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OPTING FOR A LEGISLATIVE ALTERNATIVE TO THE FOURTH AMENDMENT EXCLUSIONARY RULE

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Daniel P. Weick**

I.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] It does not, however, specify a remedy for violations; it thus "contains no provision expressly precluding the use of the evidence obtained in violation of its commands."[2] Recalling the substantial verdicts in the celebrated cases of *Wilkes* and *Entick*,[3] the Amendment's framers contemplated a significant role for damages actions against public officials engaging in unreasonable searches. For a variety of reasons, however, victims in most cases have been unable to attract lawyers—the law of official immunity evolved to shield many such officials from personal liability, the employing entities themselves could invoke sovereign immunity, and little in the way of damages ordinarily could be expected because of the nonpecuniary harm sustained and what has been termed the "moral" characteristics of the typical potential plaintiff.[4] The damages-suit mode of redress had thus lost its salience by the time the Supreme Court began to develop the rule that improperly obtained evidence could not be used at trial. The Court came to emphasize the exclusionary rule first in cases thought to present a combination of property interests and Fourth and Fifth Amendment claims because the police had improperly seized the defendant's papers and other personal effects. Over time, the exclusionary rule evolved into a stand-alone Fourth Amendment requirement that was applied initially only to the federal

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

[2] Arizona v. Evans, 514 U.S. 1, 10 (1995).

[3] Wilkes v. Wood, 19 Howell's State Trials 1153, 98 Eng. Rep. 489 (C.P. 1763); Entick v. Carrington, 19 Howell's State Trials 1030 (C.P. 1765). As Professor Amar notes: "The Framers understood the deterrence and private attorney general concepts perfectly. As civil plaintiffs, John Wilkes and company, after all, had recovered a King's ransom from civil juries to teach arrogant officialdom a lesson and to deter future abuse." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 797 (1994).

[4] The problems facing damages actions are well explored in Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955). The emerging law of official and sovereign immunity is developed in *id.* at 502-03 and Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

government and then, as a result of the 1961 decision in *Mapp v. Ohio*,[5] held applicable to state and local governments as well.[6]

No aspect of American criminal procedure has been subject to sharper attack than the exclusionary rule. Indeed, no other country in the world has adopted a similar rule.[7] On the positive side, the rule has certainly sensitized the wider public, including law enforcement agencies, to Fourth Amendment values.[8] It has done so in large part by creating a powerful "private attorney general" mechanism for Fourth Amendment enforcement because accused offenders are keen to challenge government investigatory efforts if success can mean suppression of inculpatory evidence.[9] A related benefit is that courts are actively

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[5] 367 U.S. 643 (1961).

[6] The evolution of the case law is ably recounted in William C. Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO L.J. 799 (2000).

[7] We appear to be the only country with an automatic exclusion rule. Common law countries tend to employ a discretionary, under-all-of-the-circumstances approach. *See, e.g.*, Part I of the Constitution Act, 1982, § 24(2), being Schedule B to the Canada Act 1982, ch. 11 (U.K.) ("Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."); Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.) ("the court may refuse to allow evidence . . . if it appears that . . . the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it"). *See generally* Craig Bradley, Mapp *Goes Abroad*, 52 CASE W. RES. L. REV. 375 (2001); Bram Presser, *Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence*, 25 MELB. U. L. REV. 757 (2001).

[8] Our knowledge about the effects of the exclusionary rule has not advanced much further than was the case in 1970. *See* Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665. A limited effect is reported in Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585 (1983) (data collected from 7500 cases in a nine-county study of criminal courts in three states; motions to suppress physical evidence were filed in fewer than 5% of cases, with successful motions occurring in 0.6% of cases; and unsuccessful motions had limited impact on subsequent plea bargaining). A more significant impact is suggested by U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 2 (1982) (Los Angeles county prosecutor denied prosecution in 32.5% of all felony drug arrests because an initial review showed an improper search or seizure). Studies reporting on surveys of police officers found general, though flawed, police officer awareness of Fourth Amendment requirements. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991) (survey of 547 officers in several police departments); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (interview of twenty-six officers in one Chicago police department); L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1998) (questionnaires sent to 1144 law enforcement officers in Ventura County, California yielding 411 responses).

[9] *See* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 114 (2003) ("Currently, absent the exclusionary rule, there are almost no incentives for the police to be good

involved in developing a substantial body of Fourth Amendment jurisprudence that provides guidance for law enforcement agencies and others.

