Can The American People, Through Their Legislature, Determine What Remedy Should be Available for Fourth Amendment Violations?

Kevin R Pettrey, George Mason University
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“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.”

INTRODUCTION

The Fourth Amendment protects against unreasonable searches and seizures and requires that government agents obtain a warrant from a neutral magistrate before violating an individual’s reasonable expectation of privacy. The Fourth Amendment has not always mandated exclusion of evidence which has been illegally obtained. However, in 1913 the Supreme Court held that illegally obtained evidence cannot be introduced against a criminal defendant in federal court, and in 1961 the Supreme Court ruled that states must exclude illegally obtained evidence. With the Supreme Court’s recent decision in Herring v. United States this may be about to change. If the Court has determined that the Fourth Amendment does not mandate exclusion, then Congress could establish alternative remedies for Fourth Amendment violations.

1 U.S. CONST. amend. IV.
3 See, e.g., Wolf v. Colorado, 338 U.S. 25, 33 (1949) (“in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”).
6 O’Neill, supra note 4, at 219-21 (“Congress could reinvigorate efforts to supplement the exclusionary rule as a remedy for Fourth Amendment violations.”).
7 Id.
This essay analyzes what remedy Congress can and should establish for Fourth Amendment violations. Part I will briefly examine the cases that established the Exclusionary Rule, as well as two recent cases that have spurred discussion regarding the Exclusionary Rule’s proper place in Fourth Amendment jurisprudence, and conclude with an analysis of why the Exclusionary Rule is an improper remedy for Fourth Amendment violations. Part II will discuss two situations in which Congress has attempted to legislate on constitutional protections in the criminal arena, with two different results. Finally, Part III will examine which branch, the Legislative or the Judicial, has the power to determine what remedy should be used when the Fourth Amendment is violated.

PART I: THE EXCLUSIONARY RULE

A. THE CASES ESTABLISHING THE EXCLUSIONARY RULE

The Supreme Court first held that illegally obtained evidence is inadmissible against a criminal defendant in *Weeks v. United States*.\(^8\) *Weeks* was a criminal case which involved both state and federal law enforcement officials.\(^9\) While Mr. Weeks was away at work, state law enforcement officers entered his home without a warrant and carried away various papers and articles.\(^10\) These officers then turned the papers and articles over to a U.S. Marshal.\(^11\) Without first obtaining a warrant, state officers arrested Mr. Weeks while he was at work.\(^12\) Then the Officers returned to Mr. Weeks’ home with a U.S. Marshal, who searched, without a warrant, for additional evidence and seized several letters and envelopes.\(^13\)

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\(^8\) 232 U.S. 383 (1914).
\(^10\) *Id.*
\(^11\) *Id.*
\(^12\) *Id.*
\(^13\) *Id.*
Before trial Mr. Weeks filed a “Petition to Return Private Papers, Books, and Other Property” with the trial court.\textsuperscript{14} Mr. Weeks argued in the Petition that his constitutional rights had been violated, and would be violated, if the property was not returned.\textsuperscript{15} The trial court ordered the district attorney to return Mr. Weeks’s property to him, except the property that was pertinent to the prosecution.\textsuperscript{16}

The Supreme Court discussed the history of the Fourth Amendment and concluded that the Fourth Amendment limits the power of the federal courts and of federal law enforcement officials.\textsuperscript{17} Federal courts have a duty to at all times uphold the Constitution and cannot further unconstitutional conduct.\textsuperscript{18} The Court held that if federal law enforcement officials can seize evidence from an individual in violation of that individual’s Fourth Amendment rights and use that evidence against the individual in a subsequent prosecution, then the Fourth Amendment would not provide any protection against the government.\textsuperscript{19} Based on this reasoning, the Court ruled that the trial court should have ordered that all of Mr. Weeks’ property be returned to him.\textsuperscript{20}

