Note

Redefining Possessory Interests: Perfect Copies of Information as Fourth Amendment Seizures

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Introduction

Snap! The agent's camera takes a picture of your diary entries from November third and fourth. Snap! It captures your bank statement from last September. Snap! A picture of your day planner for April thirtieth. Meanwhile, a technician is busy hooking up her equipment to your computer. A few hours later, around the time the agent is finished photographing the contents of your diary and other papers, the equipment beeps: it has finished copying your hard drive. A few minutes later, the agents leave, essentially taking your entire life with them when they do. And they can keep the copies they have made, quite possibly forever, and nothing in the Fourth Amendment will help you get them back.

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The Fourth Amendment protects individuals against unreasonable searches and seizures.[1] A search is a governmental invasion of a reasonable expectation of privacy,[2] such as an FBI agent reading a suspect's diary or examining her computer files. A seizure, however, meaningfully interferes with someone's possessory interest in her property rather than her privacy.[3] Courts generally interpret possessory interest to mean *physical* possession, even when the property allegedly seized is intangible, like information.[4] Many courts have therefore held that copying information is not a seizure because the owner retains the copied information.[5]

This approach undermines the individual's[6] ability to limit governmental access to her information. First, creating perfect duplicates via processes like copying computer files or taking photographs is

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1 *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

2 *See* Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

3 United States v. Jacobsen, 466 U.S. 109, 113 (1984); *accord* Arizona v. Hicks, 480 U.S. 321, 324 (1987) (holding that copying a serial number by hand did not meaningfully interfere with a possessory interest); Maryland v. Macon, 472 U.S. 463, 469 (1985).

4 *See, e.g.*, *Hicks*, 480 U.S. at 324; Hale v. Henkel, 201 U.S. 43, 76 (1906) ("[A] seizure contemplates a forcible dispossession of the owner."); Bills v. Aseltine, 958 F.2d 697, 707 (6th Cir. 1992) ("[T]he recording of visual images of a scene by means of photography does not amount to a seizure because it does not 'meaningfully interfere' with any possessory interest."); United States v. Thomas, 613 F.2d 787, 793 (10th Cir. 1980) ("The agent's act of photocopying, with UPS permission, certain materials before they were repackaged, was not a 'seizure.'"); *cf.* United States v. Chadwick, 433 U.S. 1, 13 n.8 (1977) (describing the seizure of a footlocker as "a substantial infringement of respondents' use and possession"). *But see Katz*, 389 U.S. at 353 (holding that recording defendant's end of a phone call seized the phone call).

5 *See, e.g.*, *Hicks*, 480 U.S. at 324; *Bills*, 958 F.2d at 707; *Thomas*, 613 F.2d at 793; United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001) (holding that copying computer files was not a seizure because it did not interfere with the owner's ability to access the information). *But see* Sovereign News Co. v. United States, 690 F.2d 569, 577–78 (6th Cir. 1982) (treating photocopied records as seized property and requiring their return unless government could show they were necessary for a specific investigation); United States v. Jefferson, 571 F. Supp. 2d 696, 704 (E.D. Va. 2008) (concluding that taking photographs or notes of documents constitutes both a search and a seizure of information).

6 For convenience's sake, this Note refers to information belonging to "individuals." Other entities—corporations, for example—also have Fourth Amendment rights, however. *See, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 311–13 (1978); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), *abrogated in part on other grounds*, United States v. Havens, 446 U.S. 620, 624–25 (1980). This proposal would apply equally to them. Indeed, in an era where many businesses are sharing data-storage space at commercial datacenters, such protections are especially important. *See* Robert Lemos, *When the FBI Raids a Data Center: A Rare Danger*, CIO, April 22, 2009, http://www.cio.com/article/490340/When_the_FBI_Raids_a_Data_Center_A_Rare_Danger.

much faster than summarizing[7] would be. It thus puts vastly greater amounts of an individual's information into play and enormously increases the opportunity for the police to unearth potential evidence of a crime wholly unrelated to their original purpose for making the copy.[8] Second, and more generally, there is just something more invidious about a *perfect* duplicate than—for example—a handwritten summary. It is one thing for a person to know that an FBI agent has read her diary, but it is another matter entirely for her to live with the knowledge that the same FBI agent has a line-for-line copy of the diary. The agent can reread the diary at will, show it to others, or mislay it so that countless strangers could also invade the author's innermost thoughts. And she must live with the knowledge that she is powerless to get it back.[9]

To avoid those results, this Note proposes that the Supreme Court broaden its definition of the term "possessory interest" to include interference not only with physical possession but also with the right to *exclusive* possession of one's information. In other words, the Court should hold that creating a perfect duplicate[10] of information[11]

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7 In this context, "summary" is a term of art that embraces not only actual summaries, such as police reports, but also verbal statements, even verbatim ones (e.g., an officer reading a line from a suspect's diary to another officer), and memories of information previously observed. For a more detailed discussion of the rule's scope, see *infra* Part II.A.

8 *See* Paul Ohm, *The Olmsteadian Seizure Clause: The Fourth Amendment and the Seizure of Intangible Property*, 2008 STAN. TECH. L. REV. 2, ¶¶ 74–78, http://stlr.stanford.edu/pdf/ohm-olmsteadian-seizure-clause.pdf (discussing law-enforcement practice of regularly duplicating data during an investigation and then examining it for unrelated data).

9 *See* Richard A. Vaughn, DDS, P.C. v. Baldwin, 950 F.2d 331, 332 (6th Cir. 1991); *infra* Part I.B.2.a; *cf.* Jones v. Berry, 722 F.2d 443, 449 & n.9 (9th Cir. 1983) (holding that revocation of consent after incriminating documents were found did not compel return of documents or make the original consent search illegal). Likewise, if the Court ruled that copying were neither a search nor a seizure, a data-owner could not force the police to return their copy of her information. *Cf.* California v. Greenwood, 486 U.S. 35, 40–41 (1988) (holding that an individual has no reasonable expectation of privacy in garbage she places on the curb in opaque trash bags to be picked up by municipal sanitation workers and that government agents therefore may conduct a warrantless, even suspicionless, examination of the trash and keep any incriminating evidence they find).

10 In this context, "perfect duplicate" means a copy generated by some process that, in its normal course of operation, accurately and precisely replicates the original embodiment of the information. *See infra* Part II.A. An illustrative and non-exhaustive list of such processes would include photography, photocopying, electronically copying the contents of a hard drive, and video recording. Oral or written summaries of information are not perfect duplicates under the proposed rule. *See id.*

11 The term "information" includes within its scope all data an individual possesses, whether that information is stored in physical papers, a journal, a hard drive, a calendar, a photograph, or any other similar medium. Although a broader definition is possible (e.g., one that would encompass information discernible from the physical layout of a room or the order of

seizes that information because the copying process meaningfully interferes with the data-owner's right to exclude the government from her information.[12]

This Note does not advocate banning police from creating and using perfect duplicates; such copies are valid and invaluable tools and have their proper place in the orderly administration of justice. Rather, this Note merely proposes applying the normal Fourth Amendment requirements[13] for seizing evidence to the creation of a perfect copy of information.

Part I provides important background on the Fourth Amendment and the right to exclude. Part II explains the contours of the proposal and defends it against possible critiques. Part III illustrates the proposed rule by applying it to various real and hypothetical scenarios.

I. The Fourth Amendment and the Right to Exclude

The Fourth Amendment stands as a bulwark against arbitrary governmental interference with property and privacy. It commands:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[14]

These fifty-four words form one of the cornerstones of modern investigatory criminal procedure. They govern everything from when and how a traveler's duffel bag can be examined,[15] to whether a suspect may be arrested in her home without a warrant,[16] to whether a person's documents may be photocopied and retained indefinitely.[17] Yet the Amendment's text provides sparse guidance on how courts should apply its sweeping mandate.

Part I.A explains the salient differences between searches and seizures and discusses the Fourth Amendment's reasonableness re-

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books on a bookshelf), this Note deals with perfect copies of documentary information because such information will be in greater demand by law enforcement and thus is more likely to be duplicated and retained indiscriminately.

12 *See infra* Part II for a more detailed explanation of the proposed rule.

13 *See infra* Part I.A.

14 U.S. CONST. amend. IV.

15 *See generally* Florida v. Bostick, 501 U.S. 429 (1991) (setting standards for examination of bus passengers' bags).

16 *See* Payton v. New York, 445 U.S. 573, 589–90 (1980).

17 *See infra* Part I.B.2.a.

quirement and remedies for Fourth Amendment violations. Part I.B analyzes cases involving duplication of information and thereby shows that the federal courts' current approach seriously underprotects an individual's ability to keep information securely in her own hands and out of the government's. Part I.C then describes the right to exclude and explains its relevance to information copying and the Fourth Amendment.

A. Fourth Amendment Fundamentals

1. Search vs. Seizure

The Fourth Amendment proscribes unreasonable searches and seizures. A search is a governmental action that interferes with an individual's reasonable expectation of privacy.[18] In other words, the Fourth Amendment protects an individual's subjective expectation of privacy only if society would view that expectation as objectively reasonable.[19] Thus, exposing one's private activities to even a limited "public" audience will make any expectation of privacy unreasonable.[20] For example, if an officer standing on a public street can see a crime taking place through a house's front window, that observation is not a search because any member of the public could lawfully have witnessed the same thing.[21] Similarly, sharing personal or financial information with a bank destroys one's reasonable expectation of privacy in that information, and government action viewing or taking that information is therefore not a search as far as the Fourth Amendment is concerned.[22] Search jurisprudence is thus a rather brittle shield against governmental intrusions because even the smallest sharing of information could be enough to destroy one's reasonable expectation of privacy.

The law of *seizures*, on the other hand, does not directly protect or rely on privacy interests. It nevertheless has the potential to be a much surer bulwark against privacy invasions than current search jurisprudence. A seizure "is [a] meaningful interference with an individ-

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18 *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring) (articulating the subjective expectation of privacy and objective reasonableness requirements); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 41 (8th ed. 2007).

19 *See supra* note 18.

