the authority "has a good relationship with the Tampa Police Department," and that "it hasn't been difficult to determine when tenants have violated the [one strike] policy."[109]

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department and Chicago housing authority); Danielle Ohl, *Annapolis Police, Housing Authority Shared Private Information for Years*, CAP. GAZETTE (Nov. 30, 2017, 9:15 PM), https://www.capitalgazette.com/news/annapolis/ac-cn-haca-tenant-list-20171130-story.html [http://perma.cc/S2D5-LF2R] ("High-level officials in the Annapolis housing authority and police department regularly shared a roster of public housing residents for at least eight years as part of a routine agreement.").

103. H.B. 2552, 2017 Leg., 85th Sess. (Tex. 2017).

104. *Id*. at § 19(b).

105. *Id*. at § 19(d).

106. Jay Matthews, *Cities Target Drug Dealers for Eviction: N.Y. Renters Ousted Before Criminal Trial*, WASH. POST, Feb. 12, 1989, at A15.

107. Thom Shanker, *Mayor Rewrites Budget to Fund War on Gangs*, CHI. TRIB., Dec. 4, 1984, at 1, 17.

108. *Id.* at 17.

109. Angie Drobnic Holan, *Buckhorn Offers Support on Enforcement*, POLITIFACT FLA. (Mar. 21, 2012, 5:49 PM), https://www.politifact.com/florida/promises/buck-o-meter/promise/936/strengthen-one-strike-and-youre-out-policy-in-p [http://perma.cc/37R5-A2K9].

California's unlawful detainer program takes a different approach. In a typical nuisance abatement regime, "officials can't initiate a nuisance abatement action unless they've given landlords the opportunity to solve problems first."[110] But California's program represents a more aggressive variation on other jurisdictions' nuisance abatement laws, allowing "a city attorney or city prosecutor [to] file, or request a landlord to file, an unlawful detainer action against a tenant"[111] based on an arrest report related to unlawful firearms[112] or drug activity.[113] The program aims to "engage landlords who . . . might otherwise be unable or unwilling to ameliorate drug- and weapon-related nuisance on rental properties they operate."[114] Similarly, in New York City, "the [New York Police Department] NYPD begins nearly every nuisance abatement action by making an emergency appeal to a civil court judge without the landlord or tenant present, alleging the dangers a residence poses."[115] In Illinois, a landlord may voluntarily assign the right to bring an eviction action for certain drug offenses to the State's Attorney.[116]

In other jurisdictions, nuisance property ordinances do not allow the city to directly initiate an eviction, but instead "allow police departments to penalize landlords for their tenants' behavior."[117] The threat of police sanction, in turn, prompts landlords to "abate" the nuisance and avoid punishment by initiating an eviction.[118] And it appears that cities' nuisance abatement regimes do not simply react to problems as they are discovered incident to ordinary law enforcement activities. Rather, there is at least some evidence that police officers are, in certain instances, tasked with affirmatively compiling records of criminal activity to provide grounds for declaring a nuisance and bringing about a private eviction.[119]

Authorities' turn from traditional criminal sanctions to civil penalties like eviction as a means of crime control in impoverished areas presents serious legal

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110. Sarah Ryley, *The NYPD Is Kicking People Out of Their Homes, Even if They Haven't Committed a Crime*, PROPUBLICA (Feb. 4, 2016), https://www.propublica.org/article/nypd-nuisance-abatement-evictions [http://perma.cc/2H8C-DUG4].

111. ANNE NEVILLE ET AL., CAL. RESEARCH BUREAU, A REVIEW OF THE UNLAWFUL DETAINER PROGRAM 2 (Apr. 2016), https://www.library.ca.gov/Content/pdf/crb/reports/CRB_Unlawful_Detainer_Report_online.pdf [http://perma.cc/UT5W-MHLW].

112. CAL. CIV. CODE § 3485 (West 2016).

113. CAL. CIV. CODE § 3486 (West 2016).

114. NEVILLE, *supra* note 111, at 1.

115. Ryley, *supra* note 110.

116. *See* 740 ILL. COMP. STAT. ANN. 40/11(a) (West 2010).

