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NOTES ON BORROWING AND CONVERGENCE

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Response to: Jennifer E. Laurin, Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670 (2011).

INTRODUCTION

Constitutional borrowing is not always practiced in a way that is consistent with constitutional commitments or rule of law values. Critics may be troubled when courts use doctrine in one area of law to legitimize a move in another area that they consider objectionable. They might also have structural concerns if the law is reshaped over time through the cumulative effects of borrowing.

In a fascinating new Essay, *Trawling for* Herring: *Lessons in Doctrinal Borrowing and Convergence*, Professor Jennifer Laurin provides a case study in what she sees as borrowing's drawbacks. It is a terrific example of just the sort of cross-doctrinal research for which we have tried to provide a theoretical framework.[1] Laurin's main argument is that the U.S. Supreme Court's recent holding in *Herring v. United States*—namely that the exclusionary rule did not apply to a violation of the Fourth Amendment that followed from police negligence—can be best understood by placing the decision in the context of the Court's ongoing practice of lifting ideas from constitutional tort doctrine.[2] Even though the *Herring* Court did not say so—a silence that she finds troubling—it actually drew on that other area of law, particularly the idea that "good faith" or "objectively reasonable" police action would not necessarily be remedied.[3]

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1. Nelson Tebbe & Robert L. Tsai, Constitutional Borrowing, 108 Mich. L. Rev. 459 (2010).

2. Jennifer E. Laurin, Trawling for *Herring*: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670, 672–73 (2011) [hereinafter Laurin, Trawling].

3. Even more recently, the Court has reaffirmed the idea that "objectively reasonable" police action cannot be deterred by, and therefore is not subject to, the exclusionary rule. Davis v. United States, 131 S. Ct. 2419, 2429 (2011) (citing United States v. Leon, 468 U.S. 897, 919

Her Essay offers a plausible account of the Court's efforts to import elements from constitutional tort law into Fourth Amendment doctrine, especially to delimit the exclusionary remedy. Laurin shows how scattered references to ideas of "causation," "good faith," and "fault," drawn from the law of section 1983, became increasingly systematic. She also demonstrates that the overlap of these two bodies of law has yielded an uncomfortable fusion of two different remedial schemes in a way that has limited the range of possible remedies for illegal searches. Most damning, she contends that borrowing has led to the "functional diminishment of the constitutional standard."[4] Laurin's method beautifully reveals the microdynamics of judging without losing sight of the broader political and cultural resources from which jurists draw to fashion persuasive opinions.

Beyond recounting what happened to the exclusionary remedy, the Essay aims to advance scholarly understanding of the dynamics of borrowing. Laurin compares her rather pessimistic depiction of the practice to our own, which defends the general custom of borrowing in terms of its benefits for the rule of law.[5] She concludes that her account "offers a rare look at the darker side" of borrowing, which has the power to "undermine a remedial regime."[6]

In this Response, we will raise three questions about her critique of constitutional borrowing. First, does her opposition to the Court's acts of strategic borrowing in the exclusionary rule cases call into question the attractiveness of borrowing itself as a judicial practice, or does it instead target a particular species of political reconstruction? Another possibility is that her discontent centers on the appropriateness of this particular crossover, perhaps because of a poor fit between the two doctrines, or perhaps because the *Herring* Court did not acknowledge its debt to another body of law.

Second, we investigate a phenomenon that Laurin calls "convergence."[7] In brief, she thinks that over time it is possible for two legal domains to "merg[e] . . . into one"[8] so that they become "functionally indistinguishable,"[9] if not formally melded. The idea seems to be that, when this happens, it is no longer possible to speak meaningfully of borrowing, because the source and target doctrines are now operationally indistinct. The sharing can even occur almost unconsciously.[10] Although this is a valuable insight, we wonder whether it is the only way to describe what has happened in the *Herring* line of cases, or whether it is also possible to tell a story in which key ideas migrated over into exclusionary rule jurisprudence, where they became more or less independent of the source domain—if similarly influenced by a deterrence framework. This alternative explanation suggests a less dire account, where, despite some habitual permeability, developments in one area of law influence

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(1984)).