20 *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

21 *See id.*

22 *See, e.g.*, United States v. Miller, 425 U.S. 435, 442 (1976) (holding that sharing information with a bank destroys the customer's reasonable expectation of privacy in that information and, derivatively, all Fourth Amendment protection for that information).

ual's *possessory interests* in [his] property."[23] Although *Black's Law Dictionary* defines possessory interest as "[t]he present right to control property, including the right to exclude others,"[24] the Supreme Court has taken a much narrower view in its seizure cases.

Courts generally equate possessory interests with physical possession.[25] For physical property, that approach makes sense. When an officer impounds suspect *Y*'s car, *Y* is completely deprived of her ability to use the car and thus cannot derive any benefit from it. When the officer makes a photocopy of *Y*'s diary but leaves the original with *Y*, however, *Y* still has possession of the original. Conventional Fourth Amendment wisdom thus would say that nothing has been seized, even though a perfect, word-for-word copy of all of *Y*'s most intimate thoughts are now the officer's to scrutinize in painstaking detail.[26]

In addition, if copying is a seizure rather than a search, the government would need a warrant (or an appropriate exception to the warrant requirement) to be able to examine the copy because the power to seize does not automatically carry with it the power to search the seized item.[27]

The Supreme Court has not been completely unyielding in its devotion to the physical-dispossession theory of seizures, however. For example, in *Horton v. California*,[28] a case involving a search for stolen goods,[29] the Supreme Court stated that "a seizure deprives [an] individual of dominion over his or her person or property."[30] Regrettably, however, such statements appear to have withered on the vine, with

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23 United States v. Jacobsen, 466 U.S. 109, 113 (1984) (emphasis added). Taking physical custody of a person, as in the case of an arrest, also constitutes a "seizure." SALTZBURG & CAPRA, *supra* note 18, at 43. Unless otherwise specified, the term "seizure" as it is used below refers not to taking custody of a person but rather to meaningful interference with a possessory interest.

24 BLACK'S LAW DICTIONARY 1284 (9th ed. 2009). *Black's* alternatively defines possessory interest to mean a "present or future right to the exclusive use and possession of property." *Id.*

25 *See supra* note 4.

26 It is possible that a court would hold that copying constitutes a search, however. *See* United States v. Thomas, 613 F.2d 787, 793 (10th Cir. 1980).

27 *See* California v. Acevedo, 500 U.S. 565, 575 (1991) ("Law enforcement officers may seize a container and hold it until they obtain a search warrant.").

28 Horton v. California, 496 U.S. 128 (1990).

29 *Id.* at 130–31.

30 *Id.* at 133.

the Supreme Court[31] and lower federal courts[32] continuing to view seizures almost exclusively through the lens of physical possession.[33]

2. The Warrant Requirement and Its Exceptions

The Fourth Amendment requires that all searches and seizures be reasonable.[34] If a search or seizure is found to be unreasonable, it will be declared illegal.[35] Constitutionally speaking, the best way to show reasonableness is to obtain a warrant before conducting a search or seizure.[36] The lack of a warrant will not necessarily mean that the act is unreasonable (and therefore illegal), however. For example, a warrantless search or seizure is lawful[37] if (1) the subject consents[38] or (2)

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31 *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 57–59, 61–64 (1992) (relying on *Horton*, *inter alia*, in holding that the county's action in hauling away plaintiff's mobile home constituted a seizure).

32 *See, e.g.*, United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001) (holding that copying computer files was not a seizure because it did not interfere with the owner's ability to access the information).

33 *See* Ohm, *supra* note 8, ¶ 31. If the Court ever wished to modify its rule regarding information, however, the language used in *Horton* could be cited as foreshadowing the change. *See Horton*, 496 U.S. at 133.

34 U.S. CONST. amend. IV.

35 *See, e.g.*, Winston v. Lee, 470 U.S. 753, 755, 767 (1985) (holding a proposed search, namely requiring defendant to submit to surgery to remove a bullet lodged beneath her skin, to be unreasonable and therefore unlawful).

36 *See* Johnson v. United States, 333 U.S. 10, 13–15 (1948).

37 This list of exceptions to the warrant requirement is not exhaustive. Rather, it merely presents those exceptions that are most relevant to the seizure issues that are the focus of this Note. For example, the plain-view exception to the warrant requirement, *see* Horton v. California, 496 U.S. 128, 134, 136–37 (1990), is also of some relevance. The scope of the plain-view exception with respect to electronic information is currently in flux. In a January 2008 opinion, a panel of the Ninth Circuit refused to ban government use of information seen by federal agents while they were executing a search warrant for specific computer files. *See* United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1110–12, 1116 (9th Cir. 2008). That decision was vacated, however, *see* United States v. Comprehensive Drug Testing, Inc., 545 F.3d 1106, 1106 (2008), and an 11-judge en banc panel ordered the government to return and not use the information it had found in plain view while performing the computer search, *see* United States v. Comprehensive Drug Testing, Inc., 579 F.3d 989, 994–1003 (2009) (en banc). The en banc panel decision requires law enforcement agents to forswear the plain-view exception whenever they seek search warrants for electronic information, which would drastically curtail the pragmatic scope of the exception. *See id.* at 1006. However, the Ninth Circuit may reconsider the case yet again, this time before all of the Circuit's active judges. *See* United States v. Comprehensive Drug Testing, Inc., No. 05-10067, (9th Cir. Nov. 4, 2009) (order requiring parties to brief question whether the case should be reheard by all of the Circuit's judges), *available at* http://volokh.com/wp/wp-content/uploads/2009/11/CDTOrder.pdf. Still, the exception's relevance is limited by two of its requirements. First, for the doctrine to apply, the viewing officer must be *lawfully* on the premises where she observed the incriminating evidence. *Horton*, 496 U.S. at 136–37. Second, the seized property's incriminating character must be "'immediately apparent'" to the officer, or else the seizure will not be lawful. *Id.* at 136–37 (quoting Coolidge v. New

the police have probable cause to believe both that a crime has been or soon will be committed and that there are exigent circumstances[39] that necessitate immediate action.[40]

a. Consent

The consent exception is the most important one in cases involving information copying. Attempts to withdraw consent will have different effects depending on whether the consented-to action was a search or a seizure. With searches, any attempt to withdraw consent must be made before the search is complete, or else the revocation will not be valid.[41] Treating copying as a search means that creating a copy "finds" all incriminating evidence and eliminates the owner's ability to withdraw consent.[42] Treating duplication as a search thus strips an individual of her right to exclude as soon as the copy is made.

Consent for a seizure can be revoked at any point before the property is returned, because a seizure, unlike a search, is an ongoing violation of the property owner's rights.[43] Unless the government can obtain a warrant or find an applicable exception to the warrant requirement, it must return the seized property immediately when consent is revoked.[44] If the government does not return it, the owner's

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Hampshire, 403 U.S. 443, 466 (1971)). Furthermore, in such cases, the officers would be empowered to seize the originals, not just make a copy, which further reduces the exception's relevance to this proposal. *Id.* at 134.

38 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

39 SALTZBURG & CAPRA, *supra* note 18, at 363.

40 *See id.* at 368–74.

41 United States v. Lattimore, 87 F.3d 647, 651 (4th Cir. 1996); *see generally* SALTZBURG & CAPRA, *supra* note 18, at 480–81.

42 If courts instead held that duplication is not a search because government agents do not actually view information during the duplication process, duplication might actually go wholly unregulated by the Fourth Amendment. Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 560 (2005). This would mean that copies could be made—and retained—without satisfying Fourth Amendment requirements. *See* U.S. CONST. amend. IV (proscribing only "searches" and "seizures" that are unreasonable).

43 *Cf.* Muehler v. Mena, 544 U.S. 93, 100–01 (2005) (affirming the rule that the duration of a seizure must be considered when determining whether it is reasonable and that a once-reasonable seizure may become unreasonable if it lasts too long); United States v. Sharpe, 470 U.S. 675, 682–86 (1985) (discussing the role of the duration of a seizure in determining its reasonableness).

44 Lee v. City of Chicago, 330 F.3d 456, 464–65 (7th Cir. 2003); *see* United States v. Ho, 94 F.3d 932, 936 n.5 (5th Cir. 1996) ("A consent which waives Fourth Amendment rights may be limited, qualified, or withdrawn."); United States v. Ward, 576 F.2d 243, 244 (9th Cir. 1978) (adopting the rule and rationale of Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977), as the law of the 9th Circuit); Mason v. Pulliam, 557 F.2d 426, 428–29 (5th Cir. 1977); *cf.* Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

options for redress depend on her situation. If she is on trial in federal court, she can move to force the return of her property under Rule 41(g) of the Federal Rules of Criminal Procedure.[45] If the federal authorities have the property but there are no charges pending, the owner may file a *Bivens*-like suit[46] in federal court to recover her property and thereby end the ongoing Fourth Amendment violation.[47] If state actors are responsible for invading her rights, she may sue under 42 U.S.C. § 1983[48] and *Ex parte Young*[49] to enjoin the deprivation.[50] Copies are not currently regulated under these rules.[51] Instead, individuals must rely on the equitable discretion of the court if they wish to secure a copy's return, and such demands almost always fail.[52]

b. Exigent Circumstances: Destruction of Evidence

The exigent-circumstances exception for destruction of evidence is also relevant. In general, it allows officers to seize evidence without a warrant if they have probable cause to believe that the property to be seized is evidence of a crime[53] and a reasonable suspicion that the evidence would be destroyed or lost if they did not seize it immediately.[54] For example, an officer who is interviewing a suspected drug

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45 FED. R. CRIM. P. 41(g).

46 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971) (holding that an individual whose Fourth Amendment rights are violated by federal agents has a federal cause of action and can recover damages after showing the violation caused her injury).

47 *See, e.g.*, Maney v. Ratcliff, 399 F. Supp. 760, 773–74 (E.D. Wis. 1975); *cf.* Farmer v. Brennan, 511 U.S. 825, 845–47, 850–51 (1994) (discussing federal inmate's Eighth Amendment *Bivens* action seeking injunctive relief).

48 42 U.S.C. § 1983 (2006).

49 *Ex parte* Young, 209 U.S. 123 (1908).

50 *See* 42 U.S.C. § 1983 ("Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a[ ] . . . suit in equity . . . ."); *Young*, 209 U.S. at 155–56 (permitting injunction of suits instituted by state officials in violation of the Constitution); *id.* at 159–60 (declaring the federal courts may enjoin unconstitutional actions taken under color of state law).