Initially the Exclusionary Rule only applied to evidence illegally collected by federal officials, so state officers were free to violate an individual’s constitutional rights and use illegally obtained evidence at trial.\textsuperscript{21} It remained that way until \textit{Mapp v. Ohio}.\textsuperscript{22} In \textit{Mapp} the Supreme Court applied the Exclusionary Rule to the states.\textsuperscript{23} This ruling stemmed from the

\textsuperscript{14} Weeks, at 387.  
\textsuperscript{15} Weeks, at 388.  
\textsuperscript{16} Weeks, at 388.  
\textsuperscript{17} Weeks, at 392.  
\textsuperscript{18} Id.  
\textsuperscript{19} Weeks, at 393.  
\textsuperscript{20} Weeks, at 399.  
\textsuperscript{21} Wolf, 383 U.S. 25 (1949).  
\textsuperscript{22} 367 U.S. 643 (1961).  
\textsuperscript{23} Id. at 655.
Court’s finding that the Fourth Amendment required exclusion and that it was a fundamental right that extended to the states.\textsuperscript{24}

In \textit{Mapp}, state officials illegally obtained evidence against an individual by searching his house without a warrant. At trial, the state argued that the search’s illegality did not matter because the Supreme Court held in \textit{Wolf} that the Exclusionary Rule did not bind the states.\textsuperscript{25} The Supreme Court reaffirmed \textit{Weeks}’s constitutional origins.\textsuperscript{26} Further, the Court overruled \textit{Wolf} and held that since the Fourth Amendment extended to the states, the Exclusionary Rule extended to the states as well.\textsuperscript{27} For years after \textit{Mapp}, the Court held that the Fourth Amendment required exclusion for Fourth Amendment violations.\textsuperscript{28}

\textbf{B. THE COURT LIMITS THE EXCLUSIONARY RULE}

Soon after the Court’s seemingly categorical ruling in \textit{Mapp}, the Court began creating exceptions to the Exclusionary Rule. The Court has created an inevitable discovery exception,\textsuperscript{29} a good-faith exception,\textsuperscript{30} an automobile exception,\textsuperscript{31} and others. In the last five years two cases have laid the framework for arguments that the Constitution does not mandate exclusion for Fourth Amendment violations at all, and that Congress may create a remedy other than exclusion for a Fourth Amendment Violation.

The first case that made it clear that the Court was possibly starting to reevaluate the Exclusionary Rule’s source was \textit{Hudson v. Michigan}.\textsuperscript{32} When police officers execute a search

\begin{itemize}
\item \textsuperscript{24} \textit{Id}.
\item \textsuperscript{25} \textit{Mapp}, 367 U.S. at 645-46.
\item \textsuperscript{26} \textit{Id}. at 649.
\item \textsuperscript{27} \textit{Id}. at 655.
\item \textsuperscript{28} O’Neill, \textit{supra} note 4, at 187-88.
\item \textsuperscript{29} See, \textit{e.g}.., \textit{Nix v. Williams}, 467 U.S. 431 (1984).
\item \textsuperscript{30} See, \textit{e.g}.., \textit{U.S. v. Leon}, 468 U.S. 897 (1984).
\item \textsuperscript{32} 547 U.S. 586 (2006).
\end{itemize}
warrant they generally must knock and announce their presence before taking more aggressive action, such as battering down a door. In \textit{Hudson} the officers failed to adequately knock and announce their presence before entering the suspect’s home and discovering narcotics and a firearm. The Court held that exclusion was not appropriate even though Mr. Hudson’s Fourth Amendment rights had been violated.

Justice Scalia wrote for the Court and stated that remedies other than the Exclusionary Rule were available to Mr. Hudson. Specifically, Justice Scalia pointed to a civil action under 42 U.S.C. § 1983 as a possible remedy for this Fourth Amendment violation. Most importantly, the Court cited several cases to support the proposition that whether or not to apply the Exclusionary Rule in a particular case is a separate determination from whether or not the Fourth Amendment was violated. The Court stated that “Our cases show that but-for causality is only a necessary, not a sufficient, condition of suppression.” Thus, the mere fact that evidence was illegally obtained is enough to allow exclusion, but not enough to demand exclusion. This clearly means that the Fourth Amendment does not demand exclusion for all Fourth Amendment violations. Therefore, it would seem that the Fourth Amendment does not require the Exclusionary Rule.