117. Desmond & Valdez, *supra* note 8, at 119.

118. *See id.* at 131–32.

119. *See, e.g.*, *Policing Effort Shows Results: Torrance Program Pays Off*, DAILY BREEZE (Torrance, Cal.), Aug. 26, 1993, at A10 ("[T]he Community Lead Officers Detail [is] designed to seek out and correct crime-related problems rather than simply making arrests. . . . [P]olice have helped property owners evict problem tenants after neighbors complained of gang activity and drug dealing."); Buffy Spencer, *Police Identify, Target Top 10 City 'Drug Dens'*, REPUBLICAN (Springfield, Mass.), Oct. 12, 1996, at A1 (describing police task force charged with compiling list of "drug dens" and facilitating evictions therein); Steven G. Vegh, *Group Targets Problem Landlords: Community Policing Is Extended to a Cumberland Avenue Neighborhood, and Other Landlords and Residents Organize*, PORTLAND PRESS HERALD (Me.), Sep. 24, 1996, at 1B ("The extension of community policing means the Cumberland neighborhood will now be under scrutiny by police who will identify 'problem buildings' and compile a record of landlord and tenant compliance with city ordinances.").

questions about tenants' entitlement to the procedural protections associated with criminal prosecutions. "At its most blatant, the use of civil penalties merely enables the police to 'hurt' criminals who have successfully avoided criminal penalties. . . . With the formalization of civil remedies as a police tactic . . . , the propriety of their use almost inevitably will be scrutinized." [120] Particularly in public or subsidized housing, the state's role in orchestrating investigations and gathering evidence prior to using that evidence to evict tenants raises questions about whether illegally seized evidence—not admissible in criminal proceedings—may nonetheless be used to secure the arguably more severe penalty of eviction from one's home.

IV. ARGUMENTS FOR EXTENDING THE EXCLUSIONARY RULE TO SOME EVICTION PROCEEDINGS

Following the Court's dual approaches to civil applications of the exclusionary rule, this Note considers several possible arguments for extending the exclusionary rule to some eviction proceedings. Those arguments are separated based on whether they address concerns grounded in deterrence or, alternatively, in the potential quasi-criminal nature of eviction. Both discussions, however, draw extensively on the history and legal structure of eviction, as well as on the relationship between law enforcement and entities initiating or facilitating evictions.

A. Deterrence

Assessing whether application of the exclusionary rule in eviction cases would advance the deterrence-related objectives implicated by the *Janis* balancing test is principally a matter of applying the multi-factor assessment developed by the lower courts.[121] The first few factors (except for the "nature of the proceeding") point relatively straightforwardly toward application of the rule. The use of the seized material is typically intrasovereign. Indeed, in many instances the search and secondary proceeding are initiated by the same agency—as when housing authority police or other police detailed to public housing conduct a search in public housing (the situation in *Tejada*[122]), or when city police conduct a search that leads to a city-initiated eviction (as sometimes occurs California and New York). The situation is similar when the revocation of a housing subsidy or the threat of a nuisance ordinance penalty against a landlord precipitates an eviction in what is nominally a "private" setting.

As suggested by the focus of the lower courts, the remaining two factors are likely more important and more complicated: whether there was any explicit

120. Michael E. Buerger & Lorraine Green Mazerolle, *Third-Party Policing: A Theoretical Analysis of an Emerging Trend*, 15 JUST. Q. 301, 316–17 (1998).

121. *See supra* text accompanying notes 38–45.

122. Tejada v. Christian, 71 A.D.2d 527, 530 (N.Y. App. Div. 1979).

understanding between law enforcement and the relevant body for the civil action, and whether the civil proceeding was in the "zone of primary interest"[123] or "within the[] predictable contemplation"[124] of the officers conducting the search. Both of these questions aim at resolving related questions: whether application of the rule would actually motivate an alteration in individual officers' behavior or police force policies.

