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Symposium on Reform of the Exclusionary Rule

An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule

L. Timothy Perrin*
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If a single principle may be drawn from this Court's exclusionary rule decisions, from Weeks through Mapp v. Ohio, to the decisions handed down today, it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.

Justice Harry Blackmun¹

I conclude, therefore, that an entirely different remedy is necessary. . . . Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. . . . Such a statutory scheme would have the added advantage of providing some remedy to the completely innocent persons who are sometimes the victims of illegal police conduct—something that the suppression doctrine, of course, can never accomplish.

Justice Warren Burger²

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1. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

2. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 422 (1971) (Berger, J., dissenting).

I. INTRODUCTION

The exclusionary rule is not inviolate. As the late Justice Blackmun suggested, if judicial understanding about the effects of the rule leads to the conclusions that it does not achieve the important goals that were its genesis and that it exacts an unacceptably high price from our criminal justice system, the challenge for courts and legislators is to find a better way.³

Our 1998 article, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*,⁴ (the Pepperdine Study), describes our extensive empirical study of the exclusionary rule and proposes a civil administrative remedy to partially replace the rule. In this symposium we have invited judges, practitioners, and academics to critique our study and our proposal with the goal of elevating the dialogue about the continuing efficacy of the exclusionary rule. First, however, we briefly review our empirical study of the rule and our proposed civil administrative remedy. Then, we present the thoughtful critiques and counter-proposals from our symposium participants. Finally, we respond to the critiques and argue in support of our proposal to radically reform the exclusionary rule.

II. WHAT'S WRONG WITH THE RULE

The exclusionary rule is broken. The rule imposes unacceptably high systemic costs and fails to provide meaningful deterrence of police misconduct.⁵ This conclusion—our recognition of the stark reality that the rule stands in need of repair—is not particularly controversial. Many, if not most, criminal law practitioners and commentators agree that the rule is inefficient and ineffective.⁶ Undoubtedly, the more difficult question is how to efficiently and effectively remedy police violations of suspects' rights. Some believe that the exclusionary rule functions as a core constitutional value.⁷ The rule protects criminal defendants against abuses by

3. See *id.*

4. L. Timothy Perrin, H. Mitchell Caldwell, and Carol A. Chase with Ronald Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 665 (1998). The proposed civil administrative remedy is sometimes referred to herein as the "Pepperdine Proposal" solely for ease of reference and does not imply that the proposal has been endorsed by Pepperdine University.

5. See *infra* notes 10-16 and accompanying text.

6. See, e.g., William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49 (1982); James T. Ranney, *The Exclusionary Rule—The Illusion vs. The Reality*, 46 MONT. L. REV. 289 (1994).

7. See Anthony G. Amsterdam, *Perspectives On The Fourth Amendment*, 58 MINN. L. REV. 349, 396-98, 411-14 (1974); Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565, 574-75 (1983); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 294-98 (1984).

the government, and thus, the high costs of the rule are simply part and parcel of our constitutional framework.⁸ For others, the exclusionary rule is simply a pragmatic choice—the best option among an array of unattractive alternatives.⁹ We disagree with both of those positions: the rule is not necessary to enforce the rights protected by the Fourth or Fifth Amendments, and retaining the rule is not justified simply because it's the best we can do.

The Supreme Court adopted the exclusionary rule with the dual purpose of giving force to the Fourth Amendment and preserving judicial integrity.¹⁰ Despite these noble objections, the rule has proven to be both costly and ineffective. The costs range from the obvious to the invidious. Chief among the obvious costs is the loss of many otherwise viable criminal cases as a direct result of the suppression of incriminating evidence. This cost expresses itself through public hostility toward a criminal justice system that permits “the criminal to go free because the constable has blundered.”¹¹ In addition, the exclusionary rule imposes certain costs on the system, including the monetary cost of litigating motions to suppress evidence. A criminal defendant has little, if anything, to lose by filing a motion to suppress evidence, particularly in view of the huge windfall gained by a successful motion. Thus, the rule creates an incentive for defendants to file even frivolous motions to suppress evidence. Between eighty and ninety percent of all such motions are denied,¹² indicating that many of them are interposed without appropriate legal or factual support. Each suppression motion consumes many hours of attorney time, court time, and witness time, all of which must be paid for with public funds or shared by the public and the litigant.¹³

Furthermore, the exclusionary rule leads to an increase in perjury by police officers attempting to avoid the effect of the exclusionary rule.¹⁴ There is some evidence of judicial acceptance of police perjury.¹⁵ In addition, the dramatic effect of granting a motion to suppress, including dismissal of charges and the release of

8. See *Amsterdam*, *supra* note 7, at 396-98, 411-14; *Kamisar*, *supra* note 7, at 574-75; *Wasserstrom*, *supra* note 7, at 294-98.

9. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841 (1994).

10. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961); *Weeks v. United States*, 232 U.S. 383, 393-94 (1914).

11. See Myron W. Orfield, *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 77 (1992) (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926)).

12. See UNITED STATES COMPTROLLER GENERAL, UNITED STATES ACCOUNTING OFFICE REPORT TO CONGRESS, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, 8, 10 (1979).

13. See *Ranney*, *supra* note 6, at 296; *Schroeder*, *supra* note 6, at 1383.

14. See *Orfield*, *supra* note 11, at 82-83.

15. See *id.*

obviously guilty defendants, has made courts reluctant to protect the constitutional rights of defendants, construing conduct that logically appears to run afoul of the Fourth Amendment as permissible.¹⁶ In a judicial system that relies on precedent, this reticence has caused a narrowing of the scope of protections afforded by the Fourth Amendment for all of us.¹⁷ The cost of increased police perjury and decreased protection of constitutional rights, while less obvious than other costs and less susceptible to precise measurement, constitute two of the most critical costs imposed by the rule.

Yet, even the high costs associated with the exclusionary rule might be justifiable if the rule effectively deterred police conduct that violated the Fourth Amendment. Several studies, including our own, have attempted to measure the rule's effectiveness.¹⁸ The results show that the effectiveness of the rule is inconclusive, at best, and some show that it is in fact a failure.¹⁹

Finally, a comparative legal analysis demonstrates that the United States stands alone among common law countries in mandating the exclusion of relevant evidence seized in violation of individual rights. England, Canada, Australia and New Zealand all give courts discretion to exclude illegally seized evidence in certain

16. See H. Mitchell Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 53-54 (1994).

17. See *id.*

18. See generally Perrin, et al., *supra* note 4, at 678; see, e.g., REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL PROSECUTIONS (1979); NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 2 (1982); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 33-35 (1966); Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1973); Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 AM. POL. Q. 57 (1977); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 632; *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968); William C. Heffernan and Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Craig D. Uchida and Timothy S. Bynum, *Criminology: Search Warrants, Motions to Suppress and "Loss Cases": The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1035 (1991); Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study, and the Implications*, 45 N.C. L. REV. 119 (1966); Stuart S. Nagal, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 283-84; Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 675 (1970); Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 85-88 (1992) (hereinafter referred to as Orfield II); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (hereinafter referred to as Orfield I).

19. See Perrin, et al., *supra* note 4, at 754-55.

circumstances,²⁰ but none mandate exclusion.²¹ Indeed, it appears that the discretion to exclude evidence is infrequently exercised and is limited to violations involving only the most egregious of circumstances.²²

The combination of these considerations, the high costs associated with the exclusionary rule, the paucity of evidence supporting its effectiveness, and the fact that the United States is unique in mandating the exclusion of unlawfully seized evidence, led us to undertake two projects. First, we conducted an empirical study aimed at evaluating the effectiveness of the exclusionary rule in safeguarding Fourth Amendment rights.²³ Second, we developed an alternative proposed remedy for Fourth Amendment violations.²⁴ The empirical study and our proposal are briefly described below.

III. AN EMPIRICAL STUDY OF THE RULE

Recognizing that previous evaluations of the exclusionary rule only measured the rule's deterrent effect indirectly,²⁵ we conducted a study of police officers intended to directly measure their ability to apply the law of search and seizure and to gauge their attitudes toward the exclusionary rule, including the extent to which police perceive the rule as a deterrent.