In 2009, the Court decided \textit{Herring v. United States} and furthered the notion that the Fourth Amendment does not mandate exclusion. In \textit{Herring}, Chief Justice Roberts wrote for the majority, holding that exclusion has always been a last resort, and that a search being

\begin{footnotesize}
\begin{enumerate}
\item Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (“An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.”).
\item Hudson, 547 U.S. at 588-89.
\item \textit{Id.} at 597.
\item \textit{Id.} at 591-92.
\item \textit{Id.} at 592.
\item See, \textit{e.g.}, O’Neill, \textit{supra} note 4.
\end{enumerate}
\end{footnotesize}
unreasonable “does not necessarily mean that the exclusionary rule applies.” 39 While previous cases hinted at the idea that the Fourth Amendment does not mandate exclusion for illegal searches, Herring blatantly states it.

In Herring, the Court explicitly stated that “The fact that a Fourth Amendment violation occurred … does not necessarily mean that the exclusionary rule applies.” 40 Further, the Court noted again that applying the Exclusionary Rule has always been a last resort. 41 Even more aggressively, the Court held that the Exclusionary Rule only applies if it “‘results in appreciable deterrence.’” 42 The Court further stated that even in cases where the Exclusionary Rule may deter Fourth Amendment violations, the deterrence must outweigh the costs of applying the Rule. 43

The language of these two cases sets the stage for the Legislature and Judiciary to face off. The Exclusionary Rule was invented by the Court and has begun to be limited by the Court. The time may be right for Congress to enter the fray and provide the courts with a remedy other than exclusion for Fourth Amendment violations.

C. WHY THE EXCLUSIONARY RULE IS INADEQUATE

The Exclusionary Rule is a tool that the Court has developed to help secure Fourth Amendment rights for all individuals. But it is not a tool that has been consistently used or that has clear rules. The balancing test that the courts utilize is unpredictable and the litany of exceptions that have been developed has made the Exclusionary Rule a shell of what it once was. Further, when the Exclusionary Rule is applied, it has high social costs.
Each of these factors has been scrutinized by scholars and the courts. The Exclusionary Rule’s most serious defect is clearly the social cost that its application often creates. “The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that ‘offends basic concepts of the criminal justice system.’” Courts have struggled with this social cost for years, and it was one of the primary reasons that many states did not adopt the Exclusionary Rule until Mapp required it. In People v. Defore, Judge Cardozo pointed out that the Exclusionary Rule requires that “the criminal … go free because the constable has blundered.” In Defore, Judge Cardozo refused to exclude evidence based on New York law, partly because of the high social cost.

But the social cost only exists if the courts decide to exclude evidence. In order to exclude evidence, a court must balance the Exclusionary Rule’s social cost against the Exclusionary Rule’s deterrent effect. The deterrent effect must outweigh the social cost. This means that even if evidence is illegally obtained, and excluding it would deter future violations, if that deterrence does not outweigh exclusion’s social cost, the evidence should not be excluded. If Osama bin Laden is captured in the United States and evidence is obtained against him illegally, can the evidence be excluded? Can the Exclusionary Rule’s deterrent effects ever outweigh the social harm of bin Laden’s release? This balancing test, and the bin Laden example, shows that the Exclusionary Rule may result in different justice for different people.

The Exclusionary Rule requires courts to use a balancing test, which is inherently subjective. No court can quantify what the Exclusionary Rule’s deterrent effect will be in any

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48 Herring, 129 S.Ct. at 700 quoting Leon, 468 U.S. at 910.
particular circumstance. Similarly, no court can quantify the social cost caused by the Exclusionary Rule’s application. Further, no case really discusses specific versus general deterrence in this context. As such, the Exclusionary Rule cannot be objectively applied.