The principal downside of an exclusionary rule regime, on the other hand, is captured well by then-Judge Cardozo's observation that "[t]he criminal is to go free because the constable has blundered."[10] The prospect of suppression is thought to be so problematic that it acts as a negative hydraulic causing judges to distort substantive Fourth Amendment law in order to avoid this consequence. Relatedly, courts rarely are compelled to consider the interests of the innocent victim of unlawful searches or other police misconduct because their gaze is so riveted on accused offenders seeking to exclude incriminatory evidence without regard to their underlying conduct.[11]

Without adding to the mountain of writings on the merits of the exclusionary rule, this paper assumes that alternatives to the rule should be seriously considered and offers a proposal that may perhaps facilitate such consideration. One important reason for receptivity to alternatives to exclusion is the path the Supreme Court has taken, soon after *Mapp*, moving away from a conception of the exclusionary rule as an integral part of the constitutional guaranty to one that views exclusion entirely in terms of its role as an effective deterrent to police misconduct. The Supreme Court's recent decision in *Herring v. United States*[12] suggests that where police are not engaging in willful misconduct a majority of the Justices will not apply the exclusionary rule even when deterrence is plausible.[13] The violation in that case sprang from negligent record keeping—presumably an activity that could be deterred—but Chief Justice Roberts' opinion for the Court found that any deterrence value was outweighed by the social costs of exclusion.[14] *Herring* is only the latest in a series of Supreme Court decisions suggesting that the exclusionary rule may be hanging on the ropes.

Our proposal for an alternative to the exclusionary rule differs from others in that while damages actions are retained, it proposes a regulated experiment—crafted and enacted into law by Congress pursuant to its Section 5 power to enforce the Fourteenth Amendment—whereby federal, state and local law enforcement agencies can operate free of the exclusionary rule if they develop internal mechanisms to deter police misconduct. The central focus would be on promoting systematic police compliance with the Fourteenth Amendment rather than addressing individual violations.

To help frame the discussion, consider the following formulation of our proposal:

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actors, and in the absence of such incentives, teaching and preaching are not going to have much of an effect.").

[10] People v. Defore, 242 N.Y. 13, 21 (1926).

[11] *See* William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443 (1997).

[12] 129 S. Ct. 695 (2009).

[13] Language in the majority opinion is effectively scored by Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009).

[14] *Herring*, 129 S. Ct. at 704.

Application for Review and Certification of Effectiveness of Alternative Remedial System for Fourth Amendment Violations

(a) The Department of Justice ("Department") is authorized to review and certify applications by federal, state and local law enforcement agencies ("Agency") seeking a declaration that the Agency has adopted and is able to implement an effective system for deterring and remedying Fourth Amendment violations committed by its personnel or those acting on its behalf.

(b) A certification authorized by Subsection (a) shall issue only if the Department determines that the Agency
(1) has or will (upon certification) put in place
(i) a regularly updated, publicly accessible registry of all searches and seizures by the Agency, including all search, seizure and arrest warrants issued at its behest, and all complaints from members of the public and Agency actions taken in response to those complaints;
(ii) quality and conduct standards for Agency personnel, including annual training requirements and a discipline schedule for repeated Fourth Amendment violations (up to and including termination of employment); and
(iii) an ombudsman's office to review complaints from members of the public and to monitor compliance with this provision; and
(2) has provided for a legally effective compensation system, waiving all sovereign and official immunity, enabling victims of Fourth Amendment violations by the Agency to bring an individual or class action suit for appropriate injunctive relief and special damages (on a schedule approved by the Department) against the Agency.

(c) Any certification authorized by Subsection (a) will have effect for one year only, subject to an annual renewal process as authorized by Department regulations.

(d) A certification authorized by Subsection (a) reflects the Department's considered determination that in light of the Agency's system for deterring and remedying Fourth Amendment violations, it is not necessary for any court within the United States to exclude any evidence because it has been obtained by the Agency in violation of the Fourth Amendment. A certification authorized by Subsection (a) shall be reviewable in the ordinary course by a court of appropriate jurisdiction.

The program would be entirely voluntary, open to federal, state or local law enforcement agencies interested in operating free of the exclusionary rule. Congress would authorize the Department of Justice to craft standards for evaluating training and disciplinary regimes. Participating law enforcement agencies (which in an appropriate case could include an entire state) would be required to submit training and discipline policies consistent with the Department's requirements. In order to provide information necessary to meaningful monitoring of the agency's compliance, participating agencies would

have to maintain a periodically updated, publicly accessible registry of all searches and seizures conducted by the agency's personnel, including warrants issued at the agency's behest and complaints received from the public.[15] In addition, participating agencies would have to agree to a schedule of damages sufficient to motive private damages actions systematic violations as well as provide compensation for dignitary harms visited on victims.

Certifications would be annually renewed and subject to judicial review in the ordinary course. Presumably, victims of unlawful searches would still try to initiate a suppression hearing and whether they succeed would depend on judicial acceptance of the certification as reflecting an effective alternative to the exclusionary rule. States which decline to participate or which do not develop adequate training and enforcement plans would continue to be bound by the Fourth Amendment exclusionary rule.

II.

The legal framework for our proposal is based on two lines of cases. First, although the Court has never expressly stated that it will entertain alternatives to the exclusionary rule, our reading of the post-*Mapp* case law is that the Court views the exclusionary rule as a remedial device for enforcing the Fourteenth Amendment that is constitutionally required only in the absence of an effective remedial alternative to exclusion.[16] Second, our proposal must work within the constraints imposed by the Court on Congress's authority under Section 5 of the Fourteenth Amendment to define remedies for constitutional violations.