Our 1997 questionnaire went to 1144 law enforcement officers in Ventura County, California, including the Sheriff's Department and the five police departments in the county.²⁶ We received responses from 411 officers, roughly 36% of those to whom the questionnaire was sent.²⁷ Additionally, we sent the same questionnaire to a group of 270 law enforcement officers from agencies throughout California who recently attended a continuing education seminar involving search and seizure law.²⁸ From this group fifty-five responded, roughly 20%.²⁹ We also administered the hypothetical questions contained in the questionnaire to eighty first year law students, who had just completed a three unit course in criminal procedure.³⁰

20. See Caldwell & Chase, *supra* note 16, at 57-66.

21. See *id.*

22. See *id.*

23. See Perrin, et al., *supra* note 4, at 711-36.

24. See *id.* at 743-53.

25. See *id.* at 711.

26. See *id.* at 712-13.

27. See *id.* at 713.

28. See *id.*

29. See *id.*

30. See *id.*

A. Participants' Backgrounds

The questionnaire sought biographical information including rank, experience, and education, and tested the officers' understanding of the law, of search and seizure, and police interrogation.³¹ The background of those participating in the study was diverse, although almost all of the respondents had taken some college courses.³² This college educated group was almost equally divided among those who had obtained an associate's degree, a two year program, and those who obtained a bachelor's degree.³³ Close to half held the rank of officer, about one-fifth held the rank of detective, and the remainder, about one-third, held a rank above detective.³⁴ The responding officers were "relatively evenly divided according to years of experience."³⁵

B. The Responses

Our study addressed four aspects of the exclusionary rule: (1) the cognitive component of deterrence; (2) the specific deterrence of offending officers; (3) the costs of the rule; and (4) alternatives to the rule.³⁶

1. Cognitive component of deterrence

The cognitive component of deterrence was studied by testing the police officer's ability to apply the law in hypothetical factual settings.³⁷ We reasoned that "police can only be deterred from conducting illegal searches or violating a suspect's *Miranda* rights if the officers know what the law does and does not permit."³⁸ The questionnaire contained five hypothetical questions involving search and seizure issues and five involving police interrogation issues.³⁹ We hoped to determine the strength of the correlation between the extent and effectiveness of training and the officers' ability to understand and apply the rules,⁴⁰ assuming that better trained officers would better understand the limits on their conduct under the Fourth Amendment and the consequences of exceeding those limits. We also sought to learn whether each officer understood the purpose of excluding improper evidence and whether the officers regularly considered the exclusionary rule in their

31. *See id.* at 713-14, app. at 756-65.

32. *See id.* at 719.

33. *See id.*

34. *See id.*

35. *See id.* at 720.

36. *See id.* at 714.

37. *See id.* at 714, app. at 763-64.

38. *See id.* at 714-15.

39. *See id.* at 714.

40. *See id.* at 735 (noting that the results of the question "support the . . . conclusion that training and education contribute to a better understanding of the law").

investigative work.⁴¹

The officers at the Sheriff's Department answered questions concerning search and seizure law correctly 64.2% of the time, the Ventura County police officers answered 64.5% correctly, the law enforcement officials who had recently attended a training course answered 64.6% correctly, and the first year law students answered 70% correctly.⁴²

The officers' performance on the search and seizure questions was largely unaffected by rank, experience, or the extent of their pre-commission education.⁴³ However, the extent of police education and training of the officer received positively affected performance and understanding.⁴⁴ In their preparatory training at a police academy, both the police department and sheriff's department respondents had received an average of about twenty three hours of education in search and seizure matters and fewer than ten hours in police interrogation matters.⁴⁵ The extent of an officer's academy training bore a positive and statistically significant relationship to the officer's understanding of the hypotheticals: the more hours of academy training in search and seizure reported by the officer, the better the officer performed on the hypotheticals.⁴⁶

All but twelve of the respondents had received some form of continuing education and training.⁴⁷ The officers who were part of the group that had recently attended a continuing education seminar performed better than any other group in answering the search and seizure hypotheticals.⁴⁸ Among the officers as a whole, those who had received some form of continuing training answered 52.6% of the hypotheticals correctly, while those without any such training answered 35% correctly.⁴⁹ In the police interrogation context, there was no apparent relationship between continuing education and understanding of the hypotheticals.⁵⁰

2. The specific deterrence of offending officers

Our survey addressed the rule's effect as a general or specific deterrent, seeking to determine whether the exclusionary rule deters individual officers from violating

41. *See id.* at 734.

42. *See id.* at 728.