1. Cooperation and Coordination Between Law Enforcement and Landlords

Police departments' agreements and coordination with cities and housing authorities suggest just the sort of mutual understanding the *Janis* factors contemplate. The court in *Head* expressly addressed the role of such agreements: "While [the Chicago Police Department] CPD and [Chicago Housing Authority] CHA are parties to an agreement that requires CPD to provide CHA with policing services, the record does not indicate CPD is, or has been, improperly motivated to illegally seize evidence to benefit civil proceedings."[125] But this cursory treatment misstates the scope of the relevant inquiry. Deterrence is ultimately forward-looking—that is, aimed at assessing whether imposition of the rule would alter the motivations of individual officers or the department moving forward. The exclusively backward-looking inquiry of the Illinois appellate court is inappropriate, as the relevant question is not merely whether the instant case was improperly motivated. Courts' search for collaboration between housing authorities (or, in other contexts, whatever may be the relevant civil entity) and police departments is not solely aimed at rooting out a conspiratorial directive from above for officers to engage in illegal searches. Rather, close collaboration also suggests that the police department may be motivated to alter its training or policies to avoid illegal searches, since the ability to secure the civil penalty at issue actually plays into its institutional priorities.

There is ample evidence that police departments beyond Chicago do in fact collaborate closely with housing authorities to secure evictions from public housing. As detailed earlier in this Note,[126] "One Strike" and related policies "led to unprecedented levels of coordination between local law enforcement and local housing authorities."[127] In many jurisdictions, "local police referred all arrests directly to housing authority management so that eviction proceedings could be quickly initiated."[128] And "[m]any housing authorities also built strong relationships with local police departments to coordinate additional policing and actions on housing authority property, including searches and raids."[129] Such a

123. Wolf v. Comm'r, 13 F.3d 189, 194–95 (6th Cir. 1993).
124. Tirado v. Comm'r, 689 F.2d 307, 311 (2d Cir. 1982).
125. U.S. Residential Mgmt. v. Head, 922 N.E.2d 1, 7 (Ill. App. Ct. 2009).
126. *See supra* text accompanying notes 98–102.
127. Goodridge & Strom, *supra* note 9, at 5.
128. *Id*.
129. *Id*.

pervasive "web of policing and enforcement" might be aptly characterized as more closely "resembl[ing] the criminal justice system . . . than real estate."[130]

Chicago and Atlanta provide specific examples of large-scale, deliberate programs of evictions meant to facilitate municipal redevelopment goals.[131] Although evictions are certainly often initiated without such collaboration,[132] such comparatively spontaneous incidents do not challenge the conclusion that the general pattern of coordination suggests that application of the exclusionary rule would broadly alter police motivations and behavior. That general pattern, as detailed earlier in this Note, includes the provision of federal instruction, training, and resources to police officers in order to facilitate evictions;[133] continuous funding arrangements between cities and police departments that provide both an open line of communication and an incentive for police officers and departments to facilitate city policing and housing objectives;[134] and even more thorough entanglement of housing and policing functions in the case of housing authority police departments or certain nuisance abatement regimes.[135] Such coordination certainly reflects the sort of "encouragement," "explicit and demonstrable understanding," or awareness of third-party interest the Second Circuit found absent in *Tirado*.[136]

2. Officers' "Zone of Interests" in Conducting Illegal Searches

As to the "zone of interests" inquiry, the *Head* court did not examine several arguments that suggest officers and departments may have the civil penalty of eviction in mind when planning and executing searches. First, eviction is often disproportionately severe compared to the underlying crime alleged. Evictions may be precipitated by minor drug charges[137] or petty misbehavior by adolescent household members.[138] When the civil penalty is substantially greater in

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130. *Id*.

131. *Id*.

132. *See, e.g.*, Bryson & Youmans, *Crime, Drugs, and Subsidized Housing*, 24 CLEARINGHOUSE REV. 435, 440 (1990):

> PHAs and landlords . . . embark on eviction actions at the slightest mention of a connection between a tenant and drugs. There is a very common pattern of PHAs reviewing newspaper stories for reports of incidents at their projects and sending tenants eviction notices with no further investigation. Alternatively, PHAs or landlords have been known to initiate eviction actions after reviewing police reports for situations where the arrested party has listed a subsidized apartment as his or her address.