Part of this balancing test is the litany of exceptions that the Court has created. For instance, *Herring* dealt with the good faith exception but was couched in deterrence terms. If an officer acts in objectively reasonable good faith reliance on a warrant, then excluding evidence will not provide a deterrent effect because officers should rely on warrants when executing a search. However, some of the exceptions do not fall into the balance test. The automobile exception, as it existed for years under *New York v. Belton*, allowed a police officer to search a vehicle’s passenger compartment and any containers found during the search, after a custodial arrest of a vehicle occupant. This was a bright line rule that had little to do with deterrence.

The way the Supreme Court rules on Exclusionary Rule cases changes with each justice. There is no clear guidance in this area of jurisprudence and police officers, prosecutors, and defense counsel often have no idea what to expect from a ruling. The subjective nature of the Exclusionary Rule makes it unpredictable, and civil rights in the United States should not be unpredictable. As such, the Exclusionary Rule is not the best remedy to protect individuals’ Fourth Amendment rights.

**PART II: SIMILAR SITUATIONS, VARYING RESULTS**

In at least two other situations Congress has enacted statutes that have clarified constitutional rights or altered Supreme Court decisions. The first statute is the Speedy Trial Act of 1974, codified at 18 U.S.C. § 3161, which clarifies the Sixth Amendment right to a speedy

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trial in criminal prosecutions by setting standards for what a “speedy trial” actually is. Among
other requirements, the Speedy Trial Act requires that a trial commence against a defendant
within seventy days from the defendant’s initial appearance or from the date that the criminal
defendant is formally charged.\footnote{18 U.S.C. § 3161(c)(1).}

The Speedy Trial Act was not a Congressional attempt to directly overrule the Court’s
decision in any particular case. Rather, Congress simply passed legislation to clarify
constitutional requirements. The Court has continually cited to the Speedy Trial Act with
approval, but has not had the opportunity to explicitly uphold its constitutionality.\footnote{See, e.g., Zedner v. U.S., 547 U.S. 489 (2006).} However, Federal Circuit Courts have upheld the Speedy Trial Act’s constitutionality.\footnote{See, e.g., U.S. v. Brainer, 691 F.2d 691 (4th Cir. 1982).} The Court has
approved of this Congressional action to define constitutional rights.

However, Congress and the Court have debated another judicially created criminal
procedure issue, with a different result. An individual may not have a coerced confession
introduced against him at trial.\footnote{Brown v. Mississippi, 297 U.S. 278 (1936).} Confessions were initially held to be coerced when police
officers used violence or brutality to obtain the confession.\footnote{Id.} The voluntariness test eventually
became whether or not the defendant’s will was overborne by the interrogation tactic.\footnote{Dickerson v. United States, 530 U.S. 428, 434 (2000).} The Court has held that basic due process considerations require voluntary confessions.\footnote{Id. at 433.}

In \textit{Miranda v. Arizona}\footnote{384 U.S. 436 (1966).} the Court created the \textit{Miranda} Warnings that are so famously
read on every episode of Law and Order.\footnote{Eric D. Miller, \textit{Should Courts Consider 18 USC § 3501Sua Sponte?}, 65 U. Chi. L. Rev. 1029, 1029 (1998).} The case also created a presumption that any
confession made by a defendant who had not been read his rights was unconstitutional.\textsuperscript{60}  

\textit{Miranda} replaced the voluntariness test with a requirement that all suspects undergoing custodial interrogation be informed of basic rights, such as the right to remain silent and the right to counsel.\textsuperscript{61} However the Court did not make the decision’s constitutional underpinnings clear.\textsuperscript{62}  
The Court stated that “It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”\textsuperscript{63}  

In response to this language Congress passed 18 U.S.C. § 3501 in 1968 which purported to overrule \textit{Miranda} and revive the voluntariness standard, allowing confessions to be admitted into evidence even if the police did not read the \textit{Miranda} Warnings to the defendant, so long as the confession was voluntary. The statute was not used often, and most courts applied the \textit{Miranda} standard instead of the statute’s voluntariness standard.\textsuperscript{64}  

The Supreme Court finally addressed the statute in \textit{Dickerson v. United States},\textsuperscript{65} and held the statute unconstitutional.\textsuperscript{66} In \textit{Dickerson}, the Court affirmed that \textit{Miranda} was rooted in the Constitution and that it could not be overridden by statute.\textsuperscript{67} Since \textit{Miranda} stemmed from the Constitution, Congress may not change its requirements by anything other than a constitutional amendment.