43. *See id.* at 730.

44. *See id.*

45. *See id.*

46. *See id.* at 731.

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

the Fourth Amendment.⁵¹ “The rule is a general deterrent to the extent that it discourages a class of individuals from prohibited conduct,” specifically if the specter of excluding evidence discourages officers from violating the rules.⁵² The rule is a specific deterrent if individual officers found to have violated the rules are especially diligent in their compliance in the future.⁵³ Some previous research has shown the rule to be a weak specific deterrent, probably because of insufficient feedback, a lack of internal discipline of offenders, or even a lack of education.⁵⁴ We asked the officers if they had testified in court on a motion to suppress and if so, the manner in which they learned about the court’s ruling, if at all.⁵⁵ From these inquiries we hoped to learn the extent to which those who had suffered the suppression of evidence in the past viewed the rule as a deterrent, as well as the extent to which their competence in applying the rules compared to officers who had never had evidence excluded.

In probing the extent of general deterrence, most officers said they considered the potential exclusion of evidence to be an important concern, but not the primary concern in their investigative work.⁵⁶ About 20% indicated it was a primary concern, while nearly 60% considered suppression to be an important concern.⁵⁷ The responses were similar with regard to police interrogation. Significantly, over 18% felt the threat of suppression was only a minor concern or of no concern in the search and seizure context.⁵⁸ Furthermore, almost 30% similarly minimized the threat of suppression in the context of police interrogations.⁵⁹

The overwhelming majority of respondents said they had testified at a suppression hearing.⁶⁰ The average number of appearances for search and seizure motions ranged from 15.4 per officer for the sheriff’s department to 18.3 for the police departments.⁶¹ While 40% of the officers responded that evidence seized by them had been suppressed, half of those officers admitted to only a single instance of exclusion.⁶² Interestingly, in response to subsequent questions asking whether any evidence they had gathered had been excluded, 55% admitted to prior exclusion,

51. *See id.* at 713-17 (describing the survey’s method for gauging the rule’s deterrent effect).

52. *See id.* at 716 (citing Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 STAN. L. REV. 937, 987-89 (1985)).

53. *See Perrin, et al., supra* note 4, at 716.

54. *See Spiotto, supra* note 18, at 276-77. Spiotto found in a study of the Chicago Narcotics Court in June 1971 that 276 defendants made motions to suppress in 172 different cases, involving alleged misconduct by 130 sworn officers. *See id.* Nine of the officers were responsible for 25 cases involving 34 defendants and within one month these officers repeated the same search practice that had just been held unlawful by the court. *See id.*

55. *See Perrin, et al., supra* note 4, app. at 758-59.

56. *See id.* at 720.

57. *See id.*

58. *See id.* at 720-21.

59. *See id.* at 720.

60. *See id.* at 722.

61. *See id.*

62. *See id.*

creating an apparent 15% discrepancy in the data.⁶³

Two-thirds of the officers who had testified in a suppression hearing reported that they heard the judge's ruling in court when it was rendered.⁶⁴ Ten percent reported hearing about the ruling from another officer.⁶⁵ Fewer than 30% learned of the ruling through formal communication with the prosecutor or their supervisor.⁶⁶

These findings suggest that the exclusionary rule fails to specifically deter police misconduct.

The rule's failure as a specific deterrent is demonstrated in two ways: (1) the apparent absence of any formal procedure . . . for notifying officers when they have had evidence subsequently excluded by the court; and (2) the failure of the officers who had previously had evidence excluded to outperform other officers on the hypothetical questions. The exclusion of evidence, if it is to provide any specific deterrence, must be a learning experience for the officer.⁶⁷

Similarly, the rule is not a significant general deterrent, as is recognized by the officers themselves. One in five officers minimized the importance of the exclusionary rule as a deterrent in the field.⁶⁸ Moreover, the study confirms that a large percentage of law enforcement officers do not understand the law well enough to be deterred by exclusion, particularly when conducting searches and seizures. "The study's results support the obvious conclusion that [continuing] training and education contribute to a better understanding of the law."⁶⁹

3. The costs of the exclusionary rule

We also gathered information about the societal costs of the exclusionary rule, including the extent to which the police lie to avoid the suppression of evidence.⁷⁰ As we explained at some length in our article, we encountered strong resistance to questions about police perjury from officers in the departments we surveyed.⁷¹ In the end, we asked the officers broadly worded questions about their awareness of misrepresentations by fellow officers either while testifying in court or in police reports.⁷²

63. *See id.*

64. *See id.* at 723.