4. Laurin, Trawling, supra note 2, at 741.

5. Id. at 672.

6. Id. at 676, 677; cf. Tebbe & Tsai, supra note 1, at 482 (addressing "dark[] motivations" that may drive a particular instance of borrowing).

7. Laurin, Trawling, supra note 2, at 674.

8. Id.

9. Id. at 711.

10. Id. at 724.

outcomes elsewhere in a less constrained way.

Third and finally, we are intrigued by Laurin's depiction of how political motivations can influence borrowing. On this point, it may be helpful to distinguish between internal and external dynamics that may be implicated by borrowing. The first is mostly associated with administrative concerns, while the second involves structural forces. We encourage her to develop her theory of the role of politics in borrowing.

I. SPECIFIC CRITIQUE OR GENERAL?

Constitutional borrowing as a general practice can and should be evaluated in a way that is distinct from how we assess any particular type or instance of it. Whether an act of borrowing ought to be embraced is a question that is related to the broader issue of whether the general practice is defensible, but it is not the same thing—a specific importation can be opposed without denying, on balance, the attractiveness of this pervasive common law technique.[11] A firm distinction between the specific and the general allows space for fine-grained critique of particular moves, while subjecting structural critiques to distinct evaluation. In her Essay, Laurin critiques a pathway of borrowing in the *Herring* line of cases that has become attractive to judges, and we find her concerns interesting and persuasive. Sometimes, however, she crosses over into assessment of the general practice that raises intriguing questions for our project. We will address her specific and general critiques in turn.

Laurin worries that the interplay between criminal procedure and constitutional tort that culminated in *Herring* has worked more harm than good. Her main concerns line up with criteria that we have offered for evaluating particular instances of borrowing, including especially: fit (are the two areas of law sufficiently similar?), transparency (has the court been forthright about its reliance on another area?), and yield (has the borrowing generated anything useful for maintaining a legal order?).[12] In fact, several of her arguments about *Herring* could serve as examples—compelling ones—of just the types of failures that we anticipated.

First, fit: Laurin objects that the principles and practical considerations driving the exclusionary rule are distinct from those that underlie remedial doctrine in constitutional tort.[13] One difference, related to the obvious divide between criminal and civil law, is that tort law focuses on individualized wrongdoing, whereas the exclusionary rule, like other criminal remedies, looks

11. Id. at 673 ("[T]he very structure of a common law tradition dictates that, particularly where novel legal issues are raised, borrowing will be a frequent feature of judicial reasoning."). While recognizing borrowing's pervasiveness, our article attempted to describe and analyze its dynamics in constitutional law, showing for instance how it interacts with five theories of constitutional interpretation. Tebbe & Tsai, supra note 1, at 511–22.

12. For this reason, we evaluated the practice in a section of our initial study that was different from the part where we offered criteria for assessing any particular instance of borrowing. Compare Tebbe & Tsai, supra note 1, at 484–94 (offering a defense of borrowing generally), with id. at 494–511 (offering criteria for judging particular borrowings).

13. Cf. Laurin, Trawling, supra note 2, at 703–04 (discussing "fit" as general criterion for analogical reasoning in law).

also to correct any institutional defects that can habitually lead to constitutional violations.[14] The *Herring* Court embraced an approach that focused on individual deterrence and a particular officer's culpability—whether the officer had engaged in "gross negligence" and therefore deserved "punishment"—rather than on systematic defects in law enforcement administration that might need to be addressed.[15] Although she sometimes characterizes the consonance between the two doctrines as adequate or minimally sufficient,[16] we read her to be attacking the substantive suitability of the two areas.

