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Instrumentalizing Jurors: An Argument Against the Fourth Amendment Exclusionary Rule

Todd E. Pettys

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**INSTRUMENTALIZING JURORS: AN ARGUMENT
AGAINST THE FOURTH AMENDMENT
EXCLUSIONARY RULE**

*Todd E. Pettys**

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INTRODUCTION

Ever since the Fourth Amendment exclusionary rule emerged on the scene roughly a century ago,¹ judges and scholars of formidable intelli-

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1. *See Weeks v. United States*, 232 U.S. 383, 393 (1914) (“If letters and private documents can . . . be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”); *see also Boyd v. United States*, 116 U.S. 616, 630-33 (1886) (giving early life to the possibility of an exclusionary rule by suggesting that using a defendant’s illegally seized documents in a criminal prosecution is tantamount to forcing the defendant to testify against himself or herself in violation of the Fifth Amendment). *See generally* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

gence and towering reputations have disagreed about the rule's merits. Prior generations found Justice Potter Stewart declaring, for example, that "the exclusion of illegally obtained evidence"² is the only effective means of "ensur[ing] that the government does not violate the fourth amendment at its pleasure,"³ while Judge Benjamin Cardozo condemned the notion that "[t]he criminal is to go free because the constable has blundered."⁴ Today, Wayne LaFave painstakingly defends the exclusionary rule⁵ and calls the Fourth Amendment his "cheval de bataille,"⁶ while Akhil Amar insists that "[t]he exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens."⁷ The core reasons for the rule's divisiveness are not difficult to perceive. Without the exclusionary rule or any other deterrence mechanism, one can reasonably fear that government officials will sometimes behave like totalitarian bullies, brazenly disregarding the Fourth Amendment's demands and securing criminal convictions on the strength of illegally obtained evidence. With the exclusionary rule, one can reasonably fear that guilty and possibly dangerous individuals will sometimes be released due to seemingly technical Fourth Amendment violations, thereby frustrating many citizens' conceptions of justice and good sense.

Both of these countervailing fears have powerfully influenced the Supreme Court's Fourth Amendment jurisprudence. With respect to the fear of totalitarian behavior, the exclusionary rule traces its birth to cases in which government officials evinced no regard whatsoever for citizens' Fourth Amendment rights. In the landmark case of *Weeks v. United States*,⁸ for example, state and federal law enforcement officers searched the defendant's home without a warrant and seized numerous items of evidence while the defendant was away, after a neighbor showed the police where a key to the defendant's residence was hidden.⁹ In *Silverthorne*

2. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983).

3. *Id.* at 1384.

4. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

5. See generally 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (4th ed. 2004).

6. Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 757 (2009).

7. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994).

8. 232 U.S. 383 (1914).

9. See *id.* at 386-87; see also *id.* at 392 ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution . . .").

Lumber Co. v. United States,¹⁰ federal officials entered the defendant's office "without a shadow of authority . . . and made a clean sweep of all the books, papers and documents found there."¹¹ In *Agnello v. United States*,¹² one group of federal officials took the defendant to the local police station while another group simultaneously searched the defendant's home without a warrant and seized incriminating evidence.¹³ In *Mapp v. Ohio*,¹⁴ police officers forced their way into the defendant's residence, physically restrained the defendant, and searched the defendant's residence without a warrant, all despite the defendant's vociferous objections.¹⁵ The Court created the exclusionary rule with the hope that, stripped of the incentive to obtain evidence illegally for use in criminal prosecutions, law enforcement officers would not commit such abuses again.¹⁶

With respect to the fear that guilty and possibly dangerous defendants will escape punishment due to non-egregious violations of the Fourth Amendment, the Court has identified numerous occasions when the exclusionary rule need not be applied. In *United States v. Leon*,¹⁷ for example, the Court held 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."¹⁸ The Court found that applying the exclusionary rule in such cases would provoke "disrespect for the law and administration of justice."¹⁹ In *Illinois v. Krull*,²⁰ the Court held that the exclusionary rule does not apply when an officer acts in objectively reasonable reliance upon a statute that is later held unconstitutional.²¹ For the officer who is complying with a statute in an objectively reasonable manner, the Court found, the exclusionary rule is

10. 251 U.S. 385 (1920).

11. *Id.* at 390; *see also id.* at 392 (stating that admitting the illegally seized evidence would "reduce[] the Fourth Amendment to a form of words").

12. 269 U.S. 20 (1925).

13. *See id.* at 29; *see also id.* at 32 ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws.").

14. 367 U.S. 643 (1961).

15. *See id.* at 644.

16. *See United States v. Calandra*, 414 U.S. 338, 347 (1974) ("The purpose of the exclusionary rule is . . . to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . .").

17. 468 U.S. 897 (1984).

18. *Id.* at 900.

19. *Id.* at 908 (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

20. 480 U.S. 340 (1987).

21. *See id.* at 349-50.

likely to have “little deterrent effect.”²² In *Hudson v. Michigan*,²³ the Court held that the exclusionary rule does not apply when the police arrive at a residence to execute a search warrant but enter the residence before giving the defendant adequate time to answer the officers’ knock on the door.²⁴ To apply the exclusionary rule on these facts, the Court concluded, “would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”²⁵ Most recently, in *Herring v. United States*,²⁶ the Court held that the exclusionary rule may not apply when “an officer reasonably believes there is an outstanding arrest warrant [and accordingly arrests the suspect and conducts a search incident to arrest], but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee[.]”²⁷

These two fears—the fear of totalitarian behavior by law enforcement officials and the fear of releasing guilty and perhaps dangerous defendants—weigh especially heavily on the judge who must decide whether the exclusionary rule applies in a given case. As Justice Stewart acknowledged on behalf of the Court in *Elkins v. United States*,²⁸ judges have no desire to “be accomplices in the willful disobedience of a Constitution they are sworn to uphold.”²⁹ The power to exclude illegally obtained evidence thus enables judges to maintain a sense of “judicial integrity.”³⁰ Yet a judge’s sense of integrity can sometimes be strained by the exclusionary rule itself. As Judge Henry Friendly observed, judges take no pleasure in “perform[ing] the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.”³¹ No judge takes satisfaction in associating himself or herself with (as Professor Amar puts it) “grinning criminals getting off on crummy technicalities,”³²

22. *See id.* at 349.

23. 547 U.S. 586 (2006).

24. *See id.* at 599 (“Resort to the massive remedy of suppressing evidence of guilt [on these facts] is unjustified.”); *see also* *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (“[W]e hold that in some circumstances an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment.”).

25. *Hudson*, 547 U.S. at 597.

26. 129 S. Ct. 695 (2009).

27. *Id.* at 698.

28. 364 U.S. 206 (1960).

29. *Id.* at 223.

30. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (reiterating Justice Stewart’s observation in *Elkins* and stating that the exclusionary rule is vital to “judicial integrity”).

31. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 953 (1965).

32. *See* Amar, *supra* note 7, at 799 (“In the popular mind, the Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities.”).

nor does any judge want to be part of the story that is told when a defendant who benefits from the suppression of incriminating evidence commits terrible crimes after he or she has been released.

The most personally wrenching Fourth Amendment cases for judges might be those that fall somewhere between two extremes—cases in which law enforcement officers' conduct is not as egregious as the conduct that prompted the Court to create the exclusionary rule in the first place, yet not so innocent (or otherwise removed from the rule's core objectives) as to fall within any of the rule's available exceptions. Unless a judge believes that such a case falls beyond the reach of Supreme Court precedent, he or she presumably will apply the rule and suppress the illegally obtained evidence. Yet the judge might anguish about whether he or she is truly doing justice, in the broadest sense of the term.

There are at least two ways in which our legal system offers solace to judges who feel misgivings when they suppress incriminating evidence pursuant to the exclusionary rule. The first involves what James Whitman, in a different context, calls "agency denial"—the notion that, when the judge carefully obeys the law's substantive and procedural demands, "it [is] *the law* that [makes] the decision, not *the judge*."³³ Professor Whitman credits Saint Augustine and Saint Jerome with proposing this conception of judges as mere "ministers of the law" in the fifth century;³⁴ he finds this conception reiterated by Gratian in the twelfth century³⁵ and argues that it provided one of the chief ways in which medieval judges learned to deflect moral responsibility for their actions.³⁶ Agency denial can play a role today when judges feel qualms about applying the exclusionary rule. In 1961, for example, when the Supreme Court announced that state judges were just as obliged as their federal counterparts to apply the exclusionary rule when law enforcement officers violate the Fourth Amendment, the Court offered state judges a version of Augustine's and Jerome's ancient assurance: "The criminal goes free, if he must, but it is the law that sets him free."³⁷

The second source of solace for judges who are troubled by their applications of the exclusionary rule lies in the subject of this Article: the work performed by jurors. Scholars and judges have long recognized that, when

33. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 17 (2008).

34. *See id.* at 38-40.

35. *See id.* at 17.

36. *See id.* at 17-18, 40. Whitman argues that, during these periods, agency denial provided a means by which Christian judges could alleviate their fear that they would imperil their own eternal fate if they mistakenly convicted an innocent defendant. *See id.* at 16-17.

37. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

a judge shares the stage with a jury, the judge diffuses the responsibility that he or she must bear for unpopular outcomes.³⁸ In the sixteenth century, for example, Sir Thomas More and others observed that “judges sought refuge from the . . . agonies of decision by . . . refusing to meddle with questions of fact” and by placing those factual questions in the hands of jurors.³⁹ James Stephen similarly noted in the late nineteenth century that trial by jury “saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner.”⁴⁰ That sense of shared responsibility confers benefits upon a judge when he or she suppresses illegally obtained yet damning evidence of the defendant’s guilt and the defendant is ultimately acquitted by a jury. Although the judge is, of course, the one who made the crucial evidentiary ruling, a portion of the public’s ire can be directed to the jurors for failing to sniff out the defendant’s apparent guilt on the strength of the evidence that was presented to them.⁴¹

When we look at applications of the exclusionary rule from the jurors’ point of view, however, we see a very different picture. Unlike a trial judge who has willingly entered a profession in which he or she must implement the rules that the Supreme Court has crafted, who has been apprised of the nature of the illegally seized evidence proffered in a given case, and who has chosen either to disregard that evidence in a bench trial or to withhold that evidence from the jurors in a jury trial, jurors are in a position of relative ignorance and powerlessness. They might be participating in the trial against their will, they might be staunchly opposed to the notion of acquitting guilty defendants in order to deter future unlawful beha-

38. See WHITMAN, *supra* note 33, at 16-17.

39. 2 THE REPORTS OF SIR JOHN SPELMAN 43 (J.H. Baker ed., 1978); *see also id.* at 138 (“No doubt judges could exert influence on a jury, but the forms of charge and oath made it plain that the ultimate responsibility for a conviction rested on the jurors’ consciences.”); Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 953 (2009) (book review) (citing SPELMAN, *supra*). Judges’ predilections changed as time wore on. John Langbein finds that judges in the late seventeenth and early eighteenth centuries “did not regard the jury as an autonomous fact-finder” and often did not hesitate to tell jurors how they ought to rule. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285 (1978). As the eighteenth century progressed and attorneys became the central players in courtroom proceedings, however, judges greatly curtailed their efforts to influence juries. *See id.* at 314.