133. *See supra* notes 93–95, 99–101 and accompanying text.

134. *See supra* note 102.

135. *See supra* notes 110–15 and accompanying text.

136. *See supra* text accompanying notes 42–45.

137. *See, e.g.*, Weil, *supra* note 8, at 177 ("Without guidelines, PHAs can evict entire families for even negligible infractions of the lease: if a child were trying drugs for the first time, or if a guest had used drugs while visiting the family.").

138. *See, e.g.*, Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L. & SOC. CHANGE 109, 135 (2011) ("The One Strike Policy has led to absurd results. One PHA evicted an entire family based on a petty fight between adolescent girls.

magnitude than any possible criminal penalty, it is quite plausible that officers may in fact be more deterred by the inability to pursue an eviction than by the inability to pursue criminal charges. Correspondingly, application of the exclusionary rule in an ultimately insignificant criminal case may provide little incentive for the officers to avoid improper searches. And the generally low-level nature of the crimes that precipitate evictions may also weaken the purported state interest in continued use of illegally-seized evidence when courts weigh the other side of the *Janis* balancing test.

Second, any minimally competent police officer must be aware, when searching a tenant's residence in public housing, that evidence of illegal activity may lead to eviction. The penalty of eviction—and the ability to pursue it effectively in court—thus almost certainly enters into the officers' minds as they conduct a search.

Third, the priorities promulgated by local officials and federal agencies suggest a strong directive from above that officers searching individuals' homes are, in part, aiming to generate grounds for an eviction. Such directives include statements from city executives, [139] HUD policies, [140] and departmental instructions. The history of evictions from public housing provides support for the conclusion that such administrative directives do significantly influence police actions on the ground.[141] Correspondingly, application of the exclusionary rule is likely to shape administrative and departmental priorities, and in turn the behavior of individual officers. Perhaps it might prevent the recurrence of official comments that arguably encourage illegal searches by officers, like this remark by the Executive Director of the San Diego Housing Commission in 1989: "We don't care if you're eventually convicted or not. . . . If you had illegal substances in your unit, that's enough under the lease for an eviction."[142]

Of course, individual officers could still be deterred from illegal searches by the proposition that the underlying evidence would be excluded from a criminal trial. But if the civil penalty is more severe and some searches are at least partially precipitated by institutional pressures to generate evidence for eviction, the exclusion of such evidence from eviction proceedings might do much to deter such searches in the future.

3. The State's Interests

On the other side of the balancing test is the state's interest in eliminating drugs and crime from public and subsidized housing. While it is doubtful that courts would second-guess the efficacy of evictions in facilitating this goal, courts might nonetheless be willing to examine ways in which this interest—even accepting the

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A fourteen-year-old['s] act of vandalism . . . caused his family to leave the PHA when they would not throw him out to save their lease.").

139. *See supra* notes 106–08 and accompanying text.

140. *See supra* notes 91–99 and accompanying text.

141. *See supra* text accompanying note 96.

142. Leonard Bernstein, *Housing Panel Speeds up Eviction Process; Rules to Prevent Drug Use in Public Housing Stiffened*, L.A. TIMES, Sep. 21, 1989, at J2A.

state's claims as true—is structurally distinct from the interest in, for instance, actually incarcerating someone or imposing other restrictions on freedom for the same underlying criminal conduct.

Namely, the principal social interest in evicting a drug user from subsidized housing is found in the improvement of the generalized background conditions of the housing facility, rather than in the avoidance of particular future instances of drug use.[143] An eviction's primary effect is not so much to prevent the occurrence of individualized future crimes, since it does not incapacitate the criminal. Rather, an eviction chiefly aims to mitigate the consequences of future crimes by altering their location and by (ideally) limiting the third parties negatively impacted. This observation is bolstered by the express statements of government entities pursuing "One Strike" and similar policies.[144] Put more simply, the cost of a missed opportunity to evict a marijuana user from public housing is not the risk that they might smoke marijuana on one future occasion—indeed, eviction does little to prevent a drug user from partaking elsewhere. Instead the cost is the effect of pervasive drug use throughout a housing facility—a cost that can be almost entirely avoided by evicting the user the next time that person is caught.