Second, transparency: Part of what bothers Laurin about the turnabout in *Herring* is that the Court nowhere actually cited—let alone justified its reliance on—its constitutional tort precedents. Extending previous cases that tightened the connection between criminal law and civil law cases concerning Fourth Amendment violations, the *Herring* Court simply lifted the culpability framework without acknowledging its source. "Occlud[ing]" that move made it harder to uncover, assess, and resist future acts of borrowing.[17] That sort of masking, Laurin rightly says, "disserves important rule of law values."[18] We have argued similarly that covert acts of appropriation can naturalize contested linkages between constitutional domains in a way that can insulate them from critique, especially by nonspecialists.[19] While signposting is not always necessary or attractive, its absence can actually threaten the very values of accountability and accessibility that borrowing can otherwise promote.

Third, yield: Building on her earlier pathbreaking work on remedial rationing and distribution,[20] Laurin points out that the effect of harmonizing the two doctrines will be a kind of "doubling-down."[21] She means that when the Court weakens constitutional remedies in one area, there is an automatic enervating effect on the other. Fans of the exclusionary rule therefore have extra reason for concern in the contemporary judicial environment. Moreover, the doubling-down effect might concern even neutral observers who think that it is desirable to afford citizens a diverse mix of remedial regimes, whether to reduce judicial error costs or to encourage experimentation.

All of this makes good sense from our perspective. At times, though, Laurin goes further and critiques the practice of borrowing itself. After noting our general defense of constitutional borrowing, she says that her analysis of *Herring* provides "a less sanguine account of borrowing" than that of

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14. Id. at 673.

15. Id. at 730–31 (discussing "fit" explicitly).

16. Id. at 674.

17. Id. at 743 (noting "the potential of convergence to occlude its very operation").

18. Id.

19. Tebbe & Tsai, supra note 1, at 503–04.

20. See Jennifer E. Laurin, *Melendez-Diaz v. Massachusetts*, *Rodriguez v. City of Houston*, and Remedial Rationing, 109 Colum. L. Rev. Sidebar 82, 83–85 (2009) [hereinafter Laurin, Remedial Rationing], http://columbialawreview.org/assets/sidebar/volume/109/82_Laurin.pdf (on file with the *Columbia Law Review*) (arguing remedial rationing underestimates limitations of criminal and civil litigation to achieve regulatory goals); Jennifer E. Laurin, Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure, 110 Colum. L. Rev. 1002, 1022–29 (2010) [hereinafter Laurin, Rights Translation] (discussing fault-based considerations in criminal procedure).

21. Laurin, Trawling, supra note 2, at 676, 741.

"previous commentators."[22] But does it? Or is the moral of her compelling story instead that any particular instance of the practice can go awry along dimensions of fit, transparency, and yield? After all, Laurin provides just one example—albeit an important one—of the sort of migration that happens all the time in constitutional law, and in law generally.[23] Of course such crossover will sometimes happen in unsavory ways—it undoubtedly has a "dark side," to use Laurin's language.[24] But any conclusion that the practice on the whole is normatively undesirable requires a more systematic treatment.

Even if we limit ourselves to Laurin's case study, and put to one side any larger evaluation, it is interesting to ask whether Laurin's deepest objection is really to the crossover between criminal procedure and tort law itself. Is it truly the correspondence between these two areas that troubles her, or is it the substance of how the Court has eviscerated Fourth Amendment remedial schemes in both? At times, she does seem to critique the borrowing itself, independent of what it is being used to accomplish, especially insofar as she questions its fit and transparency.[25] But at other times, she gives the impression that her chief complaint is with underenforcement of criminal and civil sanctions for Fourth Amendment violations.[26] Would she be troubled if borrowing were used in much the same way except that it served to bolster, rather than undermine, the exclusionary rule in tandem with civil penalties for illegal searches? If the poor fit and occlusion persisted, then her critique would still have bite, but it is interesting to consider whether she would still find it worth making. In any event, our main point here is that Laurin's account may not undermine the actual practice of constitutional borrowing as much as it might appear.