40. WHITMAN, *supra* note 33, at 16-17 (quoting 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 573 (1883)).

41. Jurors, in turn, can employ the same agency-denial strategy that is available to judges, by telling themselves and others that it is the law, not the jury, that is to be blamed for unpopular outcomes. *See id.* at 17-18 (noting an example of agency denial by jurors in the seventeenth century).

violation by law enforcement officials, they likely have no inkling that the illegally seized evidence in the case before them even exists, and they play no role in shaping the body of evidence on which they must base their verdict. I will argue that—taken as a whole—these are morally significant differences, and that the application of the exclusionary rule in jury trials raises troubling moral issues that are not present when a judge adjudicates a case on his or her own. Specifically, I will argue that (1) courts infringe on jurors’ deliberative autonomy in a morally problematic way whenever they refuse to admit evidence that is both relevant and reasonably available;⁴² (2) this infringement is especially problematic in the Fourth Amendment setting;⁴³ and (3) although there are several ways in which these moral problems could be at least partially mitigated,⁴⁴ the best approach might be to abandon the exclusionary rule entirely.⁴⁵

I. JURORS’ DELIBERATIVE AUTONOMY

Withholding relevant, reasonably available evidence from jurors is always morally problematic. Those moral difficulties are especially troublesome when the evidence is withheld pursuant to the Fourth Amendment exclusionary rule.

A. The Moral Problem with Exclusionary Rules

Exclusionary rules of all sorts—such as rules barring relevant evidence believed to pose a risk of unfair prejudice,⁴⁶ rules barring the admission of relevant hearsay,⁴⁷ and rules barring the use of relevant character evidence to prove how a person behaved on a particular occasion⁴⁸—raise a variety of significant difficulties. Two of those problems are familiar and are referenced in this Article’s opening paragraph. First, as Jeremy Bentham pointed out nearly two centuries ago, exclusionary rules can frustrate efforts to achieve justice when they deprive the fact-finder of evidence that rationally bears upon a defendant’s likely guilt or innocence: “Evidence is

42. *See infra* Part I.A.

43. *See infra* Part I.B.

44. *See infra* Part II.A.

45. *See infra* Part II.B.

46. *See, e.g.*, FED. R. EVID. 403 (permitting the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”).

47. *See, e.g.*, FED. R. EVID. 802 (declaring the general rule that hearsay is inadmissible).

48. *See, e.g.*, FED. R. EVID. 404 (banning, with limited exceptions, the admission of character evidence aimed at proving how a person behaved on a particular occasion).

the basis of justice: exclude evidence, you exclude justice.”⁴⁹ Second, as Professor Amar observes, when exclusionary rules lead to the suppression of “evidence the public knows to be true . . . the gap between public truth and truth allowed in the courtroom can demoralize the public, whose faith in the judicial system is a key goal of the public trial ideal.”⁵⁰ There is, however, a third problem with exclusionary rules that has almost entirely escaped notice. As I have argued elsewhere,⁵¹ exclusionary rules are morally problematic because they infringe upon jurors’ deliberative autonomy. In brief, the argument runs as follows.

The first premise concerns each rational person’s moral claim to deliberative autonomy. Every rational individual is sovereign with respect to the use of his or her own physical and rational capacities. As Immanuel Kant argued in his *Foundations of the Metaphysics of Morals*, “every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will.”⁵² Kant’s “practical” imperative thus directs us to “[a]ct so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.”⁵³ The practical imperative insists, in other words, that no rational being should be wholly instrumentalized by another. As Alan Gewirth puts it,

[a]ll the human rights . . . have as their aim that each person have rational autonomy in the sense of being a self-controlling, self-developing agent who can relate to other persons on a basis of mutual respect and cooperation, in contrast to being a dependent, passive recipient of the agency of others.⁵⁴

49. 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 1 (1827); see also *United States v. Leon*, 468 U.S. 897, 907 (1984) (stating that one of the exclusionary rule’s “social costs” is that it impedes “the truth-finding functions of judge and jury”).

50. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 119 (1997). The public’s faith in the judicial system can similarly be undermined when the public believes that newly discovered evidence indicates that an innocent person has been wrongly convicted but the courts refuse to consider the evidence. See Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2342 (2007) (“[T]he perceived moral authority of the criminal justice system is compromised, and the public’s confidence in the courts tested, when judges refuse to consider a prisoner’s legal claims notwithstanding the prisoner’s presentation of significant evidence that he or she might actually be innocent.”).

51. See Todd E. Pettys, *The Immoral Application of Exclusionary Rules*, 2008 WIS. L. REV. 463. Part I.A of the present Article briefly recounts arguments that I made at greater length in the *Wisconsin Law Review*.

52. IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 52 (Harold Weisberg ed., Lewis White Beck trans., Bobbs-Merrill Co. 1969) (1785).

53. *Id.* at 54.

54. ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATIONS AND APPLICATIONS* 5 (1982); see also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liber-*

Before launching medical treatment programs, for example, doctors provide their patients with relevant information and obtain their patients' informed consent, because failing to do so would dishonor patients' deliberative autonomy and would treat patients "merely as a means to whatever purpose the provider has in withholding or misrepresenting this information."⁵⁵

The second premise in the argument concerns rational decision makers' use of relevant evidence. When faced with the task of gathering evidence that might inform a decision, a rational person desires access to "as much of the available relevant evidence as is practicable under the circumstances."⁵⁶ As Frederick Schauer observes, we recognize that "informed and intelligent" choices can be made only when rational people have broad access to relevant information.⁵⁷ Because obtaining and evaluating evidence consumes time, money, and other valuable resources, the rational decision maker does not necessarily wish to see and hear *all* of the relevant evidence before reaching a conclusion. The rational patient who is facing a difficult treatment decision would rarely demand that she be told about every study that has ever been conducted on the given medical issue, for example, nor would she demand that researchers conduct costly new studies on her behalf before she makes her choice. The rational patient simply desires as much of the relevant information as can reasonably be obtained and evaluated under the circumstances. I use the phrase "reasonably available" as a shorthand means of identifying the evidence that a rational decision maker would wish to obtain and evaluate in a given instance.

The third premise builds upon the first two: the government infringes upon a person's deliberative autonomy when it withholds or suppresses reasonably available information that might rationally influence a decision that the person must make. We see this belief reflected, for example, in the First Amendment's celebrated protection of the freedom of speech.⁵⁸ As David Strauss explains, Americans' commitment to free speech is

ty, 59 U. CHI. L. REV. 225, 233 (1992) (stating that "all basic liberties" are grounded in "autonomy: the Kantian right of each individual to be treated as an end in himself").

55. Candace Cummins Gauthier, *Philosophical Foundations of Respect for Autonomy*, 3 KENNEDY INST. ETHICS J. 21, 31 (1993); *see also id.* at 24 ("When we treat another person as an end in himself or herself, we respect that person's dignity and intrinsic value as a rational and autonomous being.").

56. Pettys, *supra* note 51, at 486-89; *cf.* Andrew McLaughlin, *Rationality and Total Evidence*, 37 PHIL. SCI. 271, 276 (1970) (arguing that, when a rational person is preparing to use inductive reasoning in order to reach a conclusion, he or she will desire access to as much of the relevant evidence as is practicable under the circumstances).

57. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 69 (1982).

58. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

grounded, at least in part, in the conviction that the government infringes upon a citizen's deliberative autonomy when it "interfere[s] with a person's control over her own reasoning processes" by limiting the person's access to opinions and information.⁵⁹ We believe, Ronald Dworkin writes, that "[w]e retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."⁶⁰ When the government withholds or suppresses reasonably available information that rationally bears upon a choice that we face, the government thus infringes upon our deliberative autonomy in a morally troublesome way.

Jurors, therefore, have an autonomy-based moral right not to have the government screen the relevant, reasonably available evidence that they will see and hear in the cases whose outcomes they have been charged to determine. We infringe upon that right when we force jurors to make a decision—a decision for which they will feel a significant measure of responsibility and for which the public will indeed hold them at least partially responsible—yet withhold relevant evidence that a rational juror would wish to see or hear before rendering a verdict.⁶¹ To put it in the terminology of this Article's title, we instrumentalize jurors in a morally problematic way when we withhold reasonably available evidence that might rationally influence their verdicts. When we suppress relevant evidence, we treat jurors merely as a means to whatever ends we have in mind when we try to justify the evidence's exclusion.

By way of analogy, consider the candidate for public office who waits until after the election has been held to reveal damning information about his intentions as a public official. Citizens who cast their ballots for that candidate, and later discover the information that the candidate concealed, may reasonably perceive that—to use the colloquial term—they have been "used." They may perceive that they have not been treated with the dignity they are owed as rational voters, and that they instead have been used merely as a means to the ends that prompted the candidate to withhold the information in the first place. Or consider the faculty member who seeks to leverage a better compensation package for herself at her home institution by securing an offer of employment from another university. When the lat-

59. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991).

60. RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 200 (1996).

61. *Cf.* JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 123 (1949) (stating that, because exclusionary rules so often are used to suppress relevant evidence, "frequently the jury cannot learn of matters which would lead an intelligent person to a more correct knowledge of the facts").

ter institution learns that the candidate secured its offer with no intention of ever accepting, the members of that institution's hiring committee might well perceive that they have been immorally used merely as a means to the candidate's objectives. It is no different in the courtroom when we elicit verdicts from jurors based upon a government-redacted body of evidence—we use jurors as instruments to achieve whatever ends have prompted us to withhold or suppress evidence that rational jurors would want to see or hear.