A.

Exclusion as a remedy for Fourth Amendment violations originated in *Weeks v. United States*, where the Court held the remedy applicable in federal cases.[17] After initially refusing to do so in *Wolf v. Colorado*,[18] the Court

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[15] Stops authorized under *Terry v. Ohio*, 392 U.S. 1 (1968), would not need to be listed unless they resulted in a search.

[16] *See generally* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 9-10 (1975) ("To what extent can the Court insist upon adherence to constitutionally inspired, but not compelled, rules without considering as decisive whether the state has provided minimally satisfactory alternatives? Can the Court, in other words, create a sub-order of 'quasi-constitutional' law—of a remedial, substantive, and procedural character—to vindicate constitutional liberties? If the Supreme Court is not mistaken in its insistence on the application of the exclusionary rule in state cases—and it seems too late in the day to conclude that it is—I think we are driven to conclude that the Court has a common law power."). Professor Monaghan's article was cited in *Stone v. Powell*, 428 U.S. 465, 486 n.22 (1976), for the proposition that the "imperative of judicial integrity" rationale for the exclusionary rule plays a limited role in explaining the application of the rule in particular cases.

[17] 232 U.S. 383, 398 (1914).

[18] 338 U.S. 25 (1949). Interestingly, *Wolf* was the first decision of the Court to characterize exclusion as a deterrent remedy and almost invited legislative alternatives:

extended the Fourth Amendment exclusionary rule to the states by way of the Fourteenth Amendment in *Mapp v. Ohio*.[19] Although not a model of analytical clarity, Justice Clark's opinion for the Court, fairly read, suggests a reading of the exclusionary rule as an integral part of the Fourth Amendment. The Court stated that exclusion was more than a rule of evidence or common law remedy, and that *Weeks* had found that "the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction if obtained by government officers through a violation of the amendment."[20] The Court previously had justified non-imposition of the exclusionary rule on the states to give them an "'adequate opportunity to adopt or reject the (*Weeks*) rule,'"[21] but in *Mapp* it decided the states had enjoyed opportunity enough. The Court found it time to "close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of [the Fourth Amendment]" and held "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[22] Ultimately, the Court held the exclusionary rule was constitutionally grounded for otherwise application to the states could not be justified:

> The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent . . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient . . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment . . . .[23]

On the other hand, the *Mapp* Court also gave expression to the deterrence rationale suggesting that exclusion was constitutionally required because it was the "only effectively available way" to enforce the constitutional guaranty: "[T]he purpose of the exclusionary rule 'is to deter—to compel respect for the

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> [W]e have no hesitation in saying that were a State affirmatively to sanction . . . police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.

Id. at 28. Justice Black, concurring, stated: "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40.

[19] 367 U.S. 643 (1961).

[20] *Id.* at 649 (quoting Olmsted v. United States, 277 U.S. 438, 462 (1928)).

[21] *Id.* at 654 (quoting Irvine v. California, 347 U.S. 128, 134 (1954)).

[22] *Id.* at 654-55.

[23] *Id.* at 655-56.

constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[24] Shortly thereafter, explaining for the Court in *Linkletter v. Walker* why the *Mapp* rule would not be applied retroactively, Justice Clark, *Mapp*'s author, reaffirmed the deterrence theme: "Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[25]

Mapp's "essential part of the right to privacy" view of the exclusionary rule was relatively short lived. By the 1970s, the Court had shifted to the view that exclusion was not part of the constitutional right but was a "judicially created remedy" for enforcing the right and the Court therefore would not extend the rule to other areas. The shift was first announced in *United States v. Calandra* in which the Court declined to apply the exclusionary rule to grand jury proceedings.[26] The Court explained: "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[27] Pointedly, the Court acknowledged, the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[28] Exclusion was subject to a sort of cost-benefit analysis: "We must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context."[29] *Calandra* thus struck a tone markedly different from the language used in *Mapp* and laid the groundwork for further limitations on the exclusionary rule.

Having put itself firmly on the deterrence road, the Court expressed deep skepticism regarding the efficacy of the exclusionary rule even for deterrence in *United States v. Janis*.[30] In that case, the Court held that evidence obtained by state officials in violation of the Fourth Amendment could be used by federal officials in a later civil tax case.[31] Regarding the empirical evidence as inconclusive, the Court observed:

> If the exclusionary rule is the "strong medicine" that its proponents claim it to be, then its use in the situations in which it is now applied . . . must be assumed to be a substantial and efficient deterrent. Assuming this efficacy, the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence,

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[24] *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
[25] 381 U.S. 618, 636-37 (1965).
[26] 414 U.S. 338, 354 (1974).
[27] *Id.* at 347.
[28] *Id.* at 348.
[29] *Id.* at 349.
[30] 428 U.S. 433 (1976).
[31] *Id.* at 454.