This is in contrast to the social interest furthered by incarcerating a person for criminal activity. There, retribution for or future avoidance of the criminal act is itself the primary public interest advanced by the penalty. This difference matters because it suggests that the cost of excluding evidence in an eviction proceeding is less grave than in criminal proceedings—in the logic of an eviction proceeding, a single future criminal act is not itself an especially significant harm to be avoided. And if a future violation does occur, a new, properly conducted eviction proceeding can capture virtually all the social benefits that a successful earlier eviction would have advanced—especially because monitoring for future misbehavior is relatively simple when wrongdoing is so tied to a particular location. It is likewise true that future action can capture most of any possible government interest in ensuring only the "deserving" receive the benefit of housing assistance, as a few more undeserved assistance payments in the short-term would be dwarfed by the future payments foregone by a later eviction. In contrast, the failure to imprison someone for a crime foregoes *any* possible retributive interest related to that crime, and for most crimes subject to incarceration the most severe harm has already occurred from the criminal act itself if allowed to reoccur in the absence of incapacitation. This is likewise true of civil penalties like taxes on illegal activity or deportations. In such scenarios, the public interest is primarily in preventing the commission of particularized future crimes through financial sanctions or by removal from the country.

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143. *See, e.g.*, U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d 1, 7 (Ill. App. Ct. 2009). ("To extend the rule and suppress evidence of criminal activity would hinder CHA's ability to enforce lease agreements designed to promote safety and deter illegal conduct in public housing communities.").

144. *See, e.g.*, U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 98, at xv ("By aggressively rooting out criminals, the policy can [ ] help build public housing communities that are drug free and [ ] safer.").

Of course, a government actor could instead argue that the interest served by an eviction is principally backward-looking and retributive, rather than remedial. Such an argument would certainly push back against the deterrence-based balancing approach. But it would tremendously strengthen the alternative argument that evictions are essentially criminal in nature.[145] Likewise, the more the public interest furthered by an eviction appears weighty and akin to that of traditional criminal sanctions, the more likely such a penalty is to have occupied the "predictable contemplation" of officers or departments conducting searches.[146]

Alternatively, it might be that elements of the criminal law—like punishments for low-level drug offenses—are similarly geared at altering negative background conditions rather than avoiding dangerous, discrete acts. But in the eviction context, the negative behavior is so closely tied to a particular location that there is little risk of future evasion of detection compared to comparable criminal offenses. As such, a lost opportunity for criminal punishment may be a more substantial social cost than a failed eviction.

Additionally, a countervailing state interest—cordial and trusting relationships between police and residents of public housing—may be furthered by application of the exclusionary rule. This could be the case either because application of the rule successfully deters future illegal searches, or because the exclusion of evidence bolsters public faith in law enforcement and the criminal justice system.[147] In a similar vein, some courts have recognized a public interest in judicial integrity that is safeguarded by broader application of the exclusionary rule.[148]

B. Quasi-Criminal Sanctions

There are two potential routes by which to determine whether eviction proceedings based on a tenant's criminal record are quasi-criminal and thus subject to the exclusionary rule. The first possibility is to assess whether a sufficiently tight comparison exists between the arena where the court has already extended the exclusionary rule—civil forfeiture proceedings—and evictions. The second is to apply the factors developed in *Ward* to determine whether the original principles

145. *See supra* Section IV.B.

146. *See supra* Section IV.A.2.

147. *See* Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 467–95 (2012)*; see also* Robert M. Bloom & David H. Fentin, *"A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 75–80 (2010).