Although American jurors have largely become accustomed to seeing the government infringe upon their deliberative autonomy in this way, the same cannot be said of decision makers in other countries. Mirjan Damaška points out, for example, that in Continental legal systems, lay and professional judges insist upon maintaining their freedom to take a leading role in developing the body of evidence on which they base their verdicts. “Their freedom to do so is highly valued, because it is perceived as flowing from their responsibility for the correct decision—‘the truth.’ The notion that an adjudicator should accept responsibility for a judgment while at the mercy of information supplied by others bruises deeply ingrained Continental legal sensibilities.”⁶²

Infringing upon jurors' deliberative autonomy by withholding relevant, reasonably available information is especially troubling in the United States because juries are a vital dimension of our system of self-government. As Linda Kerber explains, “[m]embers of the founding generation construed jury service to be central to the process of democracy; it was the context in which average citizens exercised reflective judgment.”⁶³ Believing that citizens in our self-governing society ordinarily must be free to decide for themselves what is true,⁶⁴ we hold that political speech is “entitled to the

62. MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT 91 (1997).

63. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 129 (1998). Others have made the same point. *See, e.g.*, AMAR, *supra* note 50, at 121-22 (“For the Framers, . . . the criminal jury was . . . a political institution embodying popular sovereignty and republican self-government. Through jury service, citizens would learn their rights and duties, and actively participate in the governance of society.”); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) (“The jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.”); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 55 (2001) (observing that jury service grants citizens “a measure of sovereign authority that is seldom assigned to lay persons”); Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 321 (2005) (arguing that “the jury is arguably the purest form of democracy and self-governance”).

64. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 26-27 (1960).

fullest possible measure of constitutional protection.”⁶⁵ The prevalent use of exclusionary rules in jury trials runs counter to those convictions. When we withhold relevant evidence from jurors, we undercut their ability to serve a vitally important self-governance function.⁶⁶

B. The Fourth Amendment Exclusionary Rule

Weighty though it is, jurors’ moral claim of entitlement to see and hear all of the relevant, reasonably available evidence in a case is not absolute; that claim might be outweighed in a given instance by other social goods.⁶⁷ In sexual-assault cases, for example, we exclude potentially relevant evidence of the victim’s past sexual conduct because we fear that victims otherwise will be deterred from pressing charges against their attackers.⁶⁸ We similarly often suppress potentially relevant statements made by criminal defendants and prosecutors during plea negotiations, in order to maintain defendants’ and prosecutors’ incentives to enter those valuable discussions.⁶⁹ In both of those instances, the argument against fully honoring jurors’ deliberative autonomy is quite plausible because excluding the given evidence is essential to achieving other important social objectives: sexual-assault victims might indeed refuse to press charges if evidence of their sexual histories were admissible, and defendants and prosecutors alike might indeed refuse to enter meaningful plea negotiations if they had cause to fear that their statements could be introduced into evidence at trial. When evaluating the appropriateness of those or other forms of exclusionary rules, therefore, one must weigh the social evils that application of the rule entails against the social goods that the rule helps to achieve.

That kind of balancing already explicitly occurs in the Fourth Amendment setting. “[B]ecause the [Fourth Amendment exclusionary] rule is prudential rather than constitutionally mandated,” the Court has explained, “we have held it to be applicable only where its deterrence benefits outweigh its substantial social costs.”⁷⁰ Among the interrelated social costs

65. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984).

66. *Cf. AMAR, supra* note 50, at 124 (“[H]ow can the jury judge well on behalf of the community if, because of upside-down exclusion rules, it is denied reliable information that is known to the general community?”).

67. *See generally* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 32 (1988) (“[A]utonomy is both important normatively and fundamental conceptually. Neither of these precludes the possibility that other concepts are both important and fundamental.”).

68. *See* FED. R. EVID. 412.

69. *See* FED. R. EVID. 410.

70. *See* *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (internal quotation marks omitted); *see also* *Herring v. United States*, 129 S. Ct. 695, 700 (2009) (“[T]he benefits of deterrence must outweigh the costs.” (citation omitted)); *Hudson v. Michigan*, 547

that the Court has identified thus far are the ways in which the exclusionary rule impedes “the truth-finding function of judge and jury,”⁷¹ enables guilty (and perhaps dangerous) defendants to go free or to secure more favorable plea bargains,⁷² and brings disrespect upon the criminal justice system.⁷³ A social cost that the Court has not yet taken into account, and which makes applications of the exclusionary rule even more problematic, is the rule’s infringement upon jurors’ deliberative autonomy. As I argued in Part I.A with respect to exclusionary rules of all sorts, jurors in any given case have a moral right to see and hear all of the reasonably available evidence that rationally bears upon the verdict that we have asked them to issue.⁷⁴

For at least four reasons, the Fourth Amendment exclusionary rule’s infringement upon jurors’ deliberative autonomy is especially troubling. *First*, because deficiencies in jurors’ rational capacities play no role in justifying the evidence’s suppression in the Fourth Amendment setting, jurors’ autonomy-based moral entitlements are present in full force when courts decide to apply the exclusionary rule. Jurors’ claim to deliberative autonomy is grounded in, and bounded by, their rational capacities; it is their status as rational beings that undergirds their entitlement not to be used wholly as a means to others’ ends.⁷⁵ The government is thus morally entitled to suppress relevant evidence when that evidence would either compromise or circumvent jurors’ rational capacities and thereby provoke jurors to respond with an irrational or poorly reasoned verdict.⁷⁶ In such instances, the government protects litigants from unreasonable outcomes, and protects ju-

U.S. 586, 595-96 (2006) (weighing the deterrence value of the rule in a particular setting against the rule’s social costs).

71. *United States v. Leon*, 468 U.S. 897, 907 (1984) (internal quotation marks omitted).

72. *See Hudson*, 547 U.S. at 591 (noting the undesirability of setting “the dangerous at large”); *Leon*, 468 U.S. at 907-08 (noting the undesirability of releasing or otherwise favorably treating guilty defendants).

73. *See Leon*, 468 U.S. at 908. The Court has identified additional costs that arise in fact-specific settings. The Court has concluded, for example, that applying the exclusionary rule to violations of the knock-and-announce rule would likely invite a flood of meritless claims, and would cause police officers to be reluctant to enter homes—and thereby prevent an occupant’s hasty destruction of evidence—even after waiting a reasonable time for an occupant to respond. *See Hudson*, 547 U.S. at 595.

74. *See supra* Part I.A.

75. *See supra* notes 52-61 and accompanying text; *see also* Fried, *supra* note 54, at 233 (“Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.”).

76. *Cf.* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 151 (1989) (“The government must protect citizens from social harms, and many fellow citizens do not act in a rational and autonomous way.”). *See generally* CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 124 (1996) (“[W]hen Kant says rational nature or humanity is an end in itself, it is the power of rational choice that he is referring to, and in particular, the power to set an end . . . and pursue it by rational means.”).

rors themselves from having their rational capacities temporarily overwhelmed by exceptionally powerful non-rational influences.⁷⁷ When a particular item of evidence causes jurors to experience overpowering feelings of disgust or rage, for example, there is a risk that jurors will render a verdict before they have rationally evaluated all of the evidence in the case, and will regret their decision once their emotions have cooled.⁷⁸ Exclusion in such instances not only can be morally justified, but might also be morally essential from the vantage points of litigants and jurors alike.

In the Fourth Amendment setting, however, evidence is excluded for reasons having nothing to do with preventing irrational or poorly reasoned outcomes.⁷⁹ The illegally obtained evidence is excluded not to preclude unreasonable juror responses, but rather to deter future violations of the Fourth Amendment by law enforcement personnel.⁸⁰ When the Fourth Amendment exclusionary rule is applied, therefore, jurors' rationality—and the moral entitlements which that rationality supports—are presumptively fully present.

Second, unlike many of the exclusionary rules that federal courts routinely apply, the Fourth Amendment exclusionary rule is highly controversial among the American public, and so it is unreasonable to presume that jurors are willing to help serve the exclusionary rule's deterrence-focused ends. With many other exclusionary rules—such as the rule protecting alleged sexual-assault victims from certain evidentiary uses of their sexual histories,⁸¹ or the rule enabling prosecutors and criminal defendants to enter plea negotiations without fear of negative ramifications at trial⁸²—one would expect to find broad (albeit not universal) agreement among citizens both that those rules' objectives are desirable and that excluding evidence is often a sensible means of achieving them. The Fourth Amendment exclusionary rule, however, remains the subject of sharp public disagreement.

77. See Pettys, *supra* note 51, at 500-05.

78. See *id.*; see also FED. R. EVID. 403 (authorizing the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice"); *id.* advisory committee's note (stating that unfairly prejudicial evidence is evidence that has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

79. See Friendly, *supra* note 31, at 951 ("The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable fact-finding. The evidence is likely to be the most reliable that could possibly be obtained . . .").

80. See *supra* notes 1-27 and accompanying text (discussing the exclusionary rule's origins and deterrence rationale).

81. See *supra* note 68 and accompanying text (noting Rule 412 of the Federal Rules of Evidence).

82. See *supra* note 69 and accompanying text (noting Rule 410 of the Federal Rules of Evidence).

Like Judge Cardozo⁸³ and Professor Amar,⁸⁴ many Americans balk at the notion that excluding powerful evidence of a criminal defendant's guilt is an acceptable means of deterring Fourth Amendment violations.⁸⁵ One thus cannot presume that all—or even most—jurors would be willing to be yoked in service to the exclusionary rule and its deterrence-focused objectives.

Third, the Fourth Amendment exclusionary rule's claim to democratic legitimacy is weaker than that of most other federal exclusionary rules. The exclusionary rules that are contained within the Federal Rules of Evidence all have been promulgated by elected federal officials. The Supreme Court and the Federal Rules Advisory Committee took the lead in drafting many (though not all⁸⁶) of those rules, but those rules did not become effective until they had received Congress's blessing.⁸⁷ Therefore, to the extent that the actions of the people's elected representatives can waive or weaken citizen-jurors' moral claims, jurors' moral objections to the exclusionary provisions of the Federal Rules of Evidence are at least somewhat democratically ameliorated.