> then, clearly, its use in the instant situation is unwarranted. Under either assumption, therefore, the extension of the rule is unjustified.[32]

This is a remarkable statement of judicial skepticism regarding the efficacy of exclusion and wariness of the substantial social costs inherent in exclusion of otherwise probative evidence. A similar theme pervades the subsequent rulings holding exclusionary rule claims may not be invoked in federal habeas petitions[33] and that illegally obtained evidence may be used to impeach a witness on cross-examination.[34]

The 1984 decision in *United States v. Leon*[35] further evidenced exclusionary rule skepticism. This case carved out the so-called "good faith" exception, finding that the exclusionary rule does not "bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause."[36] The Court quickly dispatched the expansive *Mapp*-era language: "Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment or that the rule is required by the conjunction of the Fourth and Fifth Amendments. These implications need not detain us long."[37] The Court explained that this "Fifth Amendment theory has not withstood critical analysis or the test of time"[38] and that "the Fourth Amendment 'has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons.'"[39] It then reprised its disquiet over the exclusionary rule:

> The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern . . . . An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.[40]

The Court went on to hold that "our evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a

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[32] *Id.* at 453-54.
[33] Stone v. Powell, 428 U.S. 465, 494 (1976).
[34] United States v. Havens, 446 U.S. 620, 628 (1980).
[35] 468 U.S. 897 (1984).
[36] *Id.* at 900.
[37] *Id.* at 905-06 (internal citations omitted).
[38] *Id.* at 906.
[39] *Id.* (quoting Stone v. Powell, 428 U.S. 465, 486 (1976)).
[40] *Id.* at 907-08.

warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case in chief."[41]

The Rehnquist Court further advanced the conceptual shift away from *Mapp*. *Pennsylvania Board of Probation & Parole v. Scott* held that the exclusionary rule is never applicable to illegally seized evidence introduced in state parole revocation hearings.[42] Reasoning that "the rule is prudential rather than constitutionally mandated," the Court found that the social costs of the exclusionary rule require that its use be confined to criminal trials.[43]

The Roberts Court gave an initial indication of the direction it would take in *Hudson v. Michigan*, holding that violations of the "knock-and-announce" rule, which requires police to identify themselves and give the occupant of a residence a reasonable opportunity to open the door before they break it down, would not result in the imposition of the exclusionary rule.[44] The Court described exclusion as a "massive remedy" resulting in the "jackpot" of a "get-out-of-jail-free card."[45]

The Court followed with *Herring v. United States*. Herring was arrested by Alabama police who believed that there was a warrant out for his arrest for "failure to appear on a felony charge."[46] Unknown to the officers, the warrant had been rescinded and remained in the system because of negligent record-keeping.[47] The officers searched the petitioner's car incident to arrest and discovered illegal drugs and a pistol.[48] While there was no further state prosecution, the evidence was handed over to federal authorities, and Herring was convicted in federal court of possession of a controlled substance and possession by a felon of a firearm.[49]

In a 5-4 decision, the Court held that the Fourth Amendment exclusionary rule did not apply to a warranted search where the violations were in good faith and due to negligent record-keeping.[50] This particular holding is not remarkable, but the sweep of the Court's language is. Consistent with the trend of post-*Mapp* decisions, the Court announced a multi-factored balancing test for deciding when the exclusionary rule would apply. First, imposition of the exclusionary rule must "result[] in appreciable deterrence."[51] Second, "the benefits of deterrence must outweigh the costs" of exclusion, namely "letting guilty and possibly dangerous defendants go free."[52] The next factor was law enforcement culpability, with the Court observing that "[t]he extent to which the exclusionary

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[41] *Id.* at 913.
[42] 524 U.S. 357, 369 (1998).
[43] *Id.* at 363-64.
[44] 547 U.S. 586 (2006).
[45] *Id.* at 595.
[46] *Id.* at 698.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 699.
[50] *Id.* at 704.
[51] *Id.* at 700 (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).
[52] *Id.* at 700-01.

rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct."[53] The Court essentially limited *Weeks* and *Mapp* to their facts by pointing out the police conduct in those cases was "patently unconstitutional" and a "flagrant" violation of constitutional rights.[54] The Court then summarized its test: "[T]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[55]

Two cautions are in order when evaluating *Herring*. First, its holding is a fairly straightforward extension of the rule from *Arizona v. Evans*[56] that a violation of the Fourth Amendment caused by the record-keeping errors of court employees falls within the good-faith exception to the exclusionary rule. Also, given Justice Kennedy's prior concurrence in *Hudson v. Michigan*,[57] it does not appear that a majority of the Court is prepared to eliminate the rule entirely. At the same time, *Herring* is the clearest indication that five Justices view the exclusionary rule as at best a necessary evil.[58] And that provides grounds for believing that the Court would be open to a serious alternative Fourth Amendment enforcement scheme that does not pose the danger of letting guilty offenders go free.