\textsuperscript{60} \textit{Miranda}, 384 U.S. at 498-99.  
\textsuperscript{61} \textit{Id}.  
\textsuperscript{62} \textit{Miranda}, 384 U.S. at 467.  
\textsuperscript{63} \textit{Id}.  
\textsuperscript{64} Miller, supra note 42, at 1029.  
\textsuperscript{65} 530 U.S. 428 (2000).  
\textsuperscript{66} \textit{Dickerson}, 530 U.S. at 436-37.  
\textsuperscript{67} \textit{Id}.
Thus, Congress has played a role in criminal procedure matters on multiple occasions. These are but two examples of ways in which Congress has acted in this area, obviously Congress has always established what a crime is, established punishments for crimes, and has put in place Rules of Criminal Procedure to comply with constitutional requirements. But these two cases are pertinent to the discussion of possible Fourth Amendment remedies because they deal with rights similar to Fourth Amendment rights.

PART III: WHAT CAN CONGRESS DO?

As evidenced by Dickerson, Congress cannot interpret the Constitution. “It is emphatically the province and duty of the judicial department to say what the law is.”68 However, Congress is free to legislate in areas not controlled by the Constitution, or in a way that is in compliance with the Constitution. Assuming that the Fourth Amendment does not mandate exclusion, Congress may create an alternative remedy.

The Court seems to have made clear that the Fourth Amendment does not mandate exclusion.69 So it should be possible for Congress to legislate a remedy for Fourth Amendment violations.70 Congress should create a civil remedy for Fourth Amendment violations. The remedy would need to deter Fourth Amendment violations, because that is the Exclusionary Rule’s primary purpose.71 When the police violate an individual’s Fourth Amendment rights, the harm is complete when the unreasonable search or seizure occurs.72 The Exclusionary Rule is

68 Marbury v. Madison, 1 Cranch 137, 177 (1803).
69 O’Neill, supra note 4, at 219-21; Herring, 129 S.Ct. at 700; supra Part I.B.
70 O’Neill, supra note 4, at 219-21.
71 Herring, 129 S.Ct. at 700.
not designed to rectify a Fourth Amendment violation; it is primarily designed to deter Fourth Amendment violations.\textsuperscript{73}

Any statutory scheme that Congress creates must effectively deter Fourth Amendment violations. The Supreme Court has the final say regarding what the law, including the Constitution, says.\textsuperscript{74} Ultimately, the Court can wipe aside any statute which Congress creates, and Congress should tread lightly with any statute that it does pass. For instance, the Court may strike down a statutory scheme that does not deter Fourth Amendment violations as being too lax. Likewise, the Court may strike down a statutory scheme that overly deters police officers from making heat of the moment decisions as being too aggressive. Congress has to play “Goldilocks” and find the statutory scheme that is “just right.”

A. CURRENT CIVIL REMEDIES

There are currently two major forms of civil damages available for constitutional violations, actions under 42 U.S.C. § 1983 and \textit{Bivens} actions.\textsuperscript{75} The Court has from time to time looked to these remedies in lieu of other remedies, including exclusion.\textsuperscript{76} However, these causes of action are not valid alternatives to the Exclusionary Rule because both causes of action allow for a significant amount of qualified immunity for police officers.\textsuperscript{77}