II. BORROWING VS. CONVERGENCE

Key to Laurin's more pessimistic account is her idea of "convergence"—an advanced form of iterated migration. As she points out, borrowing spawns further borrowing.[27] Once a connection has been drawn between two areas of law, it is available to be endorsed or expanded by subsequent courts. Judges may follow the lead of others for interpretive guidance, out of habit, for added legitimacy, or due to a stronger strategic motivation. Over time, commonalities can be emphasized or enhanced to the extent that areas of law become

22. Id. at 742.

23. See, e.g., Tebbe & Tsai, supra note 1, at 469 (describing borrowing between First Amendment and Fourth Amendment); id. at 472 (between substantive due process and dormant commerce clause); id. at 473 (between First Amendment speech cases and Second Amendment); id. at 479 (between equal protection and free exercise).

24. Laurin, Trawling, supra note 2, at 676; see, e.g., Tebbe & Tsai, supra note 1, at 482 (addressing "darker set of motivations that can, in extreme situations, infect an act of borrowing").

25. See, e.g., Laurin, Trawling, supra note 2, at 703–04 (discussing fit).

26. See, e.g., id. at 732 (bemoaning fact that convergence of these two particular fields will work as "one-way ratchet" that works to limit, and not expand, constitutional remedies).

27. Laurin, Trawling, supra note 2, at 675 ("Convergence then deepens those ties and begets further borrowing."); Tebbe & Tsai, supra note 1, at 488 ("Borrowing begets further borrowing.").

meaningfully paired in the eyes of lawyers and judges.

Convergence happens when two areas of law "merge[] . . . into one,"[28] or "become one" so that they are "functionally indistinguishable."[29] For Laurin, convergence is conceptually distinct from borrowing, even though the two phenomena are "intertwined."[30] We can imagine two ways in which convergence could stand as a distinct phenomenon, and therefore two ways that identifying the category could generate independent conceptual yield.

One distinguishing characteristic of convergence is that once two areas have merged, courts no longer flag any sharing, and the crossover becomes customary or naturalized. Judges may intentionally promote this process to effectuate a transformation. Or they might blur boundaries in a manner that is not fully conscious.[31] Either way, transparency then becomes an ongoing problem to a degree that it is not for ordinary borrowing. So in *Herring* itself, the Court may have felt no need to signal that it was deploying tort doctrine to bolster its deterrence-based interpretation of criminal procedure rules. Some evidence to this effect is that the *Herring* dissent, strong as it was, did not think to protest against the infection of ideas like the primacy of individual police culpability—on the ground, say, of poor fit.[32] Possibly, the dissent calculated that the costs of resistance had become higher than the possibility of successfully changing the trajectory of the law. Or perhaps the crossover had become so habitual that it went unnoticed.

Another possible meaning of "convergence" is that after a merger has become successful, it no longer makes sense to speak of "borrowing" because the two areas have become practically indistinguishable. When that happens, there is little independent development of either area of law. Examples of this are hard to come by, but they are possible to imagine. One might be the unification of law and equity.[33] Another may be the law of speech and assembly where a protest or demonstration is involved.

None of this is to deny the utility of the concept of convergence. Overall, it is a helpful addition to the theoretical structure that we have been working to elaborate. It has particular value because it emerges from a convincing real-world case study of an interplay between two remedial regimes. Moreover, the

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28. Laurin, Trawling, supra note 2, at 674. The full passage reads:

> These areas exemplify not only an increasing permeability of the barrier between the separate remedial realms of criminal and civil Fourth Amendment enforcement, but also the merging, functionally if not formally, of two previously independent remedial paths into one. This dynamic is distinct in its operation and effect from the initial act of borrowing. It is instead best characterized as convergence.

Id.

29. Id. at 711.

30. Id. at 674.

31. See id. at 724 ("Convergence may be knowingly pursued . . . . But it may also be a phenomenon that is observable only in retrospect . . . . Moreover, convergence may accelerate in an almost unconscious manner.").

32. On the other hand, borrowing itself can also be subtle. Laurin notes, for example, that in *Leon*, the most important precursor to *Herring*, not even the explicit borrowing from constitutional tort cases drew objection from Justice Brennan's otherwise vociferous dissent. Id. at 704.

33. That convergence, however, was less doctrinal than institutional and jurisdictional.

concept of convergence has potential explanatory power, because it directs attention to systematic problems of transparency and accountability.