B.

Any suggestion that we should look to Congress to fashion an alternative to the exclusionary rule must meet the Court's delineation of the metes and bounds of Congress's authority in the area of constitutional remedies and criminal procedure. The two key cases for our purposes are *City of Boerne v. Flores*, which provides the test for evaluating congressional attempts to enforce constitutional rights,[59] and *Dickerson v. United States*, which limits Congress's authority to rescind constitutional criminal procedure requirements recognized by the Court, at least where no effective alternative is provided in their place.[60]

The *Boerne* case concerned an attempt by Congress to overcome the Supreme Court's holding in *Employment Division v. Smith* that neutral laws of general applicability, which incidentally burden the free exercise of religion, are subject to deferential rational-basis review.[61] Congress responded by enacting

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[53] *Id.* at 701.
[54] *Id.* at 702.
[55] *Id.*
[56] 514 U.S. 1 (1995).
[57] *See* 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").
[58] Four Justices dissented, arguing for "'a more majestic conception' of the Fourth Amendment and its adjunct, the exclusionary rule." 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting *Evans*, 514 U.S. at 18 (1995) (Stevens, J., dissenting)).
[59] 521 U.S. 507 (1997).
[60] 530 U.S. 428 (2000).
[61] 494 U.S. 872 (1990).

the Religious Freedom Restoration Act ("RFRA") under its Section 5 of the Fourteenth Amendment enforcement authority. Congress in RFRA sought to "enforce" the Free Exercise Clause by essentially requiring states and localities to offer religious exemptions from generally applicable laws.[62] In effect, RFRA was an attempt to overrule *Smith* by statute.[63] When a city in Texas denied a building permit to a Roman Catholic church under a historic landmarks ordinance, the local bishop sued and the question of whether RFRA exceeded Congress' Section 5 authority came before the Court.[64] The Court conceded that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[65] Here, however, Congress had exceeded its authority because it was altering the definition of the Free Exercise right, and "Congress does not enforce a constitutional right by changing what the right is."[66] Congress can employ strong remedies—as it did with the Voting Rights Act—but "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[67] Legislation altering the standard for reviewing an infringement of Free Exercise rights was essentially a usurpation of the Court's authority to define the scope of constitutional rights, and the Court thus held the RFRA provisions at issue unconstitutional.[68]

Dickerson presented the problem of Congress attempting to override a previously announced constitutional right:[69] namely, an attempt to eliminate the warnings requirement of *Miranda v. Arizona*[70] by putting in its place the voluntariness test[71] *Miranda* had held constitutionally deficient because it needed to be supplemented by express warnings of the right to remain silent and the right to counsel.[72] The *Dickerson* Court flatly rejected the congressional move: "Congress may not legislatively supersede our decisions interpreting and applying the Constitution"[73] and stated that the *Miranda* rule was not a mere prophylaxis against constitutional violations but was itself a constitutional rule.[74]

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[62] *Boerne*, 521 U.S. at 515-16.
[63] For an evaluation of *Boerne* on this point, see Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique,* Morrison*, and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 125 (2000).
[64] *Boerne*, 521 U.S. at 512.
[65] *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).
[66] *Id.* at 519.
[67] *Id.* at 520.
[68] *Id.* at 536.
[69] 530 U.S. 428 (2000).
[70] 384 U.S. 436 (1966).
[71] *See* 18 U.S.C. § 3501 (2006).
[72] *Miranda*, 384 U.S. at 444.
[73] 530 U.S. at 437.
[74] The *Dickerson* Court was also troubled by the absence of an "effective" alternative to the warnings requirement for securing Fifth Amendment rights. *See id.* at 440-43.

The proposal outlined in this paper, in our view, meets the requirements for proper congressional Section 5 action set out in *Boerne* and *Dickerson*. As to the *Boerne* issue, we do not suggest that Congress expand or redefine Fourth Amendment rights: Congress here would be providing an alternative remedy for the exclusionary rule and that alternative would ultimately have to meet with Supreme Court approval. *Dickerson* is also not a problem because *Herring* made clear that the Court now views the exclusionary rule as a "judicially created rule" that safeguards the Fourth Amendment right but is not itself mandated by the Constitution.[75]

III.

We propose that Congress, acting under its power under Section 5 of the Fourteenth Amendment, enact an alternative to the exclusionary rule that would be available on a voluntary basis for federal, state and local law enforcement agencies to opt into if they receive certification from the Department of Justice that they have put in place an effective system to deter and remedy Fourth Amendment violations. States would, of course, remain free to continue with an exclusionary rule regime.