65. *See id.*

66. *See id.* at 723-24.

67. *Id.* at 734.

68. *See id.* at 735.

69. *Id.*

70. *See id.* at 717-18

71. *See id.*

72. *See id.* app. at 758-59.

On the question of police deception, more than 80% stated that they had never heard of a police officer attempting to avoid suppression by misrepresenting or failing to fully disclose the facts while giving in-court testimony or in preparing police reports.⁷³ This result is not surprising because this type of deception is, itself, a violation of law. Of those who admitted the existence of deception, they minimized its extent by admitting knowledge of only one or two instances.⁷⁴ A few officers acknowledged much more pervasive problems, claiming to have heard of deception and perjury as many as ten, twenty or even fifty times.⁷⁵ It is noteworthy that the officers reporting the lowest average number of instances of deception were those with less than one year of experience and the officers with the highest average were among the most experienced officers.⁷⁶

[T]hese statistics may mean nothing more than that the longer one works in law enforcement, the more likely one is to witness instances of police officer dishonesty. On the other hand, they may mean that those individuals with greater seniority and better perspective are more willing to admit that dishonesty by police happens with some regularity.⁷⁷

Finally, the responses are consistent with the widely held belief that the exclusionary rule imposes a substantial cost on society in the form of police officer deception.⁷⁸ A number of the respondents described a problem of alarming proportions.⁷⁹ Moreover, the responses depict not just occasional ethical lapses on the witness stand, but even more frequent misrepresentations by police in the completion of their reports.⁸⁰ When one factors in the natural reluctance of police officers to admit the existence of such conduct, which likely caused it to be under-reported, the problem of police deception becomes significant.

The study also reveals that the unnecessarily complicated law of search and seizure is a substantial hidden cost of the exclusionary rule. The officers were substantially more likely to respond correctly to the interrogation hypotheticals than to the search and seizure hypotheticals.⁸¹ "Yet, they considered the specter of suppression *less* prominently in the interrogation context than when conducting searches and suffered fewer exclusions under *Miranda* than under Fourth Amendment law."⁸² The relative simplicity of the *Miranda* rules, including the reliance on a bright line test for compliance, appears to achieve a better and healthier balance than the ad hoc patchwork approach of search and seizure law.

73. *See id.* at 725.

74. *See id.*

75. *See id.*

76. *See id.*

77. *Id.* at 726.

78. *See id.* at 735.

79. *See id.*

80. *See id.*

81. *See id.* at 728.

82. *Id.* at 735.

4. Police officer attitudes

Finally, the questionnaire sought to elicit police officers' attitudes about potential alternatives to the exclusionary rule, as well as alternatives to the current *Miranda* and search and seizure rules. The survey offered seven alternatives to the exclusionary rule, including retention of the exclusionary rule, criminal prosecution of the offending officer, internal discipline including termination of employment, internal discipline not including termination, payment of monetary damages by the officer after a civil lawsuit, or, alternatively, after an administrative proceeding, and requiring the officer to participate in educational courses.⁸³ The officers were instructed to circle each choice they believed would effectively deter unlawful searches, seizures, and interrogations.⁸⁴ We also asked the officers how they felt about the underlying rules of search and seizure and police interrogation, and gave them a range of options for each.⁸⁵

A strong majority of the respondents, 57%, said that "[t]he interests of the criminal justice system are well served by excluding unlawfully seized evidence,' and that none of the alternative remedies (not even education for the offending officer) was necessary. Not surprisingly, the most popular suggested alternative remedy was a requirement that officers attend educational courses on search and seizure or police interrogation with more than one-third of the respondents choosing that option."⁸⁶ The other options, which each involved significant adverse consequences to the offending police officer, were markedly less popular.⁸⁷ In fact, their mere inclusion offended some of the officers.⁸⁸ About 20% were willing to entertain the possibility of implementing internal police discipline as a consequence of misconduct.⁸⁹

In response to our questions, 40% of the officers stated they believed that the law was reasonably clear and not difficult to apply,⁹⁰ and another 40% stated a preference for bright-line rules, eliminating the need for a search warrant as long as there is probable cause.⁹¹ The remaining 20% of the officers believed that the law was too uncertain to be easily applied in the field.⁹² Thus, about 60% of the

83. *See id.* app. at 761.