Our question here is whether the relationship between criminal procedure and constitutional tort has developed to the point that the doctrines—or even just the remedial regimes—can be said to have merged "into one."[34] Without a doubt, the pathway between them is well worn; that much Laurin conclusively establishes. But it is less clear to us that the overlap has become sufficiently broad or deep that it goes unnoticed, works below the level of consciousness, is assumed by both sides of the debate, makes it meaningless to speak of borrowing, or plays an outsized causal role in the development of exclusionary rule doctrine.

Admittedly, the debt that the *Herring* Court owed to constitutional tort law may not have been obvious to ordinary citizens, and for that reason among others we sympathize with Laurin's protest.[35] Still, it might be just as possible to tell a story in which the Court's focus on individual deterrence and the culpability of particular officers, rather than on systemic deterrence of carelessness in police departments, began to influence criminal procedure over the course of several cases, perhaps legitimated by reference to tort doctrine, and now has achieved some autonomous role there, without strongly erasing distinctions between the two remedial regimes. If that story is true, what happened in *Herring* might not have even been principally attributable to borrowing, much less to convergence, since ideas like individual deterrence and culpability had already become native to criminal procedure.[36]

To circle back to Laurin's more general concerns about the practice of borrowing, note the possible implications of overlap. A synthesis of two domains of knowledge on a point of law does not destroy judicial discretion. Nor does merger mean that developments in one body of law will necessarily drive developments in another. It remains possible after *Herring* there may be cases in which section 1983 concepts are not always used or are significantly reinterpreted.

Consider, too, that the exclusionary rule has long drawn widespread ire of a sort that has not been directed at civil remedies for constitutional violations.[37] For many constitutional actors outside the judicial arena, including certain politicians and their constituents, there is something deeply troubling about the prospect of allowing a guilty criminal to go free because of a police officer's constitutional violations—different from seeing a civil litigant go uncompensated after the same unconstitutional act. That gap in

34. Cf. Laurin, Trawling, supra note 2, at 674 (describing "merging, functionally if not formally, of two previously independent remedial paths into one"). At times, Laurin uses the concept of convergence more narrowly, such as when she argues that the good faith exception in criminal procedure and the good faith defense in section 1983 had merged in earlier cases. Id. at 710–11. This usage raises fewer questions for us.

35. See supra Part I.

36. Laurin at one point acknowledges something like this possibility. Laurin, Trawling, supra note 2, at 722–23 (noting it is difficult to "causally attribute" doctrinal shifts to borrowing or convergence after initial migration has taken hold).

37. See id. at 674 (noting civil law remedial scheme had advantage of being "politically acceptable by Justices who spanned the Court's ideological spectrum").

public salience brings up another potentially distinct type of borrowing that Laurin's perceptive discussion suggests without naming—the exchange of constitutional ideas between jurists and constitutional actors outside the court system, particularly in politics. It is to that sort of exchange that we now turn.

III. THE ROLE OF THE POLITICAL IN BORROWING

Every so often, Laurin acknowledges the external forces that may be contributing to convergence. She observes that Republicans actively campaigned against the exclusionary rule and that officials in the Reagan administration proposed just the sort of borrowing she identified so as to limit the reach of the remedy.[38]

We encourage Laurin to mine this vein and develop her theory of how the external and internal features of convergence interact. Many different types of processes may be at work—some at the macro level (historical, electoral, sociological, institutional) and some at the micro level (the rationales and forms available for borrowing, more individualistic considerations that might impact the exercise of judicial discretion, and so on). Laurin talks about convergence in terms of "hydraulics" and the "tendency to generate a cascade of pressure on doctrinal barriers."[39] In these moments, she suggests that convergence is exclusively, or at least mostly, an internal process. By contrast, one of us has described convergence as a phenomenon in which judges purposively reshape formative external events and mobilized patterns of thought and discourse.[40]