One cannot make that same argument in the Fourth Amendment setting. Although some of the Court's early cases suggested that the exclusionary rule was dictated by the popularly ratified Fourth Amendment itself,⁸⁸ the Court today insists that the rule is entirely of the Court's own making.⁸⁹

83. See *supra* note 4 and accompanying text (noting Judge Cardozo's views).

84. See *supra* note 7 and accompanying text (noting Professor Amar's views).

85. See, e.g., Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1239 (1989) (book review) (stating that, like the death penalty and prayer in public schools, the Fourth Amendment exclusionary rule is among "the controversial issues of the day"); Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 855, 855 (1999) ("The exclusionary rule remains one of the most controversial judicial doctrines of this era.").

86. Rules 413, 414, and 415 (concerning the admission of evidence of a person's prior sexual offenses), for example, were drafted in the first instance by Congress. See Joseph A. Aluise, Note, *Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?*, 14 J.L. & POL. 153, 159-66 (1998) (describing the Congressional origins of those three rules).

87. See OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE 3-4 (5th ed. 2009) (describing the legislative history of the Federal Rules of Evidence).

88. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 649 (1961) (insisting that the exclusionary rule "is of constitutional origin"); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (stating that permitting the government to use illegally obtained evidence in a criminal prosecution would "reduce[] the Fourth Amendment to a form of words"); *Weeks v. United States*, 232 U.S. 383, 393 (1914) (stating that, if there were no exclusionary rule, the Fourth Amendment "might as well be stricken from the Constitution").

89. See, e.g., *Herring v. United States*, 129 S. Ct. 695, 700 (2009) ("We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation."); *United States v. Leon*, 468 U.S. 897, 905-06 (1984) (rejecting the Court's own

The rule was not contemplated by the Fourth Amendment's framers, nor was it approved by those who ratified the Fourth Amendment's text.⁹⁰ Nor has the rule subsequently been formally approved by the people's elected representatives in Congress. To the contrary, some elected officials have considered trying to abolish the rule entirely, replacing it with a legislative scheme in which damages would be payable to the victims of Fourth Amendment violations.⁹¹ Because the Fourth Amendment exclusionary rule was crafted and approved by the Court and not by Congress, it lacks the democratic pedigree necessary to support the argument that, through their elected leaders, citizen-jurors have compromised their ability to complain that the rule infringes upon their deliberative autonomy.

Fourth, the Fourth Amendment exclusionary rule is likely not essential to achieving the deterrence objectives for which it was designed. Rather than depend upon the exclusion of potentially powerful evidence to deter illegal searches and seizures, the nation could rely primarily upon financial disincentives instead.⁹² That was not true in the era to which the exclusionary rule traces its roots. As the Court pointed out in *Hudson v. Michigan*, exclusion was likely the only meaningful way to deter Fourth Amendment violations in the early twentieth century.⁹³ It was not until the Court's 1961

prior suggestions that the exclusionary rule is mandated by the Fourth Amendment and stating that "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered"); *Calandra v. United States*, 414 U.S. 338, 348 (1974) (stating that 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"); *see also* Amar, *supra* note 7, at 761 (arguing that the terms of the Fourth Amendment "do not require—or even invite—exclusions of evidence, contraband, or stolen goods").

90. *See* Amar, *supra* note 7, at 786 ("Tort law remedies were . . . clearly the ones presupposed by the Framers of the Fourth Amendment Supporters of the exclusionary rule cannot point to a single major statement from the Founding—or even the antebellum or Reconstruction eras—supporting Fourth Amendment exclusion of evidence in a criminal trial."); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 52 ("[T]he English cases that inspired the Fourth Amendment were not criminal cases, in which a defendant was seeking to escape conviction; they were tort cases in which the victims of unreasonable searches were seeking damages for invasion of their lawful interests."); *cf.* Stewart, *supra* note 2, at 1371 ("The congressional debates over the text of the proposed amendment shed no light on whether it was intended to require the exclusion of illegally obtained evidence, and the ratification debates are equally silent.").

91. *See* Stewart, *supra* note 2, at 1398 (describing the introduction and failure of such legislation in the 97th and 98th Congresses). One cannot safely assume that Congress's failure to enact such legislation demonstrates Congress's approval of the exclusionary rule. Most elected leaders might agree that some feature of existing law in a given area is deeply flawed, but the status quo will persist until a majority in Congress can agree upon how best to fix it.

92. *See infra* Part II.B.

93. *See Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

ruling in *Monroe v. Pape*,⁹⁴ for example, that § 1983⁹⁵ was held to provide a remedy against police officers who abuse their authority under state law;⁹⁶ it was not until the Court's 1971 ruling in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*⁹⁷ that the Fourth Amendment was itself held to provide a remedy against federal officers who violate a person's Fourth Amendment rights;⁹⁸ and it was not until the Court's 1978 ruling in *Monell v. Department of Social Services of the City of New York*⁹⁹ that § 1983 was held to provide a remedy against a municipality whose law enforcement officers violate a person's Fourth Amendment rights in accordance with the municipality's official policies or customs.¹⁰⁰ As I shall briefly argue below,¹⁰¹ further changes in the law are necessary in order to render the threat of financial liability a powerful deterrent to Fourth Amendment violations. The point for our present purposes is simply that, provided the threat of financial liability is made sufficiently great, the exclusionary rule is not the only means of effectively deterring Fourth Amendment violations. Because the exclusionary rule is not essential to achieving the social objectives for which it was designed, the rule's infringement upon jurors' deliberative autonomy is that much more troubling.

In cases in which law enforcement officials have illegally obtained damning evidence of a criminal defendant's guilt, judges and jurors thus stand in very different moral positions. Trial judges agree to work under the constraints that the Supreme Court imposes, they know the nature of the illegally obtained evidence in the cases that come before them, and they are the ones who declare that the finder of fact should not consider the ill-gotten evidence. Jurors, on the other hand, often serve against their will,¹⁰² they might wish to play no part in acquitting guilty and perhaps dangerous defendants as a means of deterring future Fourth Amendment violations, they likely have no idea that the illegally seized evidence even exists, and

94. 365 U.S. 167 (1961), *overruled in part on other grounds by* *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

95. 42 U.S.C. § 1983 (2006) (providing a cause of action against any person who, under color of state law, deprives another person of a federal right).

96. *See Monroe*, 365 U.S. at 184-87.

97. 403 U.S. 388 (1971).

98. *See id.* at 392-97.

99. 436 U.S. 658 (1978).

100. *See id.* at 690-94.

101. *See infra* Parts II.B.1-3.

102. *See generally* 28 U.S.C. § 1861 (2006) ("It is . . . the policy of the United States that all citizens . . . shall have an obligation to serve as jurors when summoned for that purpose."); *id.* § 1864(b) (authorizing fines, imprisonment, or both for citizens who disobey a summons to appear for jury service).

they play no role in shaping the body of evidence on which they must base their verdict. In Kantian terms, the exclusionary rule treats the trial judge “as an end.”¹⁰³ He or she hears all of the relevant facts and chooses to serve as an actor in the exclusionary-rule drama that the Court has devised. Jurors, in contrast, typically do not knowingly participate in the exclusionary rule’s operation—they are treated merely as a means to the deterrence-focused ends that the Court created the rule to serve. When jurors acquit a defendant and learn later that suppressed evidence powerfully suggested the defendant’s guilt, they can try to find comfort in agency denial,¹⁰⁴ telling themselves that the law is to be blamed for any outcomes they find regrettable. But there is no denying that they have been instrumentalized in service to the Court’s objectives.

What we find, therefore, is that the social costs of the exclusionary rule differ, depending upon whether a criminal defendant invokes his or her right to trial by jury. In bench trials, the exclusionary rule entails only those significant social costs that the Court has already identified and has taken into account when shaping the exclusionary-rule doctrines that exist today. But when a jury is serving as the finder of fact, we also must consider the rule’s infringement upon jurors’ deliberative autonomy—a social cost that the Court has not yet even acknowledged, much less taken into account. When we ask in a given case whether the rule’s deterrence benefits “outweigh its substantial social costs,”¹⁰⁵ we thus might well discover that we can justify applying the rule only if the trial judge decides the case.

II. REMEDYING THE PROBLEM

There are a variety of ways in which we might respond to the moral difficulties entailed by applying the Fourth Amendment exclusionary rule in cases tried by juries. As one sorts through the problems that a few of those purported solutions present, one begins to suspect that the best approach might be to abandon the exclusionary rule entirely.

A. Lesser Approaches

Short of abandoning the exclusionary rule altogether, there are at least three ways in which we could try to address the rule’s infringement upon jurors’ deliberative autonomy. *First*, we could ensure that jurors’ participation in the exclusionary rule’s operation is both knowing and voluntary. Ordinarily, a judge instructs jurors prior to trial merely that they must dis-

103. See KANT, *supra* note 52, at 52, 54.

104. See *supra* notes 33-37 and accompanying text (discussing agency denial).

105. *United States v. Leon*, 468 U.S. 897, 909 (1984).

regard all evidence that the judge rules inadmissible and must disregard any information that they happen to see or hear outside the courtroom.¹⁰⁶ When trial judges offer jurors an explanation for the exclusion of evidence, the explanation often focuses on the risk that the excluded evidence would result in an irrational or poorly reasoned verdict.¹⁰⁷ In cases involving Fourth Amendment violations, we could go much further than that: we could tell members of the jury pool that the trial judge is going to suppress one or more items of illegally seized evidence in order to deter future Fourth Amendment violations, and then permit prospective jurors to leave if they are not willing to serve under those circumstances. Just as medical patients “give their informed and autonomous consent to a proposal that certain kinds of information about their treatment might be withheld from them,”¹⁰⁸ jurors would be participating in the Court’s exclusionary-rule drama on terms consistent with their status as rational, autonomous beings.

There is, however, an obvious problem with that approach. Any reference to excluded evidence of the defendant’s guilt would prejudice the defendant by inviting jurors to speculate about the nature of that evidence, to ascribe more probative value to the suppressed evidence than it might actually possess, and to resolve close cases against the defendant based upon the assumption that seeing the suppressed evidence would have eliminated any lingering doubts about the defendant’s guilt. It would be perverse to honor jurors’ deliberative autonomy at the cost of placing criminal defendants in a predicament that is potentially worse than the one they would face if the fruits of the illegal search were simply admitted into evidence.