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\footnote{Leon, 468 U.S. at 906.}
\footnote{Marbury v. Madison, 1 Cranch 137, 177 (1803).}
\footnote{42 U.S.C. § 1983 and \textit{Bivens} v. Six Unknown Named Agents, 403 U.S. 388 (1971) respectively allow for civil damages against state and federal law enforcement officials in some situations.}
\footnote{See, \textit{e.g.}, \textit{Hudson}, 547 U.S. 586 (2006) (A violation of the “knock and announce rule” does not lead to exclusion, unreasonable destruction of personal property is remedied by civil suits such as § 1983 as opposed to the Exclusionary Rule).}
\footnote{See, \textit{e.g.}, \textit{Wilson v. Layne}, 526 U.S. 603, 609 (1999).}
\end{footnotes}
Analyzing qualified immunity as a defense to a lawsuit brought under § 1983 is the same as it is for a *Bivens* action.\(^78\) The text of 42 U.S.C. § 1983 clearly creates a cause of action against state officials who have violated an individual’s constitutional rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 an action at law, suit in equity, or other proper proceeding for redress . . .

Note that the language of the statute clearly indicates that it applies only to the conduct of state officials. Civil actions against federal officials for federal constitutional violations must be filed as *Bivens* actions.\(^79\) The availability of a *Bivens* action comes from the Supreme Court’s 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics.*\(^80\)

Generally, a law enforcement officer enjoys qualified immunity when he or she is performing a discretionary function.\(^81\) A defendant in either a *Bivens* or a § 1983 action may not establish a qualified immunity defense if that defendant’s conduct violated “clearly established statutory or constitutional rights of which a reasonable person would have known.”\(^82\) Thus, the qualified immunity determination often turns on an “objective legal reasonableness” test.\(^83\) This determination is based on legal rules as they existed when the defendant took the unconstitutional action.\(^84\)

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\(^78\) *Wilson*, 526 U.S. at 609.

\(^79\) See, e.g., *Wilson*, 526 U.S. at 608 (noting that the respondents acting on behalf of the federal government were sued under *Bivens* and that the respondents acting on behalf of the state were sued under § 1983.).

\(^80\) 403 U.S. 388 (1971).

\(^81\) *Wilson*, 526 U.S. at 609.

\(^82\) *Id.* at 614.

\(^83\) *Id.*

\(^84\) *Id.*
To be stripped of immunity, the official must have been aware at the time of the conduct that it was unconstitutional.\textsuperscript{85} Furthermore, it must be the case “that a reasonable official would understand that what he is doing violates [a] right” even if the action has not been specifically held unlawful, so long as the unlawfulness is apparent.\textsuperscript{86} For instance, in 1992 it was reasonable for an officer to bring media reporters to the execution of an arrest warrant even though the Court held the conduct to be unconstitutional, so the officers established a qualified immunity defense.\textsuperscript{87}

This example illustrates qualified immunity’s problems in this area. If a search is unconstitutional, but a reasonable officer would not have known it was unconstitutional, then the officer would not be liable under current qualified immunity standards. Many searches are borderline, and often officers are not certain whether or not a particular search is legal, especially considering the many exceptions the Court has made to the Exclusionary Rule.

The qualified immunity defense poses a serious problem to any remedy’s deterrent effect. If officers know that they are shielded from liability so long as reasonable officers would not know that their conduct violated a constitutional right they will attempt to push the envelope. If the courts hold that the officers’ conduct was unconstitutional, it may establish grounds to defeat qualified immunity in the future, but the officers at issue are likely safe from liability. A close call is not enough, and so officers would not be deterred from violating the Fourth Amendment on questionable calls. As such, qualified immunity defeats the deterrent purposes of any Fourth Amendment remedy.

\textsuperscript{85} Id.
\textsuperscript{86} Wilson. 526 U.S. at 615.
\textsuperscript{87} Id.
B. A Remedy That May Work

Congress probably can’t abolish the Exclusionary Rule. The Court would undoubtedly protect its own power by declaring that the Fourth Amendment requires exclusion, and that the Exclusionary Rule cannot be replaced by statute. Therefore Congress must be wary of this backlash and restrain its actions to providing a remedy which can be used in lieu of exclusion, without declaring that the Court can’t exclude evidence.