Whether or not Laurin agrees with this formulation, the reasons for undertaking convergence may be largely internal or external in a particular case. The internal include considerations such as bringing greater cohesiveness to a set of legal ideas, making an area of law easier to administer for judges, or reviving dormant but useful concepts. Each of these reasons, in one way or another, rests on the idea that the legitimacy of law depends on its internal integrity. Blurring doctrinal and linguistic boundaries can aid this concern. But let us suppose that there can occasionally be some external reasons for convergence as well: shaping the law to better reflect certain political or cultural attitudes; sending messages to certain nonjudicial constituencies, bureaucratic actors, or the public at large; or aligning judicial priorities with those of another branch of government (current or past). Suddenly, we might need a richer account of convergence to explain what is being converged and why.

So what is really driving jurists to reference section 1983, or in Laurin's words, to pick up the "accessible hammer?" A way of thinking about the dynamics of convergence is to imagine two types of jurists who might be tempted to engage in constitutional borrowing: one who is ideologically motivated and another who is not (or at least not on a given issue). The second

38. Id. at 694.

39. Id. at 710.

40. Robert L. Tsai, Eloquence and Reason: Creating a First Amendment Culture 78–162 (2008); Robert L. Tsai, Reconsidering *Gobitis*: An Exercise in Presidential Leadership, 86 Wash. U. L. Rev. 363 (2008).

judge is more interested in administration; the first is committed to political reconstruction. At this point, a distinction can be drawn between "administrative" borrowing, which entails more technical merging of doctrine, and "reconstructive" borrowing, which bridges legal discourses and political or cultural forces. Now, in reality, judges fall along some continuum of philosophical inclinations. Nevertheless, the reasons why the two jurists lay plans for convergence may differ. The ideologically committed jurist may wish to be tough on crime, or reverse the Warren Court revolution, or please political patrons. Alternatively, a judge may simply feel that law enforcement officers have for too long had their decisions second-guessed.

Once in a while, Laurin seems to want to tell just this sort of story about political reconstruction of the law.[41] For instance, she mentions Reagan's election and Attorney General William French Smith's desire to utilize the "good faith" principle as a way of limiting the exclusionary rule.[42] But this observation is not closely connected to a strong account of why judges are borrowing the idea. Most of the time, Laurin appears content with letting the pieces of the borrowing puzzle be the central figures in her story of constitutional development, rather than zooming out to view the more general picture under construction. Crime control is just the kind of high-salience issue on which there is likely to be more stringent vetting, and therefore greater congruence between electoral priorities and juridic outcomes is to be expected.[43] Nixon picked Warren Burger, a published critic of the exclusionary rule,[44] to help reverse perceived Warren Court excesses, especially in the area of crime control. Burger was later joined by Reagan's appointees in such cases as *United States v. Leon*. And is it any surprise that *Herring* was written by John Roberts, who worked for Smith as a young Justice Department lawyer?[45] Even with a story of political reconstruction, there can be variations. It may be that Burger and Roberts happened to find useful precedents to work out their conservative leanings. Or, if a stronger variation is preferred, each Chief Justice, in his own time, saw himself as completing the project begun so many years ago to return the law to the side of victims rather than perpetrators.

There are all sorts of intriguing questions raised by Laurin's article on this front. How much of the exchange of ideas between politics and law occurred passively, or at least on the level of background culture, with conservative

41. Laurin, Trawling, supra note 2, at 694–97.

42. Id. at 694.

43. See generally Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759 (1995); Cornell W. Clayton & J. Mitchell Pickerill, The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence, 94 Geo. L.J. 1385 (2006); Thomas Y. Davies, The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine, 100 J. Crim. L. & Criminology 933 (2010); James S. Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030 (2000); Keith E. Whittington, The Burger Court: Once More in Transition, *in* The United States Supreme Court: The Pursuit of Justice 300 (Christopher Tomlins ed., 2005).