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

officers—a clear majority—shared a concern about the clarity of the current law by voicing displeasure with its complexity and supporting a substantial change in the law.⁹³

By contrast, a majority of officers believe that the law surrounding police interrogation is clear and not difficult to apply.⁹⁴ Fifty-three percent of the participants approved the existing rule,⁹⁵ while 40% would prefer a rule requiring only that the statement of the accused be voluntary rather than mandating a reading of the *Miranda* rights.⁹⁶ Furthermore, only 7% believed that the law of police interrogation was unduly complicated or uncertain.⁹⁷

5. Conclusion

Our study confirms what previous studies revealed: the exclusionary rule does not effectively deter police misconduct. Indeed, it has fostered misconduct in the form of police deception. This troubling conclusion, coupled with the exceedingly high costs of the rule, mandate a search for a workable solution.

IV. REFORM OF THE RULE

The significant challenge in reforming the exclusionary rule is finding a mechanism that deters police misconduct and enforces the rights of the aggrieved fairly and equitably without crippling the ability of law enforcement officers to do their jobs. We believe that the rule can be fixed without disrupting the delicate balance between the rights of the defendant and the needs of the criminal justice system, and that our proposed repair of the rule will cause the rule to better serve the purposes for which it was originally adopted. We have proposed a two part modification of the exclusionary rule that would partially retain the rule by limiting its application only to the most egregious police violations.⁹⁸ Additionally, it would provide victims of police misconduct an efficient and equitable administrative remedy.

The first prong of our proposal limits application of the exclusionary rule to instances of intentional or willful police violation of a person's rights.⁹⁹ When law enforcement officials purposefully obtain evidence illegally, the exclusionary rule is needed to preserve judicial integrity. The court loses its judicial authority if forced to admit evidence that the police obtained without regard for another's constitutional

93. *See id.*

94. *See id.* at 734.

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.* at 673.

99. *See id.* at 743.

rights.¹⁰⁰ On the other hand, evidence that was illegally obtained by police as the result of unintentional actions,¹⁰¹ whether characterized as reckless, negligent, or innocent conduct, would not be excluded. Instead, an administrative process would be available to the injured party to provide compensation for the violation of his constitutional rights.¹⁰²

The civil administrative remedy we propose would be based on an existing administrative remedy currently used in California to redress discriminatory housing or employment practices.¹⁰³ The administrative process that we envision would be controlled by an agency completely independent from other law enforcement agencies, but within the executive branch of government. The agency would be bifurcated into an enforcement arm and an adjudicative arm.¹⁰⁴ Victims of police misconduct would initiate the administrative process by filing a written complaint with the enforcement arm of the agency.¹⁰⁵ The claim would have to be filed within one year of the violation, although the limitations period would be tolled during the pendency of any criminal proceeding.¹⁰⁶ The agency would conduct a preliminary review of the complaint to determine whether the allegations, on their face and based on preliminary investigation, sufficed to constitute a prima facie violation of the victim's constitutional rights.¹⁰⁷ If the complaint proved baseless, the agency would dismiss the claim subject to the complainant's right to pursue a tort remedy.¹⁰⁸

If the complaint survived the initial review, the administrative agency would file a formal complaint on behalf of the victim and would serve as the victim's advocate during the administrative process.¹⁰⁹ The written complaint would be served on the

100. See *Elkins v. United States*, 364 U.S. 206, 214 (1960); *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (overruled by *Mapp v. Ohio* 367 U.S. 643 (1961)); *Weeks v. United States*, 232 U.S. 383, 392 (1914); see also *Kamisar*, *supra* note 7, at 604 (discussing *Olmstead v. United States*, 297 U.S. 438 (1928)).

101. See *Perrin*, et al., *supra* note 4, at 753 (discussing the standard for intentional or willful police misconduct and concluding that the standard should be similar to the common law distinction between murder and manslaughter).

102. See *id.*

103. See CAL. GOV'T CODE § 12900 et seq. (West 1992 & Supp. 1999) (outlining the California Fair Employment and Housing Act).