It is possible that given an alternative remedy the Court would willingly move away from the Exclusionary Rule. Justice Ruth Bader Ginsburg believes that the Exclusionary Rule is necessary to protect Fourth Amendment rights. She is not alone. However, most justices on the Court today recognize the Exclusionary Rule’s high cost. Considering the Supreme Court’s recent decisions, such as *Hudson* and *Herring*, it is likely that the Court would not resist a new remedy, so long as it does not purport to usurp the Court’s power.

Congress should craft a remedy that allows the Exclusionary Rule to survive. The remedy must also deter Fourth Amendment violations. However, the remedy cannot overly deter legal conduct. Congress has a fine line to walk.

Congress could create a civil remedy similar to § 1983, but with a structure that would better deter Fourth Amendment violations because the qualified immunity standard applicable to both *Bivens* actions and suits under § 1983 does not adequately deter Fourth Amendment violations. The statute should also require that any officer found liable for violating the Fourth Amendment participate in a Fourth Amendment training program. This training program would provide better education to law enforcement officers and ensure that officers do not make similar mistakes in the future.

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88 *Herring*, 129 S.Ct. at 705.
90 See, e.g., *Hudson*, 547 U.S. 586; *Herring*, 129 S.Ct. 695.
A civil action under Congress’s new statute would need to not have any immunity. While the Court read qualified immunity into 42 U.S.C. § 1983, the statute does not expressly forbid qualified immunity as a defense.\textsuperscript{91} Congress could expressly state in the proposed statute that qualified immunity is not a defense in actions under the statute. The Court would likely respect this express prohibition.\textsuperscript{92} Without the qualified immunity shield, officers would only conduct searches that they truly believed to be lawful.

If officers act legally then courts will not find them liable for a Fourth Amendment violation. If officers violate the Fourth Amendment then they would be liable for that violation. If liable, the officer would be required to participate in a Fourth Amendment training program created by the statute, and required to pay a fine for the Fourth Amendment violation. If, for instance, an officer illegally enters and searches a home and destroys the front door to do so, the officer would be fined for the illegal entry and search but not for the price of repairing the door, because the harm addressed by the statute is the Fourth Amendment violation, not property damage. Property damage would be covered by a traditional suit under either § 1983 or \textit{Bivens}.

Creating an alternative remedy would all be for naught if it is used along with the Exclusionary Rule. If both remedies are used then the law enforcement officer would be fined \textit{and} the evidence would be excluded. Thus, all the positives in the alternative remedy would be undone by the exclusion, but the officers would have an additional cross to bear. To avoid this, any alternative remedy would have to expressly prohibit its use in conjunction with the Exclusionary Rule to ensure that the alternative remedy serves its purpose: allowing the courts to use a remedy other than exclusion.

\textsuperscript{91} Malley v. Briggs, 475 U.S. 335, 339 (1986).
\textsuperscript{92} American Trucking Ass’n, Inc. v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., Concurring) (the duty of the judiciary “is to say what the law is, not prescribe what it shall be”); \textit{Williams v. Taylor}, 529 U.S. 362, 404 (2000) quoting \textit{United States v. Menasche}, 348 U.S. 528, 538-39 (1955) (It is a principle of statutory construction that courts must “‘give effect, if possible, to every clause and word of a statute.’”)}
To meet each of these distinct requirements, Congress should consider the following statute:

42 U.S.C. § 1983A

A. Whosoever, acting under color of state or federal law, violates any individual’s Fourth Amendment rights, shall be answerable in the court having jurisdiction over the criminal matter;

B. Any actor found liable for a Fourth Amendment violation shall enter into a Fourth Amendment Education Course, to be established by the Department of Justice, and shall pay a fine in an amount to be determined by the judge, judges, justice, or justices hearing the matter, but in no event shall the fine be greater than the actor’s monthly salary;

C. No actor may claim a defense of qualified immunity as a defense to an action under this statute;

D. Nothing in this statute precludes the court hearing the criminal matter from excluding illegally obtained evidence, however no action or motion under this statute may be maintained in a proceeding if the Fourth Amendment violation complained of results in exclusion of evidence;

E. This statute may be invoked by the court hearing the matter on its own motion, and any party to the prosecution, including the state or federal prosecutor or the defendant, may make a motion for the court to invoke this statute.