51 *See* Kerr, *supra* note 42, at 563.

52 *See* FED. R. CRIM. P. 41 advisory committee's notes to 1989 amendments (describing Rule 41(e), later recodified as Rule 41(g)); ORIN S. KERR, SEARCHING AND SEIZING COMPUTERS AND ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 106 (2001); Kerr, *supra* note 42, at 563 (stating that most courts that have granted motions to recover copies have done so based on their equitable powers).

53 *See* SALTZBURG & CAPRA, *supra* note 18, at 363.

54 *See id.*; *cf.* Richards v. Wisconsin, 520 U.S. 385, 394–95 (1997) (requiring that officers

dealer would be justified in seizing a bag of white powder she saw on the suspect's coffee table during the course of the interview. In that circumstance, she would have probable cause to believe that the powder was drugs and a reasonable belief that the suspect would destroy the powder before the officer could get a warrant. In the information context, if perfect-copy creation were a seizure, officers would lawfully be able to duplicate a computer file at risk of deletion, if they had probable cause to suspect criminal activity and a reasonable belief that the file might be deleted before they could obtain a warrant.[55] In such circumstances, the Fourth Amendment's inherent balance between individual and societal interests would tilt in favor of society and would permit the seizure, even absent a warrant.

3. Remedies for Fourth Amendment Violations

The most common remedies for Fourth Amendment violations are suppression of the illegally obtained evidence, money damages, and—for illegal seizures—return of the seized property. The remedy most useful to criminal defendants is the exclusionary rule, which holds that evidence obtained in violation of the Fourth Amendment, and any evidence subsequently discovered because of that illegally obtained evidence, must be excluded from the defendant's criminal trial.[56] Those injured by Fourth Amendment violations may also seek money damages under either 42 U.S.C. § 1983 (for violations by state actors) or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[57] (for violations by federal actors). And, as noted above, those injured by the seizure of their property may sue to obtain its return.[58]

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have reasonable suspicion that evidence will be destroyed to justify noncompliance with the Fourth Amendment's knock-and-announce requirement).

55 *See* United States v. Gorshkov, No. CR00-500C, 2001 WL 1024026, at *3 (W.D. Wash. May 23, 2001).

56 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the States); Weeks v. United States, 232 U.S. 383, 391–94 (1914) (applying the exclusionary rule to federal law-enforcement activities); SALTZBURG & CAPRA, *supra* note 18, at 493. Although there is much debate about the long-term prognosis of the exclusionary rule, *see, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759, 786, 793, 798, 812–15 (1994) (arguing in favor of strong monetary-damages remedies in place of the current exclusionary rule), this Note assumes its continued availability as a remedy for Fourth Amendment violations.

57 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971) (creating a federal-agent counterpart to 42 U.S.C. § 1983).

58 *See supra* notes 45–50 and accompanying text.

B. The Federal Courts' Refusal to Treat Duplication as a Seizure

For decades, the Supreme Court and lower federal courts have struggled to articulate a rational and consistent rule for how the duplication of information should be treated for Fourth Amendment purposes. Thus far they have failed. The below cases trace the evolution of information-duplication jurisprudence beginning with the Supreme Court's 1987 decision in *Arizona v. Hicks* and show how the courts' adherence to physical dispossession as the touchstone of seizure law has severely cabined individuals' ability to exclude the government from their information.

1. Arizona v. Hicks*: Duplication of Information Is Not a Seizure*

In *Arizona v. Hicks*, the Supreme Court concluded that writing down a stereo turntable's serial number did not seize either the turntable or the serial number itself.[59] While investigating reports of gunfire from Hicks's apartment, one policeman, his suspicions aroused by the presence of two sets of expensive stereo equipment in a dingy apartment, moved a stereo turntable to find its serial number.[60] He wrote down the number and checked it against records of stolen property, which showed that the equipment was stolen.[61] The officers seized the equipment and charged Hicks accordingly.[62]

The Court concluded that copying the serial number "did not 'meaningfully interfere' with [Hicks's] possessory interest in either the serial numbers or the equipment."[63] The Court nevertheless threw out the evidence, holding that the manipulation of the equipment constituted a search.[64] In doing so, the Court rejected several lower-court cases that had held copying of information to be a seizure.[65] A num-

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59 Arizona v. Hicks, 480 U.S. 321, 324 (1987).

60 *Id.* at 323.

61 *Id.* at 323–24.

62 *Id.*

63 *Id.* (quoting Maryland v. Macon, 472 U.S. 463, 469 (1985)).

64 *Id.* at 324–25.

65 Ohm, *supra* note 8, ¶¶ 23–25 & nn.46–50; *see, e.g.*, LeClair v. Hart, 800 F.2d 692, 695–96 (7th Cir. 1986) (holding that IRS agents' verbatim dictation of documents and copious notetaking constituted a seizure of the documents' contents); United States v. Gray, 484 F.2d 352, 356 (6th Cir. 1973) (holding that copying down serial numbers on rifles was a seizure); *see also* United States v. Sokolow, 450 F.2d 324, 325–26 (5th Cir. 1971) (holding that writing down serial numbers of air conditioners constituted a seizure). These cases appear to rely on language in *Katz v. United States* and *Berger v. New York* that declared wiretapping conversations to be seizures of the conversations, as well as searches. *See* Katz v. United States, 389 U.S. 347, 352–53 (1967); Berger v. New York, 388 U.S. 41, 59 (1967). The Court's analysis in these cases did little to distinguish searches from seizures, however, and did not set up a doctrinal framework for

ber of lower courts have given *Hicks* a broad reading and have failed to draw any distinction between handwritten notes or summaries (the facts of *Hicks* itself) on the one hand, and perfect duplicates on the other.

2. *The Fourth Amendment Status of Photocopying, Photographing, and Computer-File Duplication*

A number of cases have dealt with the creation of perfect duplicates via processes such as photocopying, photography, and electronic copying of computer files. The treatment of information across these cases has not been consistent, but—taken as a whole—they demonstrate courts' unwillingness to provide significant protection for the security of individuals' information.

a. Photocopying and Seizures

In *United States v. Thomas*,[66] a Tenth Circuit panel held that the FBI's photocopying of allegedly obscene materials constituted a search of the materials rather than a seizure.[67] Relying chiefly on other circuits' Fourth Amendment jurisprudence, the court defined a seizure as "a forcible or secretive dispossession [of property]."[68] In essence, this allowed the FBI to make copies of all the purportedly obscene materials, send the originals on their way, and then retain the copies as prospective evidence in some undetermined future prosecution.[69]

A similar case is *Richard A. Vaughn, DDS, P.C. v. Baldwin*,[70] where a panel of the Sixth Circuit held that the IRS could lawfully retain copies it had made pursuant to the owner's consent, notwithstanding the owner's subsequent revocation of consent and demand for the return of the copies.[71] Dr. Vaughn's business voluntarily

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lower courts to follow when faced with situations in which the government copies intangible property. *See Katz*, 389 U.S. 347; *Berger*, 388 U.S. 41. The mixed messages sent by such cases as *Berger* and *Katz* on the one hand, and *Hicks* on the other, have confused both courts and commentators alike; the below analysis seeks to quiet some of the discord. *See infra* Parts II–III.

66 United States v. Thomas, 613 F.2d 787 (10th Cir. 1980).

67 *Id.* at 793.

68 *Id.* (internal quotation marks and citations omitted).

69 *See id.*

70 Richard A. Vaughn, DDS, P.C. v. Baldwin, 950 F.2d 331 (6th Cir. 1991); *accord* United States v. Ward, 576 F.2d 243, 244–45 (9th Cir. 1978) ("Because the records were given to the IRS on March 26, 1975, and the demand for return was not made until March 31, 1975, we agree with the district court that any evidence gathered or copies made from the records during the intervening five days should not be suppressed.").

71 *Baldwin*, 950 F.2d at 333.

turned over thousands of documents to the IRS for examination and copying.[72] When the IRS refused to return the documents, the corporation formally withdrew consent for the examination and duplication of the records and demanded that both the originals and copies be returned.[73] The IRS returned the originals but refused to return the copies.[74] Relying on its own precedent[75] and that of its sister circuits,[76] the Sixth Circuit panel held that the IRS could keep all copies it had made before the corporation withdrew its consent.[77] Although its rationale is not explicit, the court appears to have concluded that the duplication was not a seizure, leaving the corporation powerless to secure the copies' return.[78]

The government's ability to retain copies or pictures of physical documents is a power not to be taken lightly, but the scenario becomes even graver when one considers copied computer files rather than physical papers. Electronic files may be copied far more quickly and in a more compact medium than an equivalent amount of hard-copy data.[79] In *Baldwin*, for example, the copying of thousands of pages of documents took several months to complete,[80] whereas duplication of a computer containing an equivalent amount of data would likely take only a small fraction of that time.[81]

b. Duplicating Computer Files Is Not a Seizure

In *United States v. Gorshkov*,[82] the United States District Court for the Western District of Washington took the leap from physical copies to electronic data and held that remotely copying files from a computer located in Russia was not a seizure under the Fourth Amendment.[83] In the court's opinion, downloading the information

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72 *Id.* at 332.

73 *Id.*

74 *Id.*

75 *E.g.*, Sovereign News Co. v. United States, 690 F.2d 569, 577 (6th Cir. 1982); *see Baldwin*, 950 F.2d at 333–34.

76 The *Baldwin* court relied heavily on cases emanating from the Fifth Circuit, such as *Mason v. Pulliam*, 557 F.2d 426, 428–29 (5th Cir. 1977). *See Baldwin*, 950 F.2d at 333–34.

77 *Baldwin*, 950 F.2d at 333–34.

78 *See id.*

79 *See* Kerr, *supra* note 42, at 541–42, 556, 561.

80 *See Baldwin*, 950 F.2d at 332.

81 *See* Kerr, *supra* note 42, at 561.