148. *See, e.g.*, United States v. Christine, 687 F.2d 749, 757 (3d Cir. 1982) ("A secondary consideration is that convictions secured upon the basis of illegally seized evidence could "compromise the integrity of the courts." (citing Dunaway v. New York, 442 U.S. 200, 218 (1979)); United States v. $37,780 in U.S. Currency, No. CIV-89-743E, 1989 WL 132005, at *4 (W.D.N.Y. Oct. 31, 1989), *rev'd*, 920 F.2d 159 (2d Cir. 1990) (noting that the public interest served by the exclusionary rule applies with equal force in civil forfeiture proceedings as in criminal proceedings). This argument is roughly analogous to the argument advanced in due process disputes within administrative law, wherein the state's interest in streamlined process (achieved by weakening procedural safeguards) is balanced against not only the private interest affected, but also the state's interest in the proper or just distribution of the law's benefits. *See, e.g.*, Lassiter v. Dep't of Soc. Serv. of Durham Cty., 452 U.S. 18, 27–28 (1981).

underlying *Plymouth Sedan* counsel that evictions are quasi-criminal. This Note examines both avenues.

As a preliminary matter, the quasi-criminality argument is necessarily limited to evictions with some substantial state involvement. An eviction initiated without state prompting by a private landlord against a tenant not in subsidized housing is almost certainly not quasi-criminal. But several categories of evictions present much stronger reasons for thinking they may be quasi-criminal: evictions from public housing; evictions from subsidized housing triggered by regulatory requirements concerning illegal activity; and government-initiated private evictions under regimes like those of California and New York. Each of these involves a substantial state element—either the state is the sole actor inflicting punishment upon the tenant, or the state precipitated the eviction through its regulatory action.

1. Evictions and Civil Forfeiture

Forfeiture and eviction are functionally indistinguishable. Both evictions and civil forfeiture involve the loss of an individual's property interest based on purported criminal activity. In fact, the federal forfeiture statute specifically contemplates the forfeiture of a leasehold interest: an "owner" under the statute is defined as "a person with an ownership interest in the specific property sought to be forfeited, including a *leasehold*, lien, mortgage, recorded security interest, or valid assignment of an ownership interest."[149] Forfeiture proceedings against leasehold interests are in fact relatively common, and courts often go so far as to refer to the action in such proceedings as an eviction.[150] HUD even used forfeiture proceedings to pursue evictions under the Anti-Drug Abuse Act of 1988.[151] At least one California case from early in the twentieth century—before the proliferation of both civil forfeiture and eviction cases—noted that "the very nature" of an "unlawful detainer" action (one common term for an eviction) "involv[es] . . . a forfeiture."[152]

The court in *Head*, somewhat puzzlingly, suggested that eviction was distinct from forfeiture because the former's focus is "to set forth a mechanism for the peaceful adjudication of possession rights in the circuit court."[153] But of course, we can state the aim of forfeiture actions in precisely the same terms: to peacefully adjudicate whether the prior holder of a leasehold interest has a continued right to

149. 18 U.S.C. § 983(d)(6)(A) (2012) (emphasis added).

150. *See, e.g.*, United States v. 850 S. Maple, 789 F. Supp. 1385 (E.D. Mich. 1992) (routinely referring to the instant forfeiture action as an eviction); United States v. 121 Van Nostrand Ave., 760 F. Supp. 1015 (E.D.N.Y. 1991) (same); United States v. 900 East 40th St., Apartment 102, 740 F. Supp. 540 (N.D. Ill. 1990) (contrasting forfeiture with "conventional" remedy of an eviction, but noting that temporary tenancy in public housing may be property interest for purposes of forfeiture).

151. *See* Gregory W. Wiercioch, Note, *Eviction without Conviction: Public Housing Leasehold Forfeiture under 21 U.S.C. Section 881*, 48 WASH & LEE L. REV. 1409, 1412–13 (1991).

152. Knight v. Black, 126 P. 512, 525–26 (Cal. Ct. App. 1912).

153. U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d 1, 5 (Ill. App. Ct. 2009).

possession in light of alleged illegal activity. The *Head* court's distinction appears semantic, not substantive.[154] The *Skoglund* court's attempt to distinguish eviction proceedings from implied-consent proceedings on the basis that the latter is "associated with an arrest" is even more tenuous.[155] Though the tenant's criminal activity in that case did not result in an arrest, as a general matter, evictions based on criminal activity are routinely "associated with an arrest."