44. Warren E. Burger, Who Will Watch the Watchman?, 14 Am. U. L. Rev. 1 (1964).

45. Brad Snyder, The Judicial Genealogy (and Mythology) of John Roberts: Clerkships from Gray to Brandeis to Friendly to Roberts, 71 Ohio St. L.J. 1149, 1225–31 (2010).

jurists and politicians inhabiting the same spheres of life? How much can be attributed to network effects, so that the judicial codification of politically charged ideas is more consciously coordinated through events, workshops, campaigns, and organizations? And how much is happening through litigation or the electoral process?

All of this brings us back, finally, to the central issue: how to evaluate whether a series of borrowings is good, neutral, or just plain awful. Laurin is generally critical of the Supreme Court's efforts to draw from the law of section 1983 to flesh out the contours of the exclusionary rule. At various points, she points out that convergence has encouraged an attitude that civil damages and the exclusionary rule should be mutually exclusive remedies. Still, has Laurin succeeded in showing that politically minded borrowing itself is normatively undesirable or does her analysis do more to show that the High Court's borrowing in this context, in the way it has been accomplished, is troubling?

We think that whether borrowing is normatively desirable depends on commitments having little to do with borrowing itself but the ways in which something is appropriated. In terms of administrative concerns, it is possible Laurin might have understated some of the efficiency gains from convergence. One might have thought that in the realm of criminal procedure—unlike other areas of the law—greater streamlining may be warranted to best calibrate the incentives for effective policing. Whether this kind of criminal law exceptionalism is a great idea or not (we have reservations about taking this line of thinking too far), the Court has certainly made this point repeatedly.[46] Having done so, it might have seen reasons for wishing to streamline the ways in which Fourth Amendment violations are addressed across civil and criminal contexts. Or perhaps, if one takes the position that democratic legitimacy and accountability matter most, then convergence of the law with newfound political priorities may have been needed to balance the judge-centered vision of the Warren Court. This would point the way toward an external defense of convergence.

We believe that Laurin's story might illustrate a different type of borrowing, rather than a necessary corruption of judicial decisionmaking—something closer to political reconstruction than to administrative migration. Under some normative conceptions of the legal order (say, one grounded in popular constitutionalism), reconstructive migration of ideas may be more inevitable and less troubling as a systematic matter than is sometimes feared, even though we might agree with Laurin on the substance of the transformation that is occurring in the particular context of the Fourth Amendment's exclusionary rule. After all, winners in the political process often do get to set the terms of legal debate, including in the courts.

An important contribution of her study is its demonstration of how

46. See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996) (denying defense request for discovery from prosecutors after deferring to "special province" of executive branch); McKleskey v. Kemp, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

borrowing can matter to legal decisionmaking, even when judges are drawing on more overtly political resources for constitutional adjudication. In contexts where borrowing is pushing in a certain ideological direction—say, against the exclusionary rule—administrative borrowing still may supply Justices with doctrinal mechanisms to effectuate their independent policy preferences.[47] In other words, the reasons for undertaking convergence may be largely technical. Internal borrowing is not necessarily epiphenomenal, even for a tribunal as politically sensitive and involved as the Supreme Court. Instead, judges may resort to it at least in part because they recognize that they must demonstrate some minimal fit between—to use Laurin's excellent example—a campaign to curtail the exclusionary rule and existing doctrinal tools. That borrowing can and does matter in this way bolsters our impression that the practice has important benefits for the rule of law, and for negotiating the line between law and politics.

CONCLUSION

Laurin has presented an incisive account of the evolution of the exclusionary remedy, one that ought to be read carefully by anyone concerned with civil rights or criminal procedure. Ultimately, whether it is better to have multiple, alternative remedies, or a legal scheme that narrows and streamlines the range of remedies, strikes us as a question that turns on questions of fairness, deterrence, and justice. What Laurin accomplishes in *Trawling for* Herring is a powerful reminder that constitutional borrowing can have real consequences, not all of which are always welcome. It reinforces the importance of transparency, especially where the incongruities between the domains of legal knowledge are significant. To satisfy rule of law standards, the tradeoffs entailed in a major act of borrowing should ordinarily not be made without a meaningful airing of the stakes.

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47. Laurin, Trawling, supra note 2, at 674.