82 United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026 (W.D. Wash. May 23, 2001).

83 *Id.* at *3; *see also* United States v. Triumph Capital Group, Inc., 211 F.R.D. 31, 48 (D. Conn. 2002) (stating that agent's duplication of a hard drive did not seize it). The *Gorshkov* court also held, in the alternative, that the Fourth Amendment did not apply because the ac-

was not a seizure because "it did not interfere with Defendant's or anyone else's possessory interest in the data," i.e., "[t]he data remained intact and unaltered" and was "accessible to Defendant and any co-conspirators or partners with whom he had shared access."[84] In other words, remote duplication of electronic information did not trigger traditional seizure rules. Such a result is inimical to the Fourth Amendment's guarantee of security in one's "papers[ ] and effects."[85]

The 2009 amendments to Rule 41 of the Federal Rules of Criminal Procedure reinforce the prevailing view that copying information does not constitute a seizure. The new Rule 41(e)(2)(B) provides:

> A warrant under Rule 41(e)(2)(A) may authorize the seizure of electronic storage media or the *seizure or copying* of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant in Rule 41(e)(2)(A) and (f)(1)(A) refers to the *seizure or onsite copying* of the media or information, and not to any later off-site copying or review.[86]

The new rule twice joins "copying" and "seizure" with the conjunction "or," implying that the two concepts do not overlap, i.e., that copying is not a seizure.[87] The 2009 amendments to Rule 41(f) also refer to seizures and copies as alternative options:

> In a case involving the seizure of electronic storage media or the *seizure or copying* of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was *seized or copied*.[88]

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cessed computer was located outside the United States and the Fourth Amendment does not apply extraterritorially. *Gorshkov*, 2001 WL 1024026, at *3.

84 *Gorshkov*, 2001 WL 1024026, at *3.

85 U.S. CONST. amend. IV.

86 FED. R. CRIM. P. 41(e)(2)(B) (emphasis added). The rule presumptively allows later review of copied information; it does not require officers to explain why a search of all copied data is necessary to their investigation. *See id.* This default permission risks further blurring the line between searches and seizures and exposing all copied information to review, even if it would be inappropriate under the circumstances of an individual case. The ex parte nature of warrant applications only heightens this risk and decreases the likelihood that post-copying review will be denied. Also, because (1) the time limit for executing the warrant refers only to *copying* (or physical seizure) and (2) there is no separate timeframe for completing an off-site review, *see id.*, there is a greater possibility that the government will not act diligently in filtering the data and returning that which is irrelevant to its investigation.

87 *See id.*

88 FED. R. CRIM. P. 41(f) (emphasis added). Rule 41(f)'s policy of permitting retention of

This dichotomy reflects the current state of the case law on duplications as seizures[89] and underscores that the Court does not presently view copying as a form of seizure.[90] One recent case stands counter to this trend, however, holding that duplication constitutes a seizure of documents' contents.

c. Photographs and Handwritten Notes Are Seizures

In *United States v. Jefferson*,[91] the United States District Court for the Eastern District of Virginia held that photographing documents and taking notes of their contents constituted both a search and a seizure of the contents of the documents.[92] According to the *Jefferson* court, a person has a possessory interest in the privacy of her information.[93] When the privacy of that information is infringed by government action, that person loses some of the privacy she previously had possessed.[94] Because a seizure is defined as a meaningful interference with an individual's possessory interest,[95] such invasions of privacy are seizures (as well as searches).[96]

This rule is flawed because it collapses the distinction between searches and seizures in the information-copying context[97] and makes the finding of any Fourth Amendment violation contingent on finding an invasion of a reasonable expectation of privacy. Under the *Jefferson* rule, if a duplication searches, it also seizes, and if it does not search, it does not seize.[98] This approach is both underinclusive and

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a copy would remain unaltered under this Note's proposal because any officer who had a warrant to seize—i.e., copy—information would, by definition, be allowed to retain a copy of that information. *See infra* Part II.A.

89 *See supra* Part I.B.1–2.b.

90 It is unremarkable that the Rules reflect the current understanding of the Fourth Amendment, as they are not the optimal forum for effecting a significant reorientation of search-and-seizure law. That is not to say, however, that the Court could not be persuaded if faced with a suitable case with full briefing and argument on the issue.

91 *United States v. Jefferson*, 571 F. Supp. 2d 696 (E.D. Va. 2008). *Sovereign News Co. v. United States,* 690 F.2d 569 (6th Cir. 1982), is another relevant case. There, the court treated photocopied records as seized property and required their return unless the government could show they were necessary for a specific investigation. *Id.* at 577–78.

92 *Jefferson*, 571 F. Supp. 2d at 704.

93 *Id.* at 702.

94 *Id.* at 703.

95 *See Maryland v. Macon*, 472 U.S. 463, 469 (1985).

96 *See Jefferson*, 571 F. Supp. 2d at 704.

97 *See id.* at 701–04 (discussing the notion of a "possessory privacy" interest in information); *supra* text accompanying notes 91–96.

98 If the act also interferes with the person's actual physical possession of the item containing the information, however, it will be deemed a seizure. *See* United States v. Jacobsen, 466 U.S. 109, 113, 124–25 (1984).

overinclusive. Because expectations of privacy are easily negated, the rule would provide little additional protection for individuals' information.[99] The rule is also inappropriate because it would make all summaries, and perhaps even memories, into seizures. This Note proposes a more robust yet more targeted basis for protecting individuals' information—including the right to exclude within the scope of the possessory interests protected by the Fourth Amendment.

C. The Right to Exclude

The right to exclude is a property owner's right to control how and to what extent others will be able to use, access, or possess her property.[100] It extends to both real and personal property[101] and, in essence, is the right to tell someone else (including the government), "This is mine, not yours. Keep your hands off, unless and until I say otherwise." In addition, the right is not an all-or-nothing proposition; even though an owner gives *A* access to her property, she still possesses the right to exclude *B*.[102] The right also includes the power to revoke prior permission to use or possess.[103]

The right does have limits, however.[104] For example, the fact that individuals may be arrested in their homes[105] and that their "persons, houses, papers, and effects"[106] may sometimes be seized demonstrates that the right to exclude must and does yield to the needs of law enforcement in some circumstances.

The Constitution, Supreme Court precedent, and federal and state statutory and case law all support the conclusion that an individual possesses a right to exclude the government from her information.

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99 *See supra* notes 18–22 and accompanying text.

100 JESSE DUKEMINIER ET AL., PROPERTY 86 (Vicki Been et al. eds., 6th ed. 2006).

101 *See id.* at 90.

102 *Cf.* Int'l News Serv. v. Associated Press, 248 U.S. 215, 239–41 (1918) (expressing the view that a news-gathering organization does not lose the right to exclude a competitor from the information it has collected when it publishes that information to its client newspapers and to the public).

103 *See* DUKEMINIER ET AL., *supra* note 100, at 92.

104 *Id.* at 90–91 (listing exceptions and qualifications to the right to exclude); *see, e.g.*, State v. Shack, 277 A.2d 369, 370, 374–75 (N.J. 1971) (denying farm owner the right to exclude aid workers seeking to provide necessary legal and health services to his resident farm workers); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 699 (1988).

105 *See* New York v. Harris, 495 U.S. 14, 18 (1990) (discussing in-home arrests and the conditions under which they will be legal).

106 U.S. CONST. amend. IV.

1. Constitutional Provisions

Three provisions of the Constitution support the conclusion that individuals have a right to exclude others from their information. The first such provision is the Fourth Amendment itself. The text of the Fourth Amendment guarantees the "right of the people to be secure . . . against unreasonable searches and seizures."[107] A measure of that security can be gained by recognizing a right to exclude the government from one's information.[108] The Fourth Amendment was designed to guard against the evils of general warrants,[109] which allowed government officials to search or seize any person's home, papers, or other property if the executing officers thought that property might relate to the offense listed in the warrant.[110] Government agents could purport to be searching for evidence of one crime but instead seize and pore over all of a person's documents for any other purpose, or no purpose at all.[111] The Framing generation considered general warrants to be a gross invasion of privacy and property rights.[112] The Framers designed the Fourth Amendment to curtail such abuses.[113] The right to exclude the government from information contained in one's papers (be they physical or digital) furthers that purpose by empowering owners to refuse to allow the government to copy their information and by enabling them to demand the return of any copy they let the government make.[114]

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107 *Id.*

108 Ohm, *supra* note 8, ¶ 89.

109 Olmstead v. United States, 277 U.S. 438, 463 (1928); *see* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 79–82, 95–96 (John Hopkins Press 1937) (discussing the purpose of the various State constitutional provisions on which the Amendment was based).

110 *See* LASSON, *supra* note 109, at 53–55.

111 *Id.*

112 *See generally id.*, at 51–78 (discussing the use of the writs of assistance in the American colonies and the colonial reaction).

113 *See Olmstead*, 277 U.S. at 463; Russell M. Gold, Note, *Is This Your Bedroom?: Reconsidering Third-Party Consent Searches Under Modern Living Arrangements*, 76 GEO. WASH. L. REV. 375, 378 (2008).

114 In a secondary way, the right to exclude also protects individuals' privacy interests in their information because it gives individuals whose information has been copied the power to reclaim the copy rather than let it remain in the government's hands indefinitely, where it may be scrutinized, lost, or improperly disposed of, all of which would threaten, though not actually invade, the owner's privacy. *See* United States v. Karo, 468 U.S. 705, 712 (1984) (holding that privacy is not invaded until information is actually conveyed to government agents); *cf.* United States v. Jefferson, 571 F. Supp. 2d 696, 702 (E.D. Va. 2008) (holding that there is a possessory interest in privacy).

Second, the Takings Clause of the Fifth Amendment[115] enjoins the government from taking private property (either real[116] or personal[117]) for public use without fairly compensating the owner.[118] It likewise applies to intangible property.[119] Depriving an individual of her right to exclude others from her property constitutes such a taking and requires just compensation.[120] The Court has fiercely protected the right to exclude in this context, even going so far as to deem it "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[121] Although there certainly is not a one-to-one correlation between the actions that are takings and those that constitute seizures, the strong protection afforded the right to exclude under the Fifth Amendment strongly suggests that it should be protected under the Fourth, as well.

The final relevant constitutional provision is Article I, Section 8, clause 8, which gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[122] The federal patent[123] and copyright[124] statutes find their constitutional bases in this provision.[125] This provision offers

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115 U.S. CONST. amend. V.

116 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438 (1982) (permanent cable-TV fixtures placed on owner's building).

117 *See, e.g.*, United States v. Gen. Motors Corp., 323 U.S. 373, 383–84 (1945) (machinery and other "fixtures").