Congress is well situated to fashion an alternative enforcement mechanism for Fourth Amendment rights.[76] Choice of remedy should reflect legislative fact finding and a considered determination of which mechanisms stand the best chance of ensuring compliance while minimizing the cost of enforcement to society. That is classically a legislative role, as the Court has recognized in other contexts such as the so-called *Bivens* action against federal officials for constitutional violations.[77]

At the core of our proposal is the view that the mechanism for enforcing the Fourth Amendment should focus on promoting the social goal of a law enforcement system that respects constitutional rights rather than providing a benefit to individual defendants. To that end, legislation should focus on structural reforms that will substantially further Fourth Amendment compliance. Law enforcement agencies seeking certification would need to develop training and disciplinary regimes to help officers know and internalize the limits on their authority. Participating agencies would also need to maintain a publicly accessible registry of the searches conducted by law enforcement, including an

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[75] Herring v. United States, 129 S. Ct. 695, 699 (2009).

[76] Conceivably, the states might be able to establish a certification system of their own, without awaiting federal legislation and Department of Justice certification. The absence of federal oversight would detract from the deference owed state certifications but would not necessarily doom such a program.

[77] *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (direct cause of action for damages under the Constitution for Fourth Amendment violations). The Court indicated in *Bivens* that the constitutional damages remedy it was recognizing might have to give way in the face of an "explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397.

account of complaints from the public and the actions taken with respect to those complaints. Certification would also require consent to a schedule of exemplary damages coupled with a waiver of sovereign and official immunity permitting suit against the government entity employing the law enforcement official under Section 1983 or other law.[78] All of this should be subject to monitoring by a mandatory ombudsman's office and the Department of Justice.[79] And all certifications by the Department would be subject to judicial review in the ordinary course.

Training and Disciplinary Requirements

The first element of our proposal would be for state and local officials to develop and submit for review by the Department of Justice a comprehensive plan for training police in Fourth Amendment compliance and for appropriately disciplining officers who commit violations. Two basic criteria would seem in order: First, the training aspect of the plan should enable police officers to know and understand limits on their authority to search and arrest, and have this message reinforced periodically. Second, the disciplinary aspect should provide for graduated sanctions of sufficient severity (up to and including suspension or dismissal from the police force) to ensure that officers' incentives are properly aligned towards compliance with the Fourth Amendment.

In order to achieve the first goal, state and local authorities would presumably continue to integrate instruction on constitutional criminal procedure rules into their police academies and similar training programs. This could be supplemented by continuing education requirements for police and conditioning promotions on satisfactory performance on testing results.

The disciplinary plan should be linked to a mechanism for receiving civilian complaints of illegal searches and seizures with an independent office to investigate and pursue such complaints. While isolated instances of misconduct could be handled by counseling, repeated or intentional violations should result in substantial discipline like removal from patrol or ejection from the police force.

Public Reporting Requirements

Law enforcement agencies participating in this program also should be required to publicly report the locations and other identifying details of their searches and arrests, as well as complaints from the public and how those complaints were handled. This would achieve two important goals. First, it would help ensure transparency in the handling of Fourth Amendment

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[78] Participation in the alternative remedy would constitute a waiver of state sovereign immunity under the Eleventh Amendment, and, in any event, Congress' Section 5 enforcement authority permits it to abrogate state sovereign immunity to enforce constitutional rights. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

[79] For certification of federal law enforcement agencies, Congress should consider establishing a separate agency not responsible for law enforcement.

complaints by creating a source of information for the public to monitor the extent of compliance. Second, the registry would provide a critical substitute for the *Mapp* suppression hearing to keep account of instances of police misconduct, itself laying a predicate for possible systemic litigation.

Participating law enforcement agencies would also be required to establish an ombudsman's office to review complaints from members of the public and monitor compliance with certification requirements.

Monitoring by the Department of Justice

All of the actions required by a state or law enforcement agency's plan would be reviewed and approved in the first instance by the Department of Justice.[80] Certifications would last for a year unless renewed by the Department after reviewing the search and seizure data and making compliance recommendations.[81] In addition, the Department could look to existing authority to bring suits seeking injunctive relief against jurisdictions or agencies with systematic compliance problems. At the least it could decline to renew a certification if the jurisdiction did not implement its plan; this would have the effect of reinstating that jurisdiction's exposure to the exclusionary rule. The Department's failure to renew a certification would not be reviewable.[82]

Damages Actions for Systematic Violations

As a further condition of certification, participating agencies would also have to agree to a schedule of special damages—a penalty for each violation set low enough to avoid stimulating numerous individual suits but high enough that by the time a jurisdiction accumulates a significant number of violations a class action is economically viable.[83]

In addition to remedies for systematic violations, the schedule should authorize nontrivial damages for all victims of Fourth Amendment violations, including those who are never charged or later found innocent of wrongdoing. In

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[80] This might, in some respects, be analogized to the Department's preclearance role under the Voting Rights Act.

[81] Methods for sorting through the potentially large amount of data can be developed in consultation with other agencies and/or private sector professionals experienced in conducting compliance monitoring and auditing. While it would likely be impractical to review every search or seizure in many jurisdictions, the Department could review a representative sample to assess compliance.