Second, in accordance with the Court’s determination that the exclusionary rule ought to be applied only when the rule’s deterrence value outweighs its social costs,¹⁰⁹ we might continue to use a balancing test to evaluate the rule’s applicability in various factual settings, and treat the rule’s infringement on jurors’ deliberative autonomy as an additional factor

106. See, e.g., 1A KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 10.01, at 2 (6th ed. 2008) (“Statements or exhibits which are not ‘admitted into evidence’ may not be considered by you in reaching your verdict.”); *id.* at 5 (“You must not consider any evidence to which an objection has been sustained or which I have instructed you to disregard. . . . You must not consider anything you may have read or heard about the case outside of this courtroom . . .”).

107. See, e.g., JOSEPHINE R. POTUTO ET AL., FEDERAL CRIMINAL JURY INSTRUCTIONS § 1.17 (2d ed. 1993) (proposing a jury instruction which states that excluded evidence is usually “unimportant or unreliable” or would cause jurors “to respond emotionally,” and that “[i]t is because the law protects what [jurors] hear that we have such confidence in the impartiality and the integrity of the jury”).

108. Dean Cocking & Justin Oakley, *Medical Experimentation, Informed Consent and Using People*, 8 BIOETHICS 293, 299 (1994).

109. See *supra* notes 70-73 and accompanying text (describing the Court’s balancing test).

weighing against the rule's application when jurors are serving as the finders of fact. While appearing to fit nicely within the Court's existing analytic framework, this approach has the disadvantage of placing that framework under added scrutiny and pressure, neither of which it can easily bear.

The rhetoric of balancing can serve the judiciary reasonably well when the courts are announcing a new constitutional or prudential rule and when numerous exceptions to that rule are not anticipated. Judges can describe the competing factors they have taken into account with respect to the given problem, and then announce the rule that will henceforth embody the judges' net assessment of how those competing factors shake out.¹¹⁰ But if the rule is one to which the courts will make numerous exceptions, such that judges must repeatedly re-strike the balance in order to account for varying factual scenarios, then the courts' use of balancing rhetoric can quickly wear thin.¹¹¹ The more often that judges purport to drag their scales from their closets in order to reshape a rule or reassess the range of a rule's proper application, the more the public is given cause to wonder about the nature of those mysterious scales and whether the judges' use of those scales is entirely judicial in character.¹¹²

With respect to the balancing that the Court purports to conduct regarding the Fourth Amendment exclusionary rule, it is easy enough for the Justices merely to recite the various factors that the Court must weigh in the balance, with the deterrence value of the rule's application on one side and certain social costs entailed by the rule's application on the other. It is exceptionally difficult, however, to devise a means by which those competing values can be translated into what Alexander Aleinikoff calls "a common currency for comparison."¹¹³ How, for example, does the Court weigh the value of deterring future violations of the Fourth Amendment against the value of using damning evidence to secure the incarceration of dangerous

110. See MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 2.03, at 2-15 to -18 (1984) (describing this as "definitional balancing," in contrast to the "ad hoc balancing" approach that is often used to determine results on a case-by-case basis). Later editions of Professor Nimmer's treatise abandoned the term "definitional balancing," concluding that "[t]he term has not caught on." 1 RODNEY A. SMOLLA, *SMOLLA & NIMMER ON FREEDOM OF SPEECH* § 2:12, at 2-7 n.1 (2010).

111. Cf. NIMMER, *supra* note 110, at 2-17 to -18 (defending "definitional balancing" when it truly generates a rule that "can be employed in future cases without the occasion for further weighing of interests," although conceding that definitional balancing cannot "offer absolute assurance that a given court under sufficient internal or external pressure in some 'hard' case will not depart from a definitional rule").

112. Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (conceding that "[w]e will have . . . balancing modes of analysis with us forever," but arguing that such "modes of analysis [should] be avoided where possible").

113. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973 (1987).

criminals? Both of those are indisputably “weighty” concerns; but by what shared unit of measurement can one be said to outweigh the other?¹¹⁴ In the absence of a common currency, how can one be assured that the Justices are doing something more exalted than merely implementing their own personal preferences?¹¹⁵ When the Court repeatedly re-strikes the balance in order to take account of differing arrays of social costs and deterrent effects, at what point must one say that the Justices are behaving more like legislators than like members of the judicial branch? Asking the Court to take a newly perceived social cost into account and to engage in an even more complicated balancing analysis than that in which the Court has previously engaged thus places added pressure on an analytic framework that is not terribly robust to begin with.

Those problems are rendered even more acute by the fact that the Court does not know the precise strength of its chief premise—namely, that the exclusionary rule does indeed deter Fourth Amendment violations. From a common-sense perspective, one can readily grant that the rule does deter *some* Fourth Amendment violations; there are undoubtedly occasions when law enforcement officers resist the temptation to cut corners, in order to ensure that prosecutors can use any evidence that the officers ultimately obtain to secure a conviction. But as Albert Alschuler recently noted, precisely “[q]uantifying the behavioral effects of the exclusionary rule is . . . impossible,”¹¹⁶ and everyone who has searched for compelling evidence that the exclusionary rule “substantially increase[s] police compliance with the Fourth Amendment” has failed to find it.¹¹⁷ Even if the competing variables could be reduced to a common unit of measurement, it nevertheless would be exceptionally difficult to ascertain just how weighty the countervailing social costs would have to be in order to render the exclusionary rule inapplicable.

For those concerned about the exclusionary rule’s infringement upon jurors’ deliberative autonomy, therefore, it is hard to take comfort in the pro-

114. *See id.* at 975 (stating that, in the exclusionary rule setting, “the Court has not developed any common scale for evaluation”).

115. *Id.* at 973 (“Balancing . . . must demand the development of a scale of values external to the Justices’ personal preferences. But from where and what might such a scale be derived? This is a problem that has bedeviled balancers for some time.”); *see id.* at 976 (stating that the balancing often “takes place inside a black box”).

116. Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1368 (2008).

117. *Id.* at 1383; *see also* *Elkins v. United States*, 364 U.S. 206, 218 (1960) (stating that “it is hardly likely that conclusive factual data could ever be assembled” to prove the extent of the exclusionary rule’s deterrent value); LAFAVE, *supra* note 5, § 1.2, at 3 (observing that there is evidence that the exclusionary rule does have value as a deterrent, but it is difficult to quantify the rule’s deterrent effects).

posal that the Court simply treat that infringement as one more social cost to be weighed in the balance. At some point in the discussion of the factors that deserve a place on the scale and of the weight that each of those factors carries, one must finally concede that the discussion presupposes the existence of a finely tuned scale that the Court does not actually possess. There simply is no means by which it objectively could be said that the addition or subtraction of *any* single social cost would tip the balance in favor of or against the rule's application. The language of scales and balancing is merely the language that the Justices use to describe their own individual efforts to take account of competing values. Absent a reason to believe that there are instances when taking account of jurors' deliberative autonomy would oblige courts to demand even greater deterrence value from the exclusionary rule before suppressing relevant evidence, there is no reason to believe that courts are paying jurors' deliberative autonomy any serious regard at all.

Third, because the moral concerns I have identified arise with jurors and not with judges,¹¹⁸ we might conclude that courts simply should refuse to apply the Fourth Amendment exclusionary rule in all cases tried by juries. A criminal defendant whose Fourth Amendment rights have been violated would then be put to a choice: he could forego his right to trial by jury and obtain the benefits of the exclusionary rule by placing his fate in the hands of a trial judge who has announced her intention to disregard the illegally obtained evidence, or he could invoke his right to trial by jury but suffer the admission of the fruits of the illegal search.

I confess that I was rather enamored with this proposal when I first began to draft this Article, and that I continue to feel a lingering attraction to it today. After all, the suggestion is not as radical as one might initially suppose: the choice between bench and jury trials already often carries evidentiary consequences of at least an informal sort. Although the Federal Rules of Evidence formally apply in bench and jury trials alike,¹¹⁹ the stringency with which those rules are applied often varies depending on whether judges or jurors are serving as the triers of fact.¹²⁰ Many of those

118. See *supra* notes 102-104 and accompanying text (summarizing the different moral concerns entailed by the exclusionary rule's application in bench and jury trials).

119. See FED. R. EVID. 1101(a), (b) (stating that the Federal Rules of Evidence apply in the United States district courts' civil and criminal proceedings).

120. See DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* § 1.7, at 1:32 (2001) ("[I]t is clear that both scholars and judges generally tend to favor much more open admissibility in bench trials than in jury trials."); JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 4d.1, at 213-14 (Peter Tillers rev. ed., 1983) ("In most jurisdictions the ordinary rules of evidence are nominally applicable in non-jury trials. However, many of the exclusionary rules are not vigorously enforced in bench trials."); cf. Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714 n.8 (2001) ("Most lawyers

evidentiary rules are based upon the premise that jurors are susceptible to non-rational influences and cognitive errors; because trial judges believe they are less susceptible than laypeople to those decision-making pitfalls, they often relax the rules' requirements when jurors are absent.¹²¹ With respect to the Fourth Amendment exclusionary rule, we might simply flip that usual way of thinking and hold that the rule applies only when the case is being adjudicated by the trial judge alone.

If we took that approach, however, we would lose much of whatever deterrent power the exclusionary rule currently exerts. Of course, that would be of no particular concern if law enforcement officers and their employers knew that Fourth Amendment violations would likely result in significant financial liability. If that were the case, the loss of the exclusionary rule's deterrent effects in cases tried by juries would be largely inconsequential: the financial disincentives would pick up the slack left by the exclusionary rule's absence. But assume for the moment that officers and their employers do not currently have satisfactorily strong financial incentives to honor suspects' Fourth Amendment rights (an assumption I will endorse in Part II.B). If we declared the exclusionary rule inapplicable in all jury-tried cases, then Fourth Amendment violations likely would not result in *any* satisfactorily adverse consequences for law enforcement officials in those cases, and the opportunity to use those violations as an occasion to send public-benefitting deterrence signals to governments and their agents would be lost.

Before abandoning the exclusionary rule in cases tried by juries, therefore, we would want to be sure that the law imposed a threat of financial liability sufficient to deter Fourth Amendment violations. Once we had assured ourselves on that front, however, the case for maintaining the exclusionary rule even for bench trials would crumble. After all, if we can achieve satisfactory deterrence through financial liability for misconduct in cases that ultimately are tried by juries, then surely we can use that same system of financial liability to draw deterrent effects from cases that ultimately are tried solely by judges.