118 U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

119 Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002–03 (1984) (opining "[t]hat intangible property rights protected by state law are deserving of the protection of the Taking Clause").

120 *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 168, 179–80 (1979) (holding that the government could not grant public access to private marina newly connected to "navigable water[s] of the United States" unless it paid the owners just compensation for interfering with their right to exclude others from the marina).

121 *Id.* at 176. Indeed, some scholars would even go so far as to declare the right to exclude the *sine qua non* of property. *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

122 U.S. CONST. art. I, § 8, cl. 8.

123 *E.g.*, Patent Act, Pub. L. No. 82-593, 66 Stat. 792 (1952) (codified as amended as Title 35 of the U.S.C.).

124 *E.g.*, Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended as Title 17 of the U.S.C.).

125 *See* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–29 (1964) (discussing enactment of the patent and copyright laws). It may be argued that, under the textual canon *expressio unius est exclusio alterius*, the specific constitutional and statutory recognition of patent and copyright protections precludes the recognition of a right to exclude. The proper role of *expressio unius* in constitutional interpretation is a contested point. *See* David M. Golove, *Against Free-Form Textualism*, 73 N.Y.U. L. REV. 1791, 1815–36, 1860–66, 1877–82, 1919–24 (1998).

only limited support because this Note focuses on a broader class of information than that which is protected by these specific constitutional and statutory provisions. Nevertheless, they remain instructive because they underscore the inherent value of control over information and evidence a constitutional commitment to protecting each person's right to exert some control over her information.

2. Supreme Court Precedent

The Supreme Court has also decided nonconstitutional cases that support the conclusion that individuals possess a right to exclude others from their information and that such a right merits strong protection. The leading case is *International News Service v. Associated Press*,[126] which recognized the inherent value of informational control and granted an information-owner the right to exclude others from using or reproducing its information, even though no constitutional or statutory provision expressly required that result. In that case, the Supreme Court concluded that the Associated Press ("AP") had a "quasi-property" right in the information it had collected for its client newspapers.[127] The Court held that one element of that quasi-property right was the right to exclude a competitor, the International News Service ("INS"), both from issuing exact replicas of AP's news stories and from reproducing their substance using different words.[128] Moreover, AP retained its right to exclude INS even after it had dis-

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John Manning, for example, treats it as a rule of reason, "direct[ing] interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive." John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1725 (2004). Others point out the absurd results of applying it in particular contexts, for example, allowing the Vice President to preside at his own impeachment trial because the Constitution provides that the Chief Justice shall preside at the President's impeachment trial but is silent as to the Vice President's. *See* Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849 (2000). The context of Article 1, Section 8 does not suggest that the specific powers listed are meant to preclude the recognition of other rights of the people, especially in light of the Ninth Amendment. *See* U.S. CONST. art. I, § 8; *id.* amend. IX ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."). Moreover, the *expressio unius* argument would fly in the face of Supreme Court precedent that accepts specific statutes as expressions of generally accepted public policies rather than as narrow, isolated pillars in the law. *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–93, 401–03, 409 (1970) (noting that legislation evidences general legislative policies to which courts must accord significant weight and holding that the federal maritime statutes' noncoverage of decedent longshoreman's claim did not prohibit the Court from extending federal common law to permit recovery).

126 Int'l News Serv. v. Associated Press, 248 U.S. 215 (1918).

127 *See id.* at 229, 236.

128 *See id.* at 245–46. Indeed, even Justice Brandeis in dissent agreed that "[a]n essential

tributed the information to its client newspapers (and thereby to the public); in essence, the Court upheld not an all-or-nothing right to exclude but rather a selective one.[129]

The decision thus recognized that the power to exclude from information is a valuable right that merits protection even though no positive law expressly required it.[130] By prohibiting copying of the underlying substance in addition to banning word-for-word duplication, the Court protected the right to exclude even more strongly than this Note would suggest doing. For reasons discussed in detail below in Part II, this ban on summaries would prove unworkable in the law-enforcement context; nevertheless, the Court's endorsement of such a robust right to exclude provides strong support for the more modest right suggested herein.

3. Federal and State Statutory and Case Law

State and federal statutory and decisional law provide some of the strongest evidence of the existence and importance of individuals' right to exclude others from their information.[131] For example, copying someone's unlisted phone number, Social Security Number, and insurance policy number have been held to constitute deprivation of property under Wyoming's larceny statute, in part because it deprived the victim of the ability to exclude the defendant—or anyone else—from it.[132]

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element of individual property is the legal right to exclude others from enjoying it." *Id.* at 250 (Brandeis, J., dissenting).

129 *See id.* at 238–42 (majority opinion).

130 The Court did not base its decision on either Article I, Section 8 of the Constitution (granting Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings") or the Copyright Act. *See id.* at 234–35. Instead, the Court appears to have been relying on principles of equity. *See id.* at 236–37, 240.

131 Susan W. Brenner & Barbara A. Frederiksen, *Computer Searches and Seizures: Some Unresolved Issues*, 8 MICH. TELECOMM. & TECH. L. REV. 39, 112 n.236 (2002) (suggesting that state laws criminalizing unauthorized duplication of computer files may provide a basis for concluding that such conduct by the government constitutes a seizure of the files).

132 *See* Dreiman v. State, 825 P.2d 758, 761–62 (Wyo. 1992). *Dreiman* dealt with the duplication both of physical property (keys) and information (the aforementioned unlisted telephone number and the Social Security and insurance-policy numbers, as well as entries on the victim's calendar). *See id.* at 760. The court concluded that the duplicated information constituted "property" within the meaning of the state's larceny statute and that taking it was thus a crime. *See id.* at 761–62. The court made it quite clear that it regarded the duplication of the information, especially the unlisted phone number, as "a deprivation of property." *Id.* at 761.

And Wyoming is by no means alone. In *United States v. Girard*,[133] a panel of the United States Court of Appeals for the Second Circuit construed 18 U.S.C. § 641,[134] which criminalizes the theft of government property,[135] to embrace theft of information as well as tangible property.[136] Likewise, information has been held to be property meriting protection under the federal mail fraud statute.[137] In the realm of information stored on computers, both Congress[138] and virtually every state legislature[139] have enacted statutes prohibiting individuals from accessing or duplicating information stored on someone else's computer. Given how strongly state and federal law disfavors acts of information copying by private parties, it seems only logical to conclude that identical conduct by the government should be highly suspect.

Taken as a whole, the foregoing constitutional, statutory, and decisional authorities demonstrate that information is at least quasi-property and that protecting an individual's right to exclude others from accessing or using that property without permission has strong roots in the American legal system. Unwarranted governmental invasions of this fundamental protection thus should be a violation of the Fourth Amendment's ban on unreasonable seizures.

II. Explanation of Proposal

The Supreme Court should hold that perfectly duplicating information seizes the information because it deprives the information's owner of her right to exclude others from it. To achieve this result, the Supreme Court should broaden its definition of possessory interest beyond mere physical possession to include an individual's right to exclude the government from her written or digital information. Under the proposed rule, any duplication process, such as photography or photocopying, that yields a perfect copy of a document in the owner's possession would be a seizure of the document's information because creating the copy would strip the owner of her ability to control the use and disposition of that information.

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133 United States v. Girard, 601 F.2d 69 (2d Cir. 1979).

134 18 U.S.C. § 641 (1976).

135 *See id.*; *Girard*, 601 F.2d at 70.

136 *Girard*, 601 F.2d at 71.

137 United States v. Grossman, 843 F.2d 78, 85–86 (2d Cir. 1988); *see* 18 U.S.C. § 1341 (1982).

138 *See, e.g.*, 18 U.S.C. § 2701(a) (2006).

139 *See, e.g.*, ALA. CODE §§ 13A-8-100 to -103 (LexisNexis 2005); ALASKA STAT. § 11.46.740 (2008); ARIZ. REV. STAT. ANN. §§ 13-2301(E), -2316, -2316.01, -2316.02 (2001 & Supp. 2008).

In this context, "exact" and "perfect" do not mean totally identical in appearance. Rather, the focus is on the *process* used to create the copies: if that process (photocopying, for example) usually produces copies that are virtually identical to the original, then any copy produced by that process will be deemed a perfect copy, regardless of whether the particular copy at issue is totally identical or somehow flawed. Thus, a photocopy that has a smudge over some portion of the copy's text due to an imperfection in the photocopier would still be considered exact for the purposes of this rule, and the copying would therefore be a seizure the document's contents. Likewise, miniaturizations or enlargements of originals or the use of any device that converts from one medium to another, e.g., a computer program that automatically converts an inputted audio file to a written transcript, would also be a seizure. Photocopies, photographs, and copies of computer files would thus all be seizures because they represent exact duplicates of the original.

A person's memory or notes[140] of a document's contents (collectively dubbed "summaries"[141]) would not be a seizure, however, because they generally do not interfere with the right to exclude to the same degree perfect copies do, would make the rule too socially costly and difficult to administer, and do not capture the minute, intimate details of information in the same full-color, wholly convincing way that perfect duplicates do.[142] In sum—and to put it in Fourth Amendment terms—summaries do not constitute a seizure because, although they interfere with an individual's right to exclude others from her information, that interference is not constitutionally meaningful.[143]

In crafting and applying the definition of "exact duplicate," "summary," and the proposal's other key terms, the Court could draw on the model currently embodied in Article X of the Federal Rules of Evidence, which deals with the "contents of writings, recordings, and

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140 Whether such notes are handwritten or typed, they still fall within the definition of notes about the contents of a document and are thus outside the scope of the proposed rule.

141 The definition of "summary" encompasses not only traditional synopses but would also embrace, for example, a verbatim handwritten copy of a given document. Essentially, it is a term of art for all representations of information that do not fall into the category of "perfect duplicates."

142 *See* FED. R. EVID. 1001(4); FED. R. EVID. 1001 advisory committee's note (describing Advisory Committee's intended balance between perfect duplicates and other attempts to summarize or copy contents).

143 *See supra* notes 23–26 and accompanying text. Defining the line between meaningful and non-meaningful interferences is a difficult task. This Note would make the degree of perfection in the method of copying a touchstone in that inquiry.

photographs."[144] The Rules could provide a source of definitional support for courts seeking to assign a given item either to the category of exact duplicate (and thus a seizure) or to that of summary (and therefore not a seizure). As is the case here, the touchstone for the Federal Rules is the reliability of the process producing the duplicate.[145] The Rules therefore buttress the feasibility of the summary/perfect-copy dichotomy.