[82] The Department of Justice under different administrations will exhibit different views of the importance of Fourth Amendment compliance, and conceivably in some administrations certifications may issue too easily. There would be a built-in incentive, however, not to dilute the integrity of the certification process because such actions would also diminish judicial acceptance and hence ultimately undermine the entire endeavor.

[83] Any commonality requirement to class action treatment would likely be satisfied by the fact that the action would concern claims of noncompliance with the same Department of Justice certification.

this latter set of cases, the privacy violation and property rights infringement inherent in a Fourth Amendment violation are compounded by the dignitary harm to the innocent of being treated as a criminal.

A condition of certification would be the participating jurisdiction's waiver of any sovereign or official immunity to any damages action for Fourth Amendment violations. Jurisdictions would have discretion whether to provide a legally effective action against the employing entity with any recovery to be obtained from its treasury, or to be remitted to Section 1983 actions against the public official, provided that in the latter case recovery would be obtained from the jurisdiction's funds.[84]

Judicial Review and Potential Re-imposition of the Exclusionary Rule

The Department of Justice's certifications would be reviewed in the ordinary course. Presumably, an alleged offender would seek suppression of the fruits of an unlawful search or seizure. A certified law enforcement agency would then introduce the Department's certification to bar exclusion. If such a bar is found, the defendant would be able, to the extent available under existing law, to seek appellate and habeas review of the determination after conviction. If the court rules in the suppression hearing that the evidence must be excluded notwithstanding the certification, either because the standards for certification did not provide an effective alternative remedy or because of noncompliance with those standards, this would be a ground for review to the extent successful suppression motions are reviewable under present law. Over time, once the Supreme Court weighs in, the system should develop fairly predictable criteria for Justice Department certification and judicial approval.

Assessment of the Proposal

Our proposed alternative remedial scheme should provide effective deterrence of Fourth Amendment violations with fewer social costs than the exclusionary rule. It would promote compliance more directly by creating incentives for law enforcement agencies to establish and refine internal systems more likely to lead to internalization by police officers of constitutional norms than ex post suppression hearings. It would engage Congress, the Department of Justice, state legislators, and federal, state and local law enforcement agencies in the process, and thereby reduce the sense that Fourth Amendment rights are merely "technicalities" thought up by lawyers and imposed by judges. The damages remedy would provide financial incentives to bring actions to promote systematic compliance with the Fourth Amendment, and provide innocent victims of Fourth Amendment violations, including those who are never charged, with a substantial recompense. There would also perhaps be less incentive than

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[84] One discrete benefit of our proposal is that it avoids the need for advisory opinions in light of the Supreme Court's official immunity jurisprudence. *See generally* Alschuler, *supra* note 13.

that provided by the exclusionary rule to distort substantive Fourth Amendment jurisprudence.[85]

Nevertheless, our proposal is not a panacea. The Department of Justice would be required to take the initiative and any success would depend on its commitment both to Fourth Amendment values and the certification process. Low-level and isolated violations of the Fourth Amendment would generally go unremedied save for professional sanctions for the officers involved. This is particularly true in light of the loss of individual offenders' incentives to raise and press claims of Fourth Amendment violations, which is inherent in any system that moves away from an exclusion of evidence remedy. Likewise, the damages remedy may end up suffering from juror reluctance to impose sanctions on law enforcement officials,[86] although the focus on cases raising systemic violations and those brought by innocent victims may help overcome such reluctance.

From the other side, there may not be enough incentives in this program to motivate all jurisdictions to seek certification. The maintenance of a registry may be especially costly and difficult to monitor. Despite these potential problems, we believe our proposal is on balance the best alternative to the exclusionary rule for ensuring police compliance with the Fourth Amendment and thereby preventing violations.

IV.

Alternative remedies to exclusion abound in the literature. Other common law jurisdictions use a more limited exclusionary rule that is discretionary with the trial judge rather than automatic upon finding a specific violation.[87] This discretionary model is not designed as a substitute for an American-style exclusionary rule because its purpose is to ensure the fairness of trials, not to deter Fourth Amendment-type violations. American rules of evidence already provide a legal basis for excluding misleading evidence or evidence whose provenance cannot be established,[88] so the goal of an alternative to the Fourth

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[85] Some have suggested that widespread acceptance of our proposal would result in very little Fourth Amendment law being made. We think this unlikely given the availability of judicial review of certifications and the likely increase in tort actions for systemic violations. In any event, the players in the system have nearly five decades of post-*Mapp* Fourth Amendment jurisprudence to work with for purposes of training and guidance. Should there emerge a wholly new area for application of Fourth Amendment principles, as occurred in *Katz v. United States*, 389 U.S. 347 (1967), courts ultimately will make the coverage/applicability decision.

[86] It is worth considering, though beyond the scope of this paper, whether participating jurisdictions could provide an administrative damages remedy in lieu of non-immunized exposure to a Section 1983 or like action. One reason the victim community might be receptive to such an approach is that it addresses the problem of jury insensitivity to Fourth Amendment violations. *Cf.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).