The only meaningful difference between eviction and forfeiture I have been able to identify is that some forfeiture proceedings may provide for fewer procedural safeguards than do eviction proceedings.[156] From a policy perspective, this could provide some reason to worry less about the need to also invoke the safeguard of the exclusionary rule in eviction cases. But such a policy concern does not address the relevant question here—whether the eviction proceeding is, like a forfeiture proceeding, quasi-criminal. If anything, the availability of further procedural safeguards heightens an eviction case's similarity to criminal cases.

2. The *Ward* Factors and Quasi-Criminality

Should the direct comparison to civil forfeiture be inadequate standing alone, the factors highlighted in *Ward* also support the conclusion that evictions ought to be considered quasi-criminal sanctions for the purpose of applying the exclusionary rule. Those factors are: (1) the severity of the sanction, (2) whether the penalty "correlate[es] to any damages sustained by society or to the cost of enforcing the law," and (3) how the legislature characterized the penalty.[157]

Though, as the *Head* court notes, an especially harsh sanction is not automatically quasi-criminal,[158] the severity of a penalty is nonetheless a persuasive indication of its quasi-criminality. As discussed earlier in this Note, eviction is undoubtedly a severe penalty.[159] Compared to relatively modest criminal penalties like fines or probation, an eviction's impact is dramatic and severe. At least one federal court, in analyzing the proportionality of imposing a forfeiture-eviction as a consequence of a tenant's guilty plea to distributing cocaine has acknowledged as much:

> The forfeiture of the apartment and the federal housing assistance payments which subsidize it would take from defendant her home and the *only* means by which she can obtain housing for herself and her children. . . . An order of forfeiture here would be, in

154. It also may euphemistically overstate just how "peaceful" the adjudication of possession rights is in an eviction proceeding, at least from the perspective of the displaced tenant. *See, e.g.*, DESMOND, *supra* note 1, at 298 ("The violence of displacement can drive people to depression and, in extreme cases, even suicide. One in two recently evicted mothers reports multiple symptoms of clinical depression. . . . Suicides attributed to evictions and foreclosures doubled between 2005 and 2010, years when housing costs soared.").

155. *See* Nationwide Hous. Corp. v. Skoglund, 906 N.W.2d 900, 904 (Minn. Ct. App. 2018).

156. *See* Wiercioch, *supra* note 151, at 1410–11.

157. United States v. Ward, 448 U.S. 242, 254 (1980).

158. *See Head*, 922 N.E.2d at 5.

159. *See supra* notes 1–3 and accompanying text.

> effect, a sentence of homelessness for the defendant and her three young children. . . . I conclude that the penalty of forfeiture of the defendant's lease, and the concomitant federal housing assistance benefits, is disproportionately severe.[160]

The *Ward* Court also highlighted that the penalty at issue in that case was "analogous to traditional civil damages," in contrast to a forfeiture, in which the "penalty . . . ha[s] absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[161] An eviction proceeding—in large part due to its indistinguishability from a forfeiture proceeding—also involves no necessary relationship between the cost imposed by the prohibited behavior and the penalty imposed on the tenant. Evictions are, in fact, often triggered by minor offenses like marijuana use.[162]

Importantly, the *Head* court did not address this factor, and it provides a basis for distinguishing eviction cases from the facts in *Lopez-Mendoza* and *Scott*, on which the *Head* court relied.[163] *Lopez-Mendoza* involved deportation based on illegal entry,[164] and *Scott* involved a parole revocation based on the respondent's violation of a parole condition prohibiting ownership or possession of weapons.[165] In both instances, the penalty imposed is closely related to the crime committed. In the former, an illegal entry is punished by, in effect, simply reversing the entry. In the latter, the state simply revoked its decision to grant parole once a parolee demonstrated that he was not able to abide by constraints meant to ensure that he imposed no threat to society. Similarly, in cases concerning taxes on illegal activity[166] the penalty is closely, mathematically linked to the nature and scope of the offense. In contrast, an eviction takes from a tenant a leasehold interest that can vary in value dramatically, and which has no necessary relationship to the gravity of the purported offense or the risks that offense imposes on society. Of course, one could counter that it is proportional to the extent that it aims to eliminate the ability for that property to be used in the commission of related crimes. But that is precisely the logic underlying civil forfeiture, and the Court has already declared that such forfeitures bear "absolutely no correlation to any damages sustained by society or to the cost of enforcing the law."[167] Further, in the scores of evictions

160. United States v. Robinson, 721 F. Supp. 1541, 1544–45 (D.R.I. 1989).

161. *Ward*, 448 U.S. at 254.