This statutory scheme meets all of the requirements that are outlined in this essay. There is no qualified immunity defense, the statute cannot be invoked along with the Exclusionary Rule, it requires training which will deter future Fourth Amendment violations, it allows the Exclusionary Rule to still exist in order to stave off a judicial attack on its constitutionality, it allows the court to act unilaterally to invoke the statute and it also allows the parties to move for its consideration in order to increase its use, and the fine is directly tied to the individual law enforcement officer’s salary ensuring deterrence but not over-deterrence.
This proposed statute is more similar to 18 U.S.C. § 3501 than it is to 18 U.S.C. § 3161. The statute that Congress passed in response to *Miranda*, 18 U.S.C. § 3501, was an attempt to allow more evidence to be admissible against criminal defendants. The proposed statute is an attempt to allow more evidence to be admissible against criminal defendants. Furthermore, 18 U.S.C. § 3501 was passed in response to language in a Supreme Court opinion casting doubt on constitutional requirements. The proposed statute would be passed in response to language in Supreme Court opinions, primarily *Hudson* and *Herring*, casting doubt on whether or not the Fourth Amendment requires the Exclusionary Rule. This tends to imply that the Court will strike down the proposed statute, but there are also some important differences between confessions and the Exclusionary Rule.

The Supreme Court has certainly been limiting the Exclusionary Rule. There is also a legitimate legal debate now as to whether or not the Fourth Amendment requires exclusion. This is similar to the situation as it was when Congress enacted 18 U.S.C. § 3501. However, there is at least one significant difference between the Exclusionary Rule and *Miranda*. 18 U.S.C. § 3501 was passed in response to unclear language and purported to overrule a Supreme Court decision. Further, the Court did not rule upon the statute’s constitutionality until after *Miranda* had been well cemented in American courts. The proposed statute does not attempt to overrule any Supreme Court decision, and it is being passed at a time when the Court seems willing to limit the Exclusionary Rule.

While the initial language in *Miranda* cast doubt upon the ruling’s constitutional roots, the Court had regularly enforced *Miranda* on constitutional grounds. For years, the

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Court did not hold that the Fourth Amendment requires exclusion.\textsuperscript{94} Then for several decades the Court strictly enforced the Exclusionary Rule, with several exceptions. Within the last few years the Court has limited the Exclusionary Rule and itself called into doubt its constitutional requirement.

While there are similarities, there are also significant differences. These differences should lead to the Court upholding the proposed statute regardless of its holding in \textit{Dickerson}. The Court has not consistently supported the Exclusionary Rule, and so \textit{Dickerson} may not be as strong of a precedent as it would initially seem. Passing the proposed statute would be well within Congress’s power to make laws. The Court’s authority to interpret the law would be validly exercised by considering the law on appeal. The separation of powers issue is whether or not Congress can create a remedy for a Fourth Amendment violation, when the Court has already established a remedy, and it would appear that Congress can.

CONCLUSION

Congress should pass the statute proposed in this essay because the Exclusionary Rule’s high social cost and its inability to protect Fourth Amendment rights make the Exclusionary Rule inappropriate in modern courts. Recent Supreme Court decisions show that the Court may be open to an alternative remedy for illegal searches and seizures. Further, the proposed statute solves many of the Exclusionary Rule’s problems while still deterring Fourth Amendment violations. Thus, after a careful analysis of Fourth Amendment jurisprudence it seems apparent that the Court would uphold the

\textsuperscript{94} \textit{Weeks}, 232 U.S. 383 (1914) (setting forth the Exclusionary Rule for the first time).
proposed statute, that Fourth Amendment violations would be deterred, and that more evidence would be admitted against criminals leading to a safer society.