[87] *See supra* note 7.

[88] *See, e.g.*, FED. R. EVID. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or misleading the jury").

Amendment exclusionary rule must be to deter violations rather than duplicating the work of the rules of evidence.

A prominent scholarly attempt to displace the exclusionary rule as the remedy for Fourth Amendment violations is Akhil Reed Amar's 1994 article calling, in its place, for a reinvigorated tort remedy for Fourth Amendment violations.[89] Amar also urged a doctrine of "constitutional reasonableness," higher than ordinary tort law reasonableness, as the standard of liability for Fourth Amendment violations.[90] This legal doctrine would be accompanied by elimination of qualified immunity and other official privileges and enhanced by the availability of punitive damages and presumed damages to make individual tort suits economically viable.[91]

Professor Amar's proposal is, in our view, both underinclusive and overinclusive. As for the former, his proposal leaves out the internal quality and performance standards that are critical to the process of internalization of constitutional strictures by law enforcement personnel. As for the latter, insufficient attention is paid to the social costs of damages actions against public officials.[92] Making individual actions routine (rather than occasional use of damages actions for systematic violations or innocent victims) would create at least as many problems as it solves, by distracting public officials from the core of their duties and potentially chilling the legitimate conduct of law enforcement in investigating crimes. Further, it is unlikely that the prospect of crushing damages judgments on police officers (even with state indemnification) in cases involving criminal offenders would be any more politically palatable, or acceptable to juries, than exclusion of evidence has proved to be.

Other proposals have emerged from time to time. Donald Dripps has argued in favor of a contingent exclusionary rule, in which prosecutors would have to choose between accepting exclusion of evidence obtained through violations of the Fourth Amendment or accepting imposition of a damages judgment against the state under a regime of statutory damages.[93] Unfortunately, this proposal is excessively attached to giving individualized benefits to accused criminals, and it is doubtful that monetary payments to offenders will be more politically palatable than evidence exclusion.

Judge Guido Calabresi has suggested altering the then-mandatory federal Sentencing Guidelines to create a sentence reduction for Fourth Amendment violations, thereby compensating defendants while not permitting them to avoid conviction altogether.[94] This suggestion is not readily transferable to most state systems, which lack formal guidelines and, as is true of the federal system at this

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[89] Amar, *supra* note 3.
[90] *Id.* at 801-11.
[91] *Id.* at 811-16.
[92] *See generally* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedures, and the Social Costs of Damages Litigation Against Public Officials*, 83 N.Y.U. L. REV. 911 (2008) (detailing the cost to society of damages actions against public officials in terms of the extensive litigation costs and other indirect costs beyond any actual damages paid).
[93] Donald Dripps, *The Case for a Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001).
[94] Calabresi, *supra* note 9, at 116-17.

point, afford trial judges broad discretion to impose sentences within the statutory minima and maxima. It also does little to deter Fourth Amendment violations, as sentencing adjustments for offenders are not likely to have much impact on officials who violate the Fourth Amendment.

More recently, Alicia M. Hilton has argued that—in addition to various administrative changes—prosecutors should be required to report police violations of Fourth Amendment rights to the courts, and the courts should in turn use sanctions to prohibit repeat violators from conducting searches.[95] This proposal seeks an administrative role for courts to supervise police that courts are not particularly well situated, and are not likely, to assume.

We believe the time has come for Congress to get involved by formulating a comprehensive alternative regime to the exclusionary rule by using its Section 5 authority to enforce the Fourth and Fourteenth Amendment guarantees. In contrast to other proposals, we seek to balance the need for a damages remedy with the practical reality that juries will be unwilling to impose damages for all but the most serious violations. Our focus is not on the courts but on law enforcement agencies taking seriously their internal administration of *ex ante* training and quality standards, which would better provide for the systematic prevention of Fourth Amendment violations. We believe this would offer a better alternative to evidence exclusion by promoting Fourth Amendment compliance without incurring the social costs of setting criminals free.

V.

As the Court is losing faith in the workability of the exclusionary rule, we believe it has created a space for Congress to enter and promote Fourth Amendment compliance. A remedial system that avoids the problems of granting immediate benefits to criminals—up to and including a "get-out-of-jail-free card"—would have the virtue of preserving important constitutional liberties while avoiding the counter-intuitive, and socially corrosive, result of rewarding criminals for police mistakes. States with robust exclusionary rule traditions could continue without participating in this alternative remedy. For those jurisdictions that participate in our proposed program, we believe our proposal would bring about a level of Fourth Amendment compliance at least equal to that present in an exclusionary-rule regime without the social cost of setting criminals free because of evidence exclusion due to improper police behavior.

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[95] Alicia M. Hilton, *Alternatives to the Exclusionary Rule After* Hudson v. Michigan*: Preventing and Remedying Police Misconduct*, 53 VILL. L. REV. 47 (2008).