B. Abandoning the Exclusionary Rule

That leads to the *fourth* and final way in which we might respond to the exclusionary rule's infringement upon jurors' deliberative autonomy: we

and judges have quite a relaxed sense of the rules of evidence, often ignoring them by tacit agreement and not only in bench trials.”).

121. See KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 60, at 238 (John William Strong ed., 1992) (stating that there is a reduced need for exclusionary rules in bench trials because “judges possess professional experience in valuing evidence”).

might entirely discard the exclusionary rule and replace it with a set of robust financial remedies aimed at strongly discouraging Fourth Amendment violations. In earlier generations, the Court might have regarded that proposal as a non-starter. In its recent Fourth Amendment rulings, however, the Court has made it clear that it regards the exclusionary rule as less essential today than it was during the first half of the twentieth century, and that it believes financial remedies are now a plausible alternative means of deterring at least some forms of police misconduct.

Writing for a narrow majority four years ago in *Hudson v. Michigan*,¹²² Justice Scalia underscored the Court's belief that the financial remedies available under §§ 1983 and 1988 are adequate to deter violations of the Fourth Amendment's knock-and-announce rule.¹²³ The Court stressed that those remedies were not available against state law enforcement officers half a century ago when the Court extended the exclusionary rule to state-court proceedings in *Mapp v. Ohio*.¹²⁴ Additionally, the Court observed that law enforcement leaders had placed "a new emphasis on internal police discipline" in recent decades, thereby prodding departments and their officers to become more professional in their conduct.¹²⁵ The Court concluded that, wholly apart from the exclusionary rule, the deterrents against knock-and-announce violations are "incomparably greater than the factors deterring warrantless entries when *Mapp* was decided."¹²⁶ Bearing in mind its belief that judges should use the exclusionary rule to deter Fourth Amendment violations only as a "last resort,"¹²⁷ the Court determined that there was no need for the exclusionary rule in the knock-and-announce setting.¹²⁸

That same skepticism about the exclusionary rule's necessity appeared last year in *Herring v. United States*, when the Court refused to apply the rule to Fourth Amendment violations resulting from negligent bookkeeping by police department employees.¹²⁹ The Court indicated that the exclusionary rule is appropriately applied only when Fourth Amendment violations

122. 547 U.S. 586 (2006) (5-4 decision).

123. *See id.* at 597; *see also* 42 U.S.C. § 1983 (2006) (providing a cause of action against state officials for certain violations of federal rights); *id.* § 1988(b) (authorizing the award of attorneys' fees to the prevailing party in actions brought under § 1983); *supra* notes 23-25 and accompanying text (discussing *Hudson*).

124. *See Hudson*, 547 U.S. at 597 (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). The Court also noted that additional rulings in the 1960s and 1970s paved the way for similar remedies in actions against municipalities and federal law enforcement officials. *See id.*; *see also supra* notes 94-100 and accompanying text (noting these rulings).

125. *See Hudson*, 547 U.S. at 598-99.

126. *Id.* at 599.

127. *Id.* at 591.

128. *See id.* at 599.

129. *See supra* notes 26-27 and accompanying text (noting *Herring's* holding).

are “flagrant,” “deliberate,” “patently unconstitutional,” “reckless,” or “grossly negligent”—that is, when the violations are akin to the “abuses that gave rise to the exclusionary rule” nearly a century ago.¹³⁰ Despite the fact that much of our tort system is built upon the premise that the threat of financial liability can meaningfully deter merely negligent behavior—a point that the dissent was quick to make¹³¹ and that the majority conceded in a footnote¹³²—the Court found the exclusionary rule inappropriate for merely negligent police conduct. “To trigger the exclusionary rule,” the Court wrote, “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.”¹³³ The Court held that a negligent bookkeeping error “does not rise to that level.”¹³⁴

When placed side by side with one another, *Hudson*’s discussion of alternative means of deterrence and *Herring*’s decision to limit the exclusionary rule to the most egregious Fourth Amendment violations take on a significance that is both striking and portentous. When police misconduct is “flagrant” or otherwise plainly unconstitutional, qualified immunity is likely to fail as a defense and financial liability is accordingly much more likely to attach. Law enforcement officers are entitled to the qualified-immunity defense only when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹³⁵ A victim of a Fourth Amendment violation can overcome that defense only if, at the time of the challenged conduct, “the contours of the [Fourth Amendment] right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”¹³⁶ If a Fourth Amendment violation is “flagrant,” “deliberate,” “patently unconsti-

130. *Herring*, 129 S. Ct. at 701-02 (internal quotation marks omitted); see also *supra* notes 8-16 and accompanying text (describing some of those early abuses).

131. See *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

132. See *id.* at 702 n.4.

133. *Id.* at 702. That was Judge Friendly’s view, as well. See Friendly, *supra* note 31, at 952 (“[T]he object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal . . .”).

134. *Herring*, 129 S. Ct. at 702.

135. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (reiterating this rule and explaining that it applies identically in actions brought under § 1983 against state officers and in actions brought under *Bivens* against federal officers).

136. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Court has explained that government officials are entitled to “fair warning” of the kinds of conduct for which they might be held personally liable. *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). So long as established legal principles fairly put officials on notice of the conduct that will trigger personal liability, officers can be held personally liable “even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

tutional,” “reckless,” or “grossly negligent”¹³⁷—as the *Herring* Court said that a violation must be in order for the exclusionary rule to apply—then financial liability is a real possibility. Yet if financial liability is indeed a significant threat, then *Hudson*’s chief premise moves to the fore: courts should apply the exclusionary rule to a given species of Fourth Amendment violation only if there are no other adequate means of deterring such misconduct in the future.¹³⁸ By restricting the exclusionary rule to only the most obvious Fourth Amendment violations, the Court is thus restricting the rule to cases where financial remedies are most likely to provide an alternative mechanism for deterrence. It appears, in short, that the Court has teed up the exclusionary rule for its ultimate rejection.

Why, then, didn’t the Court in *Herring* simply abandon the exclusionary rule entirely? Presumably, it is because there are not yet five Justices who are prepared to say that, with respect to those egregious Fourth Amendment violations to which the exclusionary rule’s application is now limited, the threat of financial recovery is indeed sufficiently robust to render the exclusionary rule’s deterrent effects superfluous. That was the sticking point for Chief Justice Warren Burger in his well-known opposition to the exclusionary rule nearly forty years ago,¹³⁹ and it is a point on which the dissenting Justices pushed hard in both *Hudson* and *Herring*.¹⁴⁰ There are indeed numerous ways in which existing law prevents the threat of financial liability from exerting the kind of deterrent power necessary to render the exclusionary rule dispensable.¹⁴¹ Eliminate enough of the barriers to meaningful financial consequences for Fourth Amendment violations, however, and the exclusionary rule is almost certain to be relegated to the pages of history.

For illustrative purposes, I briefly identify below three ways in which champions of jurors’ deliberative autonomy and other opponents of the exclusionary rule could productively focus their law-reform energies in an effort to render the exclusionary rule’s deterrent effects unnecessary. Before entering any discussion of possible replacements for the exclusionary rule,

137. *Herring*, 129 S. Ct. at 701-02 (internal quotation marks omitted).

138. See *supra* notes 122-128 and accompanying text (recounting *Hudson*’s reasoning).

139. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 420-22 (1971) (Burger, C.J., dissenting) (arguing that the exclusionary rule should be abandoned but only after “some meaningful alternative [has been] developed,” and urging Congress to take the lead in providing a system of financial remedies for Fourth Amendment violations).

140. See *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (stating that “[c]ivil liability will not lie for the vast majority of Fourth Amendment violations” (internal quotation marks omitted)); *Hudson v. Michigan*, 547 U.S. 586, 611 (2006) (Breyer, J., dissenting) (sharply criticizing the majority’s suggestion that financial remedies provide adequate deterrence against violations of the knock-and-announce rule).

141. See *infra* Parts II.B.1-3 (identifying three such hindrances).

however, it is important to calibrate one's expectations. When it comes to securing satisfactory deterrent effects, we need not demand significantly greater measures of precision from the exclusionary rule's replacement than we have accepted from the exclusionary rule itself. Toward that end, it bears noting that the exclusionary rule is a remarkably crude deterrent device. The rule only kicks in, for example, when an unlawful search culminates in a criminal prosecution. As Judge Richard Posner points out, the rule thus provides no deterrent against "the worst kind of police search . . . : the search of the known innocent for purposes purely of harassment."¹⁴² Even within the realm of those instances in which they do apply, the exclusionary rule and its many exceptions comprise a blunt instrument for finding the optimal point at which law enforcement officers are strongly encouraged to operate within the Fourth Amendment's boundaries, yet not so cowed that they decline to take lawful and desirable actions aimed at capturing criminals.¹⁴³ One would think that the optimal level of deterrence could be found with greater precision through a system of financial disincentives that could more easily be fine-tuned.¹⁴⁴

What we need, therefore, is not a perfect substitute for the exclusionary rule, but rather a substitute that is likely to provide a satisfactory measure of deterrence without allowing guilty defendants to escape punishment, bringing the criminal-justice system into public disrepute, infringing upon jurors' deliberative autonomy, or incurring any of the exclusionary rule's other significant social costs. Here are three ways in which we might move toward that objective:

1. Broaden the Availability of Punitive Damages for Violations of the Fourth Amendment

In civil actions alleging violations of Fourth Amendment rights today, courts restrict compensatory damages to those harms that plaintiffs actually suffered as a result of the unlawful invasion of their privacy.¹⁴⁵ Compensable harms include such things as "physical injury, property damage, [and] injury to reputation,"¹⁴⁶ as well as "mental suffering or emotional an-

142. Posner, *supra* note 90, at 54.

143. *See id.* at 55-57.

144. *See id.* In a related vein, Professor Amar points out that the exclusionary rule "over-compensates" many criminal defendants by enabling them to escape punishment entirely, rather than, say, receive varying degrees of reduction in their prison sentences. "[T]he more guilty [they] are," Professor Amar writes, "the more [they] benefit." Amar, *supra* note 7, at 797.

145. *See Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999).