There are numerous reasons for choosing this particular dividing line between what constitutes a seizure and what does not. Part II.A sets forth that rationale in detail, including the proposal's minimal impact on Supreme Court precedent, its judicious balancing of the competing needs of the individual and the state, and its ability to untangle the problem of retention of copies created pursuant to consent. Part II.B then defends the proposal against possible critiques, including the argument to maintain the status quo, that the proposed rule is subject to easy manipulation by law enforcement, and that a legislative solution is superior to a judicially crafted one. Part II.C then addresses a similar proposal recently made by Professor Orin Kerr.

A. Justification for the Summary/Perfect-Duplicate Dichotomy

The rationale for striking this particular balance between exact duplicates and other summaries is several-fold. First, and perhaps most fundamentally, a perfect copy of information is precisely that: perfect. For that reason, it is many times more invidious than a handwritten summary containing the same information. Whereas a person's memory can be flawed, imperfect, and, therefore, generally open to question, a perfect copy leaves no doubt as to what a particular document says. Every decimal point in every stock transaction and every emoticon in every e-mail could be laid bare to law-enforcement personnel if they duplicate the owner's hard drive. Which would be more troublesome, the FBI having a perfect digital copy of every piece of correspondence between two lovers over the course of a five-year span, or its possession of an agent's notes stating, "Correspondence began 11/1/03. Ended 12/14/08. Main topics of conversation: family relations, work obligations, and plans for upcoming travel. Nothing obviously suspicious"? And when the agent can get the per-

144 FED. R. EVID. art. X (capitals omitted); *see* FED. R. EVID. 1001(4) (defining a "duplicate" as "a[ny] counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, . . . or by mechanical or electronic re-recording, . . . or by other equivalent techniques which accurately reproduces the original").

145 *See* FED. R. EVID. 1001 advisory committee's note.

fect copy much more quickly than she could examine the original, why not take the copies "just in case" they were ever needed?[146] It thus is the very accuracy of the records, coupled with the ease with which they can be created and the duration for which they can be maintained, that necessitates this proposal for curtailing the government's power.

Second, restricting the proposed rule to processes that generate exact duplicates preserves the rule of *Arizona v. Hicks*.[147] The proposed rule would not require *Hicks* to be overruled because writing down the serial numbers in that case would be a summary rather than a perfect duplicate. Preserving *Hicks* upholds the principle of stare decisis and harmonizes *Hicks* with *Horton v. California*, which described seizures not in terms of physical possession but rather as an act that "deprives [an] individual of dominion over his or her person or property."[148] This statement allows the Court to say credibly that it had already foreshadowed an expansion of the definition of possessory interest.[149]

Third, and unlike the rule proposed by the court in *Jefferson*, this structure would not disrupt the fundamentals of police procedure. Under this Note's approach, officers will be allowed to take notes of the contents of documents, recall what they have seen, write their reports, and relay crucial information to others without fear that they are infringing on individuals' Fourth Amendment rights (and thereby endangering the admissibility of any evidence uncovered). The proposal is thus superior to the *Jefferson* rule because that decision could transform any summary or detailed description into a seizure.[150] For example, virtually every police report describing written or electronic information could be a seizure.[151] Such a rule would wreak havoc on

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146 *See* EOGHAN CASEY, DIGITAL EVIDENCE AND COMPUTER CRIME 225–26 (2d ed. 2004) (discussing the expediency of copying everything on a hard drive and then examining it later); Ohm, *supra* note 8, ¶ 88 (discussing the vices of law enforcement's "'[s]ave now, analyze later'" approach).

147 In that case, the Court held that an officer writing down a stereo number's serial number was not a seizure. Arizona v. Hicks, 480 U.S. 321, 323–24 (1987).

148 Horton v. California, 496 U.S. 128, 133 (1990).

149 Indeed, even *Black's Law Dictionary* states that a possessory interest comprises "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner" and the "present or future right to the exclusive use and possession of property." BLACK'S LAW DICTIONARY 1284 (9th ed. 2009).

150 *See* United States v. Jefferson, 571 F. Supp. 2d 696, 704 (E.D. Va. 2008); *see supra* notes 34–40, 91–99 and accompanying text.

151 Taken still further, it could transform into a seizure even the simple act of remembering what one has seen.

the orderly enforcement of the criminal law and would therefore impose social costs too high to be borne. This proposal, however, provides even greater protections for individual liberty without imposing such huge costs on the police and society.

Fourth, the proposed rule accounts for the basic efficiency-seeking aspects of human nature by making costly for police the shortcuts that have relatively few costs for them but potentially enormous long-term costs for the individuals whose information is copied. Consider an officer suspicious of the contents of a financial statement. Practically speaking, she has two choices if she wants to take the substance of the document with her: take a picture of the document or take notes on its contents.[152] Under current search and seizure rules, either would be appropriate (assuming she is lawfully on the premises in the first place).[153] Under the proposed rule, taking notes would be acceptable, whereas the photograph would be a seizure that would require separate consent, a warrant, or other exigent circumstances to be lawful.[154] The proposed rule thus denies to law-enforcement personnel the path that is easy for the officer but dangerous for those whose information will be copied and stockpiled.[155]

Fifth, the proposal gives owners of information the power to revoke consent for the copying or retention of their information. If current doctrine (under which copies cannot be demanded back once completed) were altered so that duplication would be considered a seizure, consent for that seizure could be revoked at any time before the return of the copy.[156] Once consent were revoked, the government would have to return the duplicate or secure a warrant.[157] If no

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152 This, of course, assumes that the hypothetical owner would refuse permission for the officer to take the original.

153 *See supra* Part I.A.1.

154 *See id.*

155 *See supra* note 146.

156 *See supra* notes 34–52 and accompanying text.

157 Under the proposal, if incriminating evidence were discovered in the copied information before revocation, the right to revoke consent would be trumped by the government's law-enforcement interest in the information, and the seizure would become legal. There is also the question of how courts should treat duplications of information that contain evidence not against the owner but against a third party. In such cases, the owner's right to exclude would be infringed, but the government would also have a legitimate interest in using that information for law-enforcement purposes. Under the proposal, the owner would be entitled to (1) sue for money damages for the time the government had a copy of the information, and (2) reclaim all copies of the information at the end of the criminal proceedings against the third party. A further condition might be imposed whereby the owner would, upon recovering exclusive control over her information, agree not to destroy the information for a fixed period of time, in ex-

warrant were obtained, the evidence would be suppressed as the product of an illegal seizure.[158]

Moreover, what the government would be allowed to keep during trial and direct appeal would be narrowly circumscribed by what it planned to introduce as evidence. For example, if the state planned to introduce obscene images recovered from the defendant's computer, the defendant could seek the return of particular files or documents that the parties could stipulate—or the court could find after *in camera* review—bore no relation to the case at hand. These restrictions would ensure that only information actually needed for the current investigation would be retained for a long period of time. Reducing the amount of extraneous information in the government's hands also decreases the chance of a future intrusion into the owner's life, either by government agents fishing in her files or by an unauthorized third party.

Finally, any unlawful duplication or retention would give the owner of the copied information the right to sue for damages and the return of her property. Money damages, as well as the recovery of the copies, will provide the main remedies for invasions of an innocent person's right to exclude.[159] The aggrieved owner could sue for damages under either 42 U.S.C. § 1983[160] or *Bivens*.[161] Her claim would essentially be that interfering with her right and power to exclude others from her documents violates the Fourth Amendment just as surely as if the police had read her diary or impounded her car without a warrant.

Also, even if the copy cannot be demanded back immediately,[162] perhaps because a court allows the government to keep the duplicate

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change for which she could seek further monetary damages from the government for this additional infringement on her right to exclude.

158 *See supra* note 56 and accompanying text.

159 Those who are never charged with crimes will gain no benefit whatsoever from the ability to suppress evidence illegally seized. Those who are charged and ultimately acquitted likewise stand to gain greatly from the availability of money damages, especially in cases where the duplicated information played a role in the case against them.

160 42 U.S.C. § 1983 (2006).

161 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

162 The rule does not envision a set point in time beyond which a person no longer can revoke consent for possession of duplicates or seek to have copies returned. If, upon receiving a demand for the return of copies, the government wished to assert that the claimant no longer had a right to demand the copies' return, the burden would be on the government to show that the individual no longer had a right to exclude others from the information, for example because she had since transferred her interest in the information to a third party or had clearly disavowed all relationship with and ownership of the information, i.e., abandoned it.

for the duration of its investigation and prosecution, the owner could demand the copy back upon completion of the proceedings. The mechanism for regaining one's property would depend on the procedural posture of each case. If the owner were being prosecuted in federal court, she could seek the return of her property under Federal Rule of Criminal Procedure 41(g).[163] If no such case were pending, she could sue for her property's return (or, styled differently, an injunction of the unconstitutional deprivation) under *Bivens*.[164] Finally, if the unconstitutional seizure were executed by state authorities, the owner could sue under 42 U.S.C. § 1983 and *Ex parte Young* to enjoin the ongoing violation of her rights.[165]

Because copying is not currently regarded as a seizure, a motion to recover duplicates is currently based primarily on courts' equitable powers and requires the owner to show that the government's retention of the copies is causing her a significant hardship; such motions almost universally fail.[166] Under the proposal, however, retaining copies constitutes an ongoing Fourth Amendment violation, which the federal courts are empowered to enjoin, regardless of whether it is a state or federal actor responsible for the invasion.[167] Recognizing duplication as an ongoing constitutional invasion rather than a mere inconvenience greatly alters the balance of interests at stake and tips that balance against the government. This proposal would thus give

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163 *See* FED. R. CRIM. P. 41(g). The property at issue here is the individual's *right to exclude*, not the physical copy itself. That right may be restored by turning over all copies in the government's possession, by deleting all government copies, or by otherwise eliminating governmental access.

164 *See* Maney v. Ratcliff, 399 F. Supp. 760, 773–74 (E.D. Wis. 1975) (gathering authorities); *cf.* Farmer v. Brennan, 511 U.S. 825, 845–47, 850–51 (1994) (discussing federal inmate's Eighth Amendment *Bivens* action seeking injunctive relief).