104. See *id.* §§ 12935 (describing the Fair Employment and Housing Commission, which serves an adjudicative function) and 12930 (describing the Department of Fair Employment and Housing, which serves the enforcement function).

105. See *id.* § 12960 (West 1992).

106. See *id.* ("No complaint may be filed after the expiration of one year from . . . the alleged unlawful practice.")

107. See *id.* § 12963.

108. See *id.* § 12965(b) (West Supp. 1999) (requiring the Department of Fair Employment and Housing to notify the complainant of available judicial options in a "right-to-sue" letter within 150 days if no administrative proceeding is initiated by the Department).

109. See *id.* §§ 12965(a) & 12969 (West 1992 & Supp. 1999).

accused officers and agencies and provide them with an opportunity to respond in writing. The administrative process would follow the provisions of the Administrative Procedures Act¹¹⁰ to ensure efficient prehearing procedures.¹¹¹ A limited discovery process would allow for the disclosure of known witnesses and the exchange of pertinent documents and exhibits. Depositions would be allowed for material witnesses and for anyone unable to attend the hearing.¹¹²

An evidentiary hearing would then be held, presided over by an administrative judge who would make findings of fact and conclusions of law based on the evidence presented.¹¹³ The administrative judge's decision would then be submitted to the adjudicative arm of the administrative agency for review.¹¹⁴ In its oversight function, the agency's commissioners would either adopt, modify, or reject the judge's decision.¹¹⁵ The decision, once final, would be judicially enforceable and subject to appellate review.¹¹⁶

The claimant would bear the burden of proof at the hearing and would have to prove that the officer violated his or her rights by acting contrary to established legal principles. The officer's conduct would be measured for its reasonableness.¹¹⁷ Thus, an officer who acted in an objectively reasonable manner would bear no liability. The objective reasonableness standard would eliminate the empty head/white heart defense for officers.¹¹⁸ Poorly trained or deliberately ignorant officers would be liable for their actions, based on the premise that ignorance is never reasonable. This standard would force officers to obtain the training and education necessary to do their jobs competently and to gain the legal protection of an affirmative defense against misconduct claims.¹¹⁹ The liability of police departments and other law enforcement agencies would be limited to claims based on the agencies' customs or policies, rather than traditional vicarious liability, consistent with the approach taken

110. *See id.* § 11500 et seq. (West 1992 & Supp. 1997).

111. *See* *Walnut Creek Manor v. Fair Employment and Housing Comm'n*, 814 P.2d 704, 715 (Cal. 1991) (administrative procedure under FEHA is "streamlined and economical").

112. *See* CAL. GOV'T CODE § 11507.6 (West Supp. 1999) (requiring exchange of witness lists and pertinent documents within 30 days of initial pleading); *see id.* at § 11511 (allowing depositions of material and unavailable witnesses upon the filing of a verified petition by either side).

113. *See id.* §§ 11513, and 11517(b) (discussing respectively the rules for evidentiary hearings and decisions by administrative law judge).

114. *See id.* § 11517(b).

115. *See id.*

116. *See id.* §§ 12973(b), 11523 (discussing respectively, the enforcement of administrative decisions and judicial review of administrative decisions).

117. *See* *Ngiraingas v. Sanchez*, 858 F.2d 1368, 1374 (9th Cir. 1988) (stating that the issue of police immunity is one of reasonableness).

118. *See* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that police immunity is available only if officers "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

119. *Cf.* *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (concluding that qualified immunity claim by officers is an affirmative defense).

under current law.¹²⁰

The claimant would be entitled to recover economic and noneconomic damages subject to traditional requirements of proof. In addition, however, the administrative system would allow the claimant to recover statutory liquidated damages for each violation committed by the police officer or agency.¹²¹ This statutorily mandated monetary recovery for injured victims would provide an incentive for victims to file claims in the administrative office even in situations where actual damage would be difficult to prove, and, at the same time, would create a strong deterrent for police misconduct. This part of the proposal is essential to make the administrative process viable, both because of the frequent difficulty encountered by victims of police misconduct in trying to prove damages¹²² and because of the need to recognize the value our system places on constitutionally protected rights. In addition, victims of intentional or willful police misconduct could recover punitive damages from the