146. *Id.*

guish.”¹⁴⁷ If a plaintiff proves that a defendant violated his or her Fourth Amendment rights but cannot prove that he or she suffered any compensable harm as a result, the plaintiff is likely to recover only nominal damages of a single dollar.¹⁴⁸

Needless to say, the sum of one dollar is hardly sufficient to give pause to law enforcement officers contemplating an illegal search. Imagine, for example, that an officer wishes to obtain evidence illegally from a home, but wants to do it in a way that minimizes his or her financial exposure. So far as compensatory damages are concerned, the officer merely needs to ensure that he or she avoids damaging the property, does not inflict any physical injuries, and treats the residence’s occupants in a manner unlikely to cause reputational harms or provoke mental anguish. With those aims in mind, the officer might simply do what state and federal officers did nearly a century ago in *Weeks*: use a hidden house key to obtain access to the residence while its occupants are away.¹⁴⁹ The *Weeks* Court created the exclusionary rule in order to deter that kind of patently unconstitutional behavior, and any system of financial remedies that is offered to supplant the exclusionary rule must deter that kind of misconduct as well.

There are at least two ways in which we might change the existing law of damages in order to deter Fourth Amendment violations satisfactorily in the exclusionary rule’s absence. First, we might design a schedule of fixed monetary awards, under which non-trivial sums are automatically awarded—even in the absence of physical, reputational, or mental harm—upon proof that specified kinds of Fourth Amendment violations have occurred. One of the problems with that approach, however, is that it implicitly encourages decisions about trade-offs that we presumably do not want law enforcement officers to make. Faced with a fixed schedule of monetary payments, law enforcement officers might well decide that illegally securing evidence of a suspect’s guilt in a given case is well worth the financial costs that will predictably follow. As Walter Dellinger observed a number of years ago, we surely do not want to establish a system in which government officials can easily “decide whether the benefits of infringing the public’s right to be protected from unreasonable searches and seizures

147. *Carey v. Phipus*, 435 U.S. 247, 264 n.20 (1978); *see also Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389-90, 397 (1971) (noting that *Bivens* had sought monetary damages for “humiliation, embarrassment, and mental suffering as a result of the agents’ unlawful conduct,” and holding that *Bivens* was “entitled to recover money damages for any injuries he has suffered as a result of the agents’ violation of the Amendment”).

148. *See, e.g., Padilla v. Miller*, 143 F. Supp. 2d 453, 478 (M.D. Pa. 1999).

149. *See Weeks v. United States*, 232 U.S. 383, 386-87 (1914); *see also supra* notes 8-9 and accompanying text (discussing *Weeks*).

are worth some expenditure of the public's funds"¹⁵⁰ Professor Dellinger raised that point as an argument against *any* effort to replace the exclusionary rule with a system of financial remedies. The argument has even greater strength, however, when law enforcement personnel know the exact costs of violations in advance, can precisely evaluate those costs in individual cases, and can carefully include those costs in their financial planning.

The second way in which we might use financial remedies to deter misconduct is by increasing our reliance on punitive damages. Under the law as it exists today, punitive damages are available in actions brought under § 1983 or *Bivens* only if “the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”¹⁵¹ When one examines the terms that the *Herring* Court used to describe the violations to which the exclusionary rule’s application is now limited (“flagrant,” “deliberate,” “patently unconstitutional,” “reckless,” and “grossly negligent”¹⁵²) and compares them to the nouns and adjectives that the Court uses to describe the violations that warrant punitive damages (“evil motive or intent” and “reckless or callous indifference”¹⁵³), one finds that while there are areas of overlap, there might also be spots of daylight between them. If there are indeed gaps between the violations for which *Herring* permits application of the exclusionary rule and the violations for which punitive damages may be awarded, that gap ought to be closed. The cases that the Court deems appropriate for the exclusionary rule’s deterrent effects today ought to be identical to the cases that are deemed appropriate for punitive damages’ deterrent effects in the absence of the exclusionary rule tomorrow.

Of course, Professor Dellinger’s point applies here, too: we do not want law enforcement officers easily deciding that Fourth Amendment violations are worth their financial costs. Yet the amount of punitive damages that a court might award in a given case could never be known with certainty in advance. Law enforcement officers who were contemplating a Fourth Amendment violation thus would have good cause to worry that the costs of the violation might prove to be notably higher than they predict. Due

150. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1563 (1972).

151. *Smith v. Wade*, 461 U.S. 30, 56 (1983) (discussing § 1983); *see also* *Carlson v. Green*, 446 U.S. 14, 21-22 (1980) (stating that punitive damages are available in *Bivens* actions). Punitive damages may be awarded “even in the absence of actual damages.” *Siebert v. Severino*, 256 F.3d 648, 655 (7th Cir. 2001).

152. *Herring v. United States*, 129 S. Ct. 695, 701-02 (2009); *see also supra* notes 129-134 and accompanying text (discussing this aspect of *Herring*’s reasoning).

153. *Smith*, 461 U.S. at 56.

process principles require that the magnitude of punitive damages not be totally unforeseeable,¹⁵⁴ but that still leaves courts with a great deal of flexibility to fashion punitive-damage awards of varying magnitudes, taking account of such factors as “the degree of reprehensibility of the defendant’s conduct”¹⁵⁵ and the civil and criminal penalties that the legislature has authorized for “comparable misconduct.”¹⁵⁶ If a defendant’s Fourth Amendment violation is “flagrant,” “deliberate,” “patently unconstitutional,” “reckless,” or “grossly negligent,”¹⁵⁷ then it ought to qualify for a deterrence-providing award of punitive damages.

2. *Increase Municipalities’ Financial Exposure for Fourth Amendment Violations Committed by Their Law Enforcement Officers*

There are two ways in which municipalities, counties, and other state subdivisions (which, for the sake of economy, I will refer to simply as municipalities) are shielded today from significant liability for their law enforcement officers’ Fourth Amendment violations. First, under *Monell v. Department of Social Services of the City of New York*,¹⁵⁸ a municipality may be sued for damages under § 1983,¹⁵⁹ but it can be held liable for the actions of its employees only if the employees were acting in accordance with the municipality’s policies or customs when they committed the mis-

154. See *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) (stating, with respect to punitive damages in civil actions, that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose”); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (reiterating this point).

155. *BMW of N. Am.*, 517 U.S. at 575 (identifying this as “the most important indicium of the reasonableness of a punitive damages award”).

156. *Id.* at 583. One area of potential trouble for those seeking to replace the exclusionary rule with increased reliance on punitive damages concerns the Court’s thinking regarding the ratio of actual to punitive damages. The Court indicated in *State Farm* that, although the Court has not yet adopted a bright-line test for assessing the relationship between actual damages and permissible punitive damages, “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” 538 U.S. at 425. The Court acknowledged, however, that it might be appropriate to deemphasize this concern when actual damages are nominal or small and the misconduct is egregious. See *id.*

157. *Herring*, 129 S. Ct. at 702; see also *supra* notes 129-134 and accompanying text (discussing this aspect of *Herring*’s reasoning).

158. 436 U.S. 658 (1978).

159. See *id.* at 690 (“Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”); see also 42 U.S.C. § 1983 (2006) (providing a cause of action against “every person” who violates another person’s federal rights under color of state law).

conduct.¹⁶⁰ The *Monell* Court reasoned that unless a municipality's employees were acting pursuant to the municipality's policies or customs when they violated a person's federal rights, the municipality itself was not the "moving force" behind the violation.¹⁶¹ When a municipal law enforcement officer violates a person's Fourth Amendment rights in a manner not contemplated by his or her employer's policies or customs, therefore, the victim's recourse under § 1983 is only against the individual officer.¹⁶²

Second, under *City of Newport v. Fact Concerts, Inc.*,¹⁶³ punitive damages cannot be imposed upon a municipality under § 1983 for the acts of its employees, even if those employees were acting in accordance with the municipality's policies or customs when they committed the wrongdoing.¹⁶⁴ The Court reasoned that Congress did not intend to abolish municipalities' historic immunity from punitive damages when it enacted § 1983;¹⁶⁵ that "[n]either reason nor justice" supports requiring taxpayers to foot the bill for punitive damages paid to plaintiffs who presumably have been fully compensated for their actual injuries;¹⁶⁶ that individual city employees are unlikely to be deterred from violating a person's federal rights by the knowledge that punitive damages might be inflicted upon their em-

160. *See Monell*, 436 U.S. at 691 ("Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."); *id.* at 694 ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."); *see also* *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) ("[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983.").

161. *Monell*, 436 U.S. at 694.

162. *See, e.g.,* *Bennett v. City of Eastpointe*, 410 F.3d 810, 823 (6th Cir. 2005) (dismissing a § 1983 claim against a municipality because there was no "evidence of an unconstitutional city policy pursuant to which [two officers] acted"); *Doe v. Broderick*, 225 F.3d 440, 456 (4th Cir. 2000) (holding that a city could not be held liable under § 1983 for an "odd, isolated incident that was the first of its kind" in the city's law enforcement department); *Cosme v. L.A. County Sheriff's Dep't*, No. CV 09-2363-CAS, 2009 U.S. Dist. LEXIS 105794, at *10-11 (C.D. Cal. Oct. 23, 2009) (dismissing a § 1983 claim against a municipality because the plaintiff "does not purport to identify any policies, ordinances, regulations, customs or the like of the [municipality], the execution of which allegedly inflicted the constitutional injuries about which he is complaining").

163. 453 U.S. 247 (1981).

164. *See id.* at 271 ("Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.").

165. *See id.* at 258-66 (examining the historical record).

166. *Id.* at 267.

ployers;¹⁶⁷ that punitive damages are not needed in order to spur voters to hold city officials politically accountable for city employees' wrongdoings;¹⁶⁸ and that deterrence is generally always best achieved by imposing punitive damages on the very person who commits the wrongdoing.¹⁶⁹

Taken together, *Monell* and *City of Newport* greatly inhibit any effort to rely upon financial remedies as the primary deterrent against Fourth Amendment violations. By restricting municipalities' liability to compensatory damages, and by permitting even mere compensatory damages to be imposed upon a municipality only when a law enforcement officer commits a wrongdoing pursuant to official city policy or custom, the Court lamentably shuns the deterrence value of *respondeat superior* liability. The threat of strict financial liability gives employers a powerful incentive to hire, train, and supervise their employees with great care.¹⁷⁰ The Court has acknowledged this point in other settings,¹⁷¹ and lower courts have done so as well.¹⁷² As Larry Kramer and Alan Sykes argued more than twenty years ago, § 1983 would yield far greater measures of deterrence against constitutional wrongdoing by municipal employees—including wrongdoing by the many law enforcement officers whom municipalities employ—if those municipalities were more frequently held financially liable for their employees' misconduct.¹⁷³ Susanah Mead has made the same point, contend-

167. *See id.* at 269 (stating that “the impact on the individual tortfeasor of this deterrence in the air is at best uncertain”).