165 *See* 42 U.S.C. § 1983 ("Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a[ ] . . . suit in equity . . . ."); *Ex parte* Young, 209 U.S. 123, 155–56 (1908) (permitting injunction of suits instituted by state officials in violation of the Constitution); *id.* at 159–60 (declaring that the federal courts may enjoin unconstitutional actions taken under color of state law).

166 KERR, *supra* note 52, at 106; *see* FED. R. CRIM. P. 41 advisory committee's notes to 1989 amendments (describing Rule 41(e), later recodified as Rule 41(g)); Kerr, *supra* note 42, at 563 (stating that most courts that have granted motions to recover copies have done so based on their equitable powers rather than under the Fourth Amendment).

167 *See Young*, 209 U.S. at 155–56 (permitting injunction of suits instituted by state officials in violation of the Constitution); *id.* at 159–60 (declaring that the federal courts may enjoin unconstitutional actions taken under color of state law); *Maney*, 399 F. Supp. at 773–74 (gathering authorities); *cf. Farmer*, 511 U.S. at 845–47, 850–51 (discussing federal inmate's Eighth Amendment *Bivens* action seeking injunctive relief).

owners a much better chance of reclaiming the copies of their information, either immediately or at the end of the proceedings.

This proposal seeks to remedy the serious shortcomings of current Fourth Amendment information-copying jurisprudence. Yet no proposal is perfect, and several critiques could be raised against the plan outlined above. Part II.B deals with the most significant of these.

B. Critiques of the Proposal

As with any proposal, this one is subject to a number of critiques. The first is that the status quo (i.e., leaving the disposition of copies to courts' equitable discretion) sufficiently protects individual rights. The current system, however, provides an ineffective and ex post answer to a problem that demands a much more robust solution. The current system is ineffective because motions for return of property based exclusively on courts' equitable jurisdiction rarely succeed.[168] The existing remedies are purely ex post because they do not help an owner reclaim her property until—at the earliest—the conclusion of the government's investigation.[169] Finally, equity-based decisions such as these are insulated from meaningful judicial review,[170] making it difficult to obtain a uniform standard across similar cases. In contrast, review of decisions under the proposed framework would be more streamlined because those decisions would depend heavily on legal conclusions, i.e., whether the copying constituted an illegal seizure.[171] The status quo is inadequate and will only become more so as instances of duplication multiply in an increasingly electronic and digital world.

The second significant critique is that law-enforcement personnel will seek to manipulate or evade the proposed rule; for example, officers might try to take verbatim notes of every document they ex-

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168 KERR, *supra* note 52, at 106. There are two reasons such motions rarely succeed. First, as a threshold requirement before they will exercise their equitable jurisdiction over a motion for return of property, most courts require that moving parties show both that the duplication has caused an irreparable injury and that they lack any other legal recourse. *See id.* Second, once the court reaches the merits, a planned or pending proceeding against the owner will almost always defeat her motion for return of the original and copies. *See id.* at 107.

169 *See* FED. R. CRIM. P. 41 advisory committee's notes to 1989 amendments (describing Rule 41(e), later recodified as Rule 41(g)); KERR, *supra* note 52, at 106–07.

170 *See, e.g.*, *In re* Search of 4801 Fyler Ave., 879 F.2d 385, 388 (8th Cir. 1989) (reviewing district court's assertion of equitable jurisdiction over petition for return of property under abuse-of-discretion standard).

171 *Cf.* Ornelas v. United States, 517 U.S. 690, 691 (1996) (holding that determinations of reasonable suspicion and probable cause for warrantless searches and seizures should be reviewed de novo).

amine or deliberately make copies that are almost—but not quite—flawless (e.g., by distorting the angle at which a photograph is taken), so as to avoid designation as a seizure while maximizing the amount of information captured. First, it is unlikely that police would take such copious notes. If the officer has a warrant to review the original, she likely could have gotten a warrant to copy it. Similarly, if she is viewing it pursuant to consent, she could seek consent to copy it. If that permission were granted, no notetaking would be required;[172] if it were denied, it is unlikely that she would be given permission to take such copious notes. Finally, if there were exigent circumstances making it necessary to review a document's contents, it is likely that they would justify taking the document itself—or a copy of it—rather than just notes.[173] Furthermore, finite police resources and the time pressures characteristic of an open investigation should deter such practices in the general course of law-enforcement activities.

It is thus likely that only in the exceptional case would the allowance for detailed notes be in any way relevant. And even in such exceptional cases, such as where an officer takes detailed notes regarding the contents of a financial statement, that notetaking is still preferable to the creation of perfect copies because notes will not be as inherently detailed or invasive, and thus not as embarrassing or potentially damaging, as a perfect copy would be. Indeed, at absolute worst, the proposed rule would place the owner of the statement in the same position she would have occupied had the new rule not been adopted; she could not be any worse off and would almost certainly be in greater control of her information.[174]

The critique that officers might distort individual duplications or the tools that create them boils down to the common-sense observation that officers will try to maximize the benefit they can derive from

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172 Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

173 *See supra* Part I.A.1.c.

174 Moreover, if the information at issue is a single piece of short alphanumeric data, such as a telephone number, a Social Security Number, or the serial number in *Hicks*, such data are likely easily discoverable through alternative means, such as motor-vehicle records or other government databases.

In addition, extending the proposed rule to cover these scenarios would likely prove futile in many cases because, taking the *Hicks* example, the officer could avoid the rule by reading the numbers aloud over his radio rather than writing them down. Such avoidance would be impossible in situations where the information at issue was contained in a long personal journal, a filing cabinet full of financial records, or a hard drive containing terabytes of data, which are better exemplars of the types of sources this rule is designed to protect.

the rule while minimizing its cost to them.[175] Although true as far as it goes, this critique is unpersuasive because the proposed rule focuses on the general reliability of the *process* used to generate the copy rather than the level of accuracy or distortion in each individual copy. So, even if a camera malfunctions (or an officer places her finger over half the lens or tilts it at a distorting angle), the picture produced will still constitute a seizure because the photographic process normally creates a perfect copy.

Finally, one could argue that the problem herein identified is ripe for legislative—rather than judicial—action. The simplest response is that it is far from clear whether such a federal statute would be binding on the States.[176] Furthermore (and setting aside the practical political difficulties of obtaining passage of such a law[177]), even if a such a statute were passed, the Supreme Court would eventually review its constitutionality, anyway. All in all, because of its authority on issues of criminal procedure, the finality a Court-enacted rule would likely bring about, the ease with which such a rule could be enacted, and its insulation from political pressures, a rule announced by the Court seems greatly superior to a similar one enacted by Congress.

C. Addressing a Possible Alternative

Professor Orin Kerr recently proposed treating copies of computer files as seizures.[178] His analysis distinguishes between copies made *before* an officer reviews the information to be duplicated, and

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175 Here, cost is measured in terms of time and energy expended and evidence excluded through findings of illegal seizure.

176 Congress may bind the states via its power to regulate interstate commerce, *see* U.S. CONST. art. I, § 8, cl. 3, and enforce the Fourteenth Amendment, *see* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Regulating State and local law enforcement is largely the province of the States, however, and federalism concerns make it unclear whether Congress could tread so heavily on that deeply rooted State power without a stronger constitutional mandate. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (invalidating a portion of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 & 42 U.S.C.), as exceeding the power of Congress under both the Commerce Clause and Fourteenth Amendment); United States v. Lopez, 514 U.S. 549 (1995) (invalidating a portion of the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, § 1702, 104 Stat. 4844 (codified as amended at 18 U.S.C. §§ 921–922, 924), as beyond Congress's Commerce Clause power). *But see* Gonzales v. Raich, 545 U.S. 1, 9 (2004) (upholding federal statute regulating cannabis that had been grown exclusively in California and prepared with inputs that had not traveled in interstate commerce).

177 These problems would only be multiplied fifty-fold by any attempt to add a uniform state law as a substitute for a federal statute binding on the States.

178 *See* Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L.J. 700, 710–11, 714–18 (2010).

copies made *after* an officer has viewed that information.[179] According to Professor Kerr, the former are seizures, but the latter are not.[180] That dichotomy is subject to two main critiques. First, its doctrinal basis appears underdeveloped. Second, the difficulty of applying it in practice may render it unworkable.

First, doctrinally, Professor Kerr accepts the traditional rule that seizures necessarily involve interference with possessory interests.[181] Specifically, he argues that "[t]he law should focus on when the person loses exclusive rights to the data."[182] Yet, in saying that the key question is whether information was viewed before it was copied, his analysis does not explain why a person loses her possessory interest—i.e., her "exclusive rights"—once government officials examine her data.[183] Even if that viewing destroys her *privacy* interest, that should be irrelevant to the seizure analysis, unless the existence of a possessory interest somehow hinges on the existence of a privacy interest—which it does not.[184] Furthermore, this Note has shown that an officer's review of data would not strip an individual of her right to exclude.[185] As such, there appears to be no basis for according different treatment to copies based on whether the original data were viewed before creating the duplicates.

Second, Professor Kerr's analysis raises a number of questions that complicate its application. For instance, it is unclear exactly how much information an officer must see in order to show that a copy is an unregulated mnemonic rather than a Fourth Amendment seizure. The proposal also does not adequately explain its impact on the plain-view doctrine.[186] If an officer sees something obviously incriminating on a computer, he could seize that information without reference to Professor Kerr's rule.[187] The Kerr proposal seems to go further, ap-

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179 *See id.* at 714–15.

180 *See id.*

181 *See id.* at 705.

182 *Id.* at 712.

183 Such a result would not obtain when dealing with physical property. If an officer reads a diary, for example, he may not then take it with him based solely on the fact that he has already perused it. *See supra* Part I.A.

184 *See supra* Parts I.B.2.c, II.A; *infra* Part III.D (discussing *United States v. Jefferson*, 571 F. Supp. 2d 696 (E.D. Va. 2008), and its reliance on a hybrid possessory-privacy interest); *supra* notes 1–33 and accompanying text (discussing the differences between searches and seizures).

185 *See supra* Part I.C (discussing the right to exclude); *infra* Part III.C (discussing the right to exclude in the context of *United States v. Gorshkov*, No. CR00-550C, 2001 WL 1024026 (W.D. Wash. May 23, 2001)).