162. *See* Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1141 (2016) (noting that "evictions [from public housing] can and do routinely occur for minor marijuana use").

163. U.S. Residential Mgmt. and Dev., LLC v. Head, 922 N.E.2d 1, 5 (Ill. App. Ct. 2009).

164. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984).

165. *See* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 359–60 (1998).

166. *See supra* notes 39–48 and accompanying text.

167. United States v. Ward, 448 U.S. 242, 254 (1980).

initiated for drug use, rather than distribution, that justification makes little sense.[168]

As discussed extensively earlier in this Note, the modern prevalence of evictions based on a tenant's criminal activity emerged from criminal laws that incorporated civil sanctions,[169] suggesting that such evictions may be quasi-criminal penalties.[170] This criminal-law-tinged history is bolstered by the statements of policymakers and agencies tasked with enforcement that imputed a distinctly punitive, anti-criminal objective onto the eviction regime.[171] While the *Ward* Court highlighted that "the civil remedy and the criminal remedy" at issue there were "contained in separate statutes enacted 70 years apart,"[172] no such separation can be found in the punishments under consideration here. Rather, the civil penalties and broad system of criminal enforcement with which they grew in tandem are inseparably interconnected. More recently, jurisdictions that have deliberately attempted to reduce the unfettered power granted to landlords by this punitive history have nonetheless effectively reaffirmed the quasi-criminal nature of an eviction proceeding. New York City, for instance, now guarantees an attorney to tenants facing eviction—a protection otherwise only afforded in criminal cases.[173]

As observed earlier in this Note,[174] the ambiguous theoretical basis for *Plymouth Sedan*'s continuing viability may cut against the persuasiveness of the foregoing analysis when considered alone. But one basis for assuaging courts' concerns in the eviction context might be that *both* the quasi-criminality test and the *Janis* factors point in the same direction. Even if the *Janis* factors fail to conclusively demonstrate that the exclusionary rule should be extended to evictions—always a possibility, in light of the complex and ultimately empirical question the test attempts to resolve—the fact that *Janis* at the very least does not point strongly in the opposite direction might be enough to resolve any lingering concerns about the propriety of extending the *Plymouth Sedan* approach here.

V. CONCLUSION

Presently, municipalities continue to evict or facilitate the evictions of scores of tenants who have not, or cannot, be charged with a crime. Yet such evictions are based on alleged or suspected criminal activity, and often entail consequences much weightier than any hypothetical criminal sanction would impose. To allow or encourage the use of illegal searches is to, in effect, punish those who have not

168. *See* Weil, *supra* note 8, at 177 ("Unlike drug dealing, drug use usually poses little direct threat to the health and safety of public housing complexes. Because it serves no housing-related goals, the rationale underlying the eviction of drug users seems to be almost purely punishment.").

169. *See supra* Part III.

170. *See supra* note 52 and accompanying text.

171. *See supra* notes 86–107 and accompanying text.

172. *Ward*, 448 U.S. at 254.

173. *See* Ashley Dejean, *New York Becomes First City to Guarantee Lawyers to Tenants Facing Eviction*, MOTHER JONES (Aug. 11, 2017, 2:37 PM) https://www.motherjones.com/politics/2017/08/new-york-becomes-first-city-to-guarantee-lawyers-to-tenants-facing-eviction [http://perma.cc/9QXJ-6Q3S].

174. *See supra* notes 60–61 and accompanying text.

been convicted of a crime and run afoul of the Fourth Amendment's protections. Furthermore, the extension of the exclusionary rule to the eviction context would harmonize an inexplicable disconnect in our law, eliminating a substantial, unjustified disparity in the safeguards afforded to targets of ordinary evictions and targets of evictions-via-forfeiture.