168. *See id.* (concluding that “the compensatory damages that are available against a municipality” are likely sufficient to provoke voters to hold officials politically accountable).

169. *See id.* at 270 (stating that “a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer”).

170. *See* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 188-89 (6th ed. 2003); *cf. id.* at 188 (stating that deterrence-focused financial disincentives are better placed on employers than on employees because “most employees lack the resources to pay a judgment if they injure someone seriously” and they thus “are not very responsive to the threat of tort liability”).

171. *See, e.g.,* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991) (stating that “[i]mposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for the vigilance by those in a position ‘to guard substantially against the evil to be prevented’” and that holding employers strictly liable for their employees' fraudulent activities “deters fraud more than a less stringent rule” (citation omitted)).

172. *See, e.g.,* *Oki Semiconductor Co. v. Wells Fargo Bank*, 298 F.3d 768, 776 (9th Cir. 2002) (“This possibility of respondeat superior liability for an employee's RICO violations encourages employers to monitor closely the activities of their employees to ensure that those employees are not engaged in racketeering.”); *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1153 (9th Cir. 1992) (“Respondeat superior liability . . . provides employers with an incentive to monitor employees and deter wrongful conduct.”).

173. *See* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249, 287 (“To summarize: either strict vicarious liability or vicarious liability based on negligence is an improvement over personal liability

ing that “forcing municipalities to be responsible for their employees’ unconstitutional conduct encourages care in the hiring, training, and supervision of municipal employees,” and that “[t]his care, in turn, should reduce the number of constitutional injuries.”¹⁷⁴

If a robust system of financial remedies is ever to render the Fourth Amendment exclusionary rule unnecessary, either Congress or the Court will almost certainly have to either remove or soften the restrictions that *Monell* and *City of Newport* impose. Although municipalities cannot control every act in which their law enforcement officers engage, they can do a great deal through their hiring, training, and shaping of departments’ internal culture to discourage violations of citizens’ Fourth Amendment rights. We ought to strengthen municipalities’ financial incentives to take those steps.

3. *Increase the Amount of Attorney’s Fees That May Be Recovered by Incarcerated Plaintiffs in Actions Brought Under § 1983*

Section 1983 provides individuals with a cause of action against persons who violate their Fourth Amendment rights under color of state law,¹⁷⁵ and § 1988 authorizes the prevailing party in a § 1983 action to recover his or her attorney’s fees from his or her opponent.¹⁷⁶ A key provision of the Prison Litigation Reform Act of 1995 (the “PLRA”),¹⁷⁷ however, caps the amount that may be awarded to a § 1983 plaintiff for attorney’s fees if he or she is incarcerated at the time he or she files the suit. That statute provides, in pertinent part:

(d)(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney’s fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that—

with respect to the efficiency of deterrent and precautionary measures to reduce the incidence of constitutional torts.”); *accord* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009, 2019 (1998) (arguing that imposing “respondeat superior liability for municipalities under § 1983 would better effectuate the . . . goal[] . . . of deterrence” because “municipalities can adjust their recruitment, training, and supervision of agents; improve the quality or amount of data provided; and develop effective methods of sanctioning misconduct and rewarding particular types of behavior”).

174. Susanah M. Mead, *42 U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 539 (1987).

175. *See* 42 U.S.C. § 1983 (2006); *see also supra* notes 123-128 and accompanying text (discussing *Hudson’s* acknowledgement that a damages remedy is available under § 1983 for certain Fourth Amendment violations).

176. *See* 42 U.S.C. § 1988(b) (2006).

177. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C.).

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.¹⁷⁸

For our purposes here, that obtusely worded statute provides, in short, that attorney's fees are capped at 150% of an incarcerated plaintiff's monetary recovery in an action brought under § 1983.¹⁷⁹

If a person suffers a Fourth Amendment violation at the hands of a state official, and then is convicted of a crime and sentenced to a term of imprisonment, the PLRA makes it extraordinarily difficult for him or her to secure effective legal representation for a § 1983 damages action. Even setting the PLRA aside, incarcerated plaintiffs already face an uphill climb to the extent that judges and juries find them to be unsympathetic litigants.¹⁸⁰ The PLRA makes matters untenably worse. Assume, for example, that an incarcerated plaintiff proves that her Fourth Amendment rights were violated, but she cannot demonstrate that she suffered any compensable harm as a result. Assume, further, that neither Congress nor the Court has yet adopted the proposal that punitive damages be made available in all cases to which the exclusionary rule today applies,¹⁸¹ and that the trial court has denied the plaintiff's request for punitive damages in the case at bar. The plaintiff in that case is likely to be awarded only a single dollar as nominal damages.¹⁸² What does the plaintiff's attorney recover for his or her efforts to defend the nation's Fourth Amendment values? The lower courts have held that, in light of the restrictions imposed by the PLRA, the plaintiff's attorney can recover no more than a mere \$1.50.¹⁸³ To state that fact is to make the argument: capping attorney's fees for incarcerated plaintiffs at

178. 42 U.S.C. § 1997e (2006).

179. *See Robbins v. Chronister*, 435 F.3d 1238, 1240 (10th Cir. 2006) ("The statutory language may be inartful, but appellate courts have consistently interpreted the statute to limit a defendant's liability for attorney fees to 150% of the money judgment."); *Royal v. Kautzky*, 375 F.3d 720, 725 (8th Cir. 2004) ("Although awkwardly worded, the PLRA allows an award of attorney fees for 150 percent of the damages award."), *cert. denied*, 544 U.S. 1061 (2005).

180. *See Caleb Foote*, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500-01 (1955).

181. *See supra* Part II.B.1.

182. *See supra* note 148 and accompanying text.

183. *See, e.g., Pearson v. Welborn*, 471 F.3d 732, 742-44 (7th Cir. 2006); *Robbins*, 435 F.3d at 1244; *Royal*, 375 F.3d at 726; *Boivin v. Black*, 225 F.3d 36, 39-41 (1st Cir. 2000).

such an implausibly low level undercuts any effort to rely on damages actions as the primary means of deterring Fourth Amendment violations. If the exclusionary rule is to become a relic of the past, the PLRA's cap must be lifted.

CONCLUSION

The Fourth Amendment exclusionary rule infringes upon jurors' moral right to see and hear all of the relevant, reasonably available evidence in the cases whose outcomes they have been asked to determine. By excluding potentially powerful evidence of defendants' guilt, the rule instrumentalizes jurors by treating them wholly as a means to the Court's goal of deterring future Fourth Amendment violations. Although exclusionary rules of all sorts are morally problematic,¹⁸⁴ the Fourth Amendment exclusionary rule is especially troublesome: deficiencies in jurors' rational capacities play no role in justifying the evidence's exclusion in the Fourth Amendment setting; it is unreasonable to presume that jurors are willing to be yoked in service to the Court's ends; the rule's claim to democratic legitimacy is weaker than that of most other federal exclusionary rules; and the rule is not essential to achieving the deterrence objectives for which it was designed.¹⁸⁵ Although there are a variety of ways in which we might try to address the rule's infringement upon jurors' deliberative autonomy,¹⁸⁶ the best approach is probably to discard the exclusionary rule altogether and replace it with a set of financial remedies aimed at strongly discouraging Fourth Amendment violations.¹⁸⁷

Even without paying any regard to the exclusionary rule's morally troublesome treatment of jurors, the Court has already traveled quite some distance down the path toward abandoning the exclusionary rule. In *Hudson*, for example, the Court indicated its belief that the risk of financial liability can supplant the need for the exclusionary rule's deterrent effects in at least some instances,¹⁸⁸ while in *Herring* the Court signaled its desire to restrict the exclusionary rule to the most egregious Fourth Amendment violations—violations for which qualified immunity is unlikely to succeed as a defense and for which the risk of financial exposure thus might provide a satisfactory measure of deterrence.¹⁸⁹ The Court is unlikely to reject the exclusionary rule altogether, however, until the threat of financial liability

184. *See supra* Part I.A.

185. *See supra* Part I.B.

186. *See supra* Part II.A.

187. *See supra* Part II.B.

188. *See supra* notes 122-128 and accompanying text (discussing *Hudson*).

189. *See supra* notes 129-134 and accompanying text (discussing *Herring*).

for Fourth Amendment violations has been made more robust. Congress almost certainly must play a leading role in that effort. After all, many of the existing obstacles to meaningful financial recovery are statutory in nature—it is through its reading of § 1983, for example, that the Court has imposed various limits on plaintiffs' ability to recover compensatory and punitive damages from law enforcement officers' municipal employers,¹⁹⁰ and it is the PLRA that imposes a daunting cap on the ability of incarcerated plaintiffs to recover meaningful attorney's fees when they prevail in § 1983 actions.¹⁹¹

Of course, the Court could help matters along by revisiting some of its prior statutory interpretations with an eye toward strengthening citizens' ability to recover compensatory and punitive damages when law enforcement officers violate their Fourth Amendment rights. In 1978, for example, the Court in *Monell* rejected seventeen-year-old precedent and held that there are instances when municipalities may be held liable for compensatory damages under § 1983.¹⁹² It is unlikely, however, that the Court will take comparable action today without any prompting from Congress. Absent a compelling reason to believe that the Court misperceived Congress's original intentions the first time around, a package of new statutory interpretations runs the risk of appearing more legislative than judicial in nature. If Congress wishes to enact the legislative-reform package necessary to make the Court's Fourth Amendment exclusionary rule a thing of the past, the Court has given us good reason to believe that it would be willing to go along. But it likely does fall to Congress to take the next step.

190. See *supra* notes 158-169 and accompanying text (discussing *Monell* and *City of Newport*).

191. See *supra* Part II.B.3 (discussing the PLRA).

192. See *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)); see also *supra* notes 158-162 and accompanying text (discussing *Monell*).