186 *See supra* note 37 (describing the plain-view exception and its uncertain application in digital-evidence cases).

187 *See id.* The exception allows an officer lawfully viewing evidence to seize it without a

parently allowing an investigator to copy computer data to reinforce his memory, even if he had not seen anything incriminating.[188] Finally, consider an agent who sees information that is written in a language in which he is not fluent. He can see the information and perhaps understand certain words and characters, but he cannot comprehend it fully. Would copying that information be a seizure?[189]

Professor Kerr's article leaves open these—and many other—"difficult cases."[190] This Note's reliance on the perfect-copy rule helps it avoid some of those cases. Furthermore, reliance on the right to exclude provides this Note with stronger doctrinal footing.[191] Although Professor Kerr and this Note reach similar conclusions, they do so by rather different paths. Because it is more doctrinally sound and more precisely defined, this Note's resolution better addresses the copying conundrum than does the Kerr proposal.

III. Application of the Proposal

Part II described the proposed rule, explained its benefits, defended it against likely critiques, and addressed a possible alternative. Full understanding, however, requires more than abstract explanation. Accordingly, the below examples apply the rule to several scenarios and thereby show how it would function in practice and how it would (and would not) change current standards.

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warrant if the evidence is both in plain view and incriminating on its face. *See* Horton v. California, 496 U.S. 128, 136–37 (1990). Professor Kerr's test does not include the incriminating-character requirement, which leaves open the possibility that an officer could copy a significant amount of data based only on vague suspicions rather than certainty of inculpation.

188 *See* Kerr, *supra* note 178, at 719 ("[C]opying an item already in plain view merely records an observation and does not add to the government's power to collect evidence, while copying an item that has not been in plain view freezes the scene and adds to the information in the government's control.").

189 One might also ask the normative question whether an act's character as a seizure *should* turn on the language in which information is recorded or language skills of the agent making the copy.

190 *See* Kerr, *supra* note 178, at 718.

191 Professor Kerr might argue that reliance on the right to exclude would necessitate a huge judicial undertaking to define the right's scope. *See id.* at 718–19 (making a similar argument with respect to the right to delete advocated by Professor Ohm). There are two responses to this critique. First, the Court already has a significant body of right-to-exclude and perfect-copy jurisprudence on which it can draw. *See supra* notes 100–39, 144–45 and accompanying text. Second, the Fourth Amendment itself is always evolving, requiring new definitions and rationales as circumstances change. As such, it is not unduly burdensome for the Court to assume responsibility for sculpting the confines of the rule proposed above.

A. Introduction Revisited

Under the proposed rule, the scenario set forth in the Introduction, in which government agents photograph an individual's documents and duplicate her hard drive, would constitute seizures of the contents of both the documents and the computer.[192] Even those documents that are in plain view would be considered seized if they were imaged, because, although their information was exposed to the view of anyone in the room, taking pictures of the documents captured an exact copy of the documents and thus eviscerated the owner's ability to exclude the government from her information. Under existing law, the initial copying and retention of the copies would be legal,[193] whereas under the proposed rule, the consented-to copying would initially be a lawful seizure and would remain so until the owner revoked consent. Once the owner revoked consent, however, continued retention by the government would be an illegal seizure because the consent was the only thing making the seizure constitutionally reasonable (and, therefore, lawful).[194] Unless the government could obtain a warrant for the copies, it would have to return them or face suppression of any evidence stemming from the copies.[195]

B. Richard A. Vaughn, DDS, P.C. v. Baldwin

Baldwin would have a different outcome under the proposed rule than it did in the actual case. In that decision, a panel of the Sixth Circuit held that IRS agents were entitled to retain copies that had been made pursuant to a taxpayer's consent, even after the taxpayer tried to revoke her consent and demand the return of the copies.[196] The panel did, however, require that the IRS return copies it had made after the revocation of consent.[197]

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192 This discussion assumes that the duplications were conducted pursuant to consent.

193 *See supra* notes 23–38 and accompanying text. *Compare* Sovereign News Co. v. United States, 690 F.2d 569, 577–78 (6th Cir. 1982) (treating photocopied records as seized property and requiring their return unless government could show they were necessary for a specific investigation), *with* United States v. Ward, 576 F.2d 243, 244–45 (9th Cir. 1978) ("Because the records were given to the IRS on March 26, 1975, and the demand for return was not made until March 31, 1975, we agree with the district court that any evidence gathered or copies made from the records during the intervening five days should not be suppressed.").

194 *See supra* notes 44–48 and accompanying text.

195 *See supra* note 56 and accompanying text.

196 Richard A. Vaughn, DDS, P.C. v. Baldwin, 950 F.2d 331, 333–34 (6th Cir. 1991).

197 *Id.* at 334. For further discussion of *Baldwin*, see *supra* notes 70–78 and accompanying text.

Under the *Baldwin* court's ruling, the IRS likely could have kept those pre-revocation copies for an indefinite period of time,[198] scrutinizing them to find even the smallest irregularity, so as to justify their efforts. Or, conversely, they could have boxed up the records and shipped them to a warehouse where they could sit, forever gathering dust and susceptible to loss, unauthorized examination, and theft. Under the proposal, however, all of the copies would have to be returned, regardless of the time at which they were created, because the taxpayer's consent was the only thing making it lawful for the IRS to keep the copies. This case thus demonstrates one of the key virtues of the proposal in that it empowers a person who has allowed government agents to duplicate her records to reassert her right to control access to her information by demanding the copies' return.

C. United States v. Gorshkov

Although the outcome in *Gorshkov* would not change based solely on the application of the proposed rule, the reasoning used to achieve that result would change significantly.[199] In that case, the district court ruled that the Fourth Amendment did not proscribe FBI agents' electronic downloading and duplication of files stored on a computer located in Russia.[200] The court held that downloading the information did not seize it because the copied information remained available to third parties who otherwise would have had access to it; in the alternative, the court also held that the Fourth Amendment did not apply extraterritorially.[201] The proposed rule would negate the court's analysis of the downloading process and would leave the decision to stand or fall on the opinion's alternate rationale.[202]

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198 *See, e.g.*, Unites States v. David, 131 F.3d 55, 59–61 (2d Cir. 1997) (holding that five-year retention of defendant's savings bonds without disposition was reasonable because the government still possessed "an interest [in the property] beyond the property's use in the criminal proceedings," namely the possibility that it might be able to use some of the bonds to offset a criminal financial penalty against the defendant); *Baldwin*, 950 F.2d at 333–34. *But see, e.g.*, *Sovereign News*, 690 F.2d at 577–78.

199 For a discussion of *Gorshkov*, see *supra* notes 82–85 and accompanying text.

200 *See* United States v. Gorshkov, No. CR00-550C, 2001 WL 1024026, at *2–3 (W.D. Wash. May 23, 2001).

201 *See id.* at *3. The court further buttressed its conclusion by holding that even if the Fourth Amendment applied, the agents' actions were reasonable because exigent circumstances existed. In addition, the court concluded that even if there were a Fourth Amendment violation, the evidence should not be suppressed because the warrant responsible for uncovering the incriminating evidence at issue was not based upon any of the copied materials; in other words, it held the independent-source doctrine applied, as well. *See id.* at *4–5.

202 *See id.* at *2–5.

The fact that multiple people had access to the information in question shows again why the proposed rule is superior to the status quo. A court operating under current law might hold that each user had no expectation of privacy in the information because others also had access to the information and that, therefore, the copying was lawful.[203] The proposed rule, however, would protect the individuals' interest in the information because the access of multiple users would not eliminate each individual's right to exclude others the way it would destroy privacy expectations. For example, if owners of data had distributed disks or hard copies of the information to those they wished to include, they would still retain the right to deny access to others, including the government, because inclusion of one person by giving her a copy of the information did not eliminate the owners' right to exclude others from that same information.[204]

D. United States v. Jefferson

The result in *Jefferson* likewise would be different under the proposed rule because the officers' notetaking, which the *Jefferson* court declared to be a seizure,[205] would not constitute a seizure under the proposed rule. One might therefore argue that, in this case, the Note's rule provides less protection than does the rule of the actual case. However, as noted above,[206] the *Jefferson* rule is simply unworkable in practice. To force on the courts the huge amounts of litigation that likely would result from such an overinclusive rule would be a result as poor as the one it sought to avoid.

In addition, several considerations demonstrate that the proposed rule is not underinclusive. First, the Fourth Amendment's protections against unreasonable search do remain as additional safeguards.[207] Also, because the proposed rule applies only in cases of information copying, the traditional Fourth Amendment seizure protections would still protect against meaningful interference with the individual's ability to use and possess the physical embodiment of her information.[208] If, for example, FBI agents sat poring over and taking notes of the contents of a person's day planner for twelve uninterrupted hours, that individual likely would have a claim that the officers had effec-

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203 *See id.* at *4 & n.2; *supra* note 22 and accompanying text.

204 *See supra* notes 100–03 and accompanying text.

205 United States v. Jefferson, 571 F. Supp. 2d 696, 704 (E.D. Va. 2008). For a discussion of *Jefferson*, see *supra* notes 91–99 and accompanying text.

206 *See supra* notes 91–99, 150–51 and accompanying text.

207 *See supra* Part I.A.

208 *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984).

tively seized her planner (and the information it contained) by depriving her of access to and use of it for that period of time.[209]

Conclusion

This Note has sought to pose a solution to the next generation of search and seizure disputes: governmental duplication of individuals' information. Given the huge amount of information stored on computers and archived in documentary records, the potential for governmental abuse is deeply troubling. And, even assuming wholly benevolent motives on the part of the police, there is still the possibility that a person's private or sensitive information could be lost, stolen, or accessed by an unauthorized third party.

Allowing police to make perfect copies and keep them indefinitely would raise the specter of general warrants, the very evil against which the Fourth Amendment was directed, and it would jeopardize both the privacy and the property of "the people" the Amendment was designed to protect. To close this loophole, the Supreme Court should recognize the right to exclude as an interest worthy of Fourth Amendment protection. Electronic communication and data mark the next great epoch of search-and-seizure jurisprudence, and the Court should adopt this Note's proposal in order to reaffirm the Framers' pledge that we the people will forevermore be free from the tyranny of general warrants and unreasonable searches and seizures.

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209 *See supra* notes 23–26 and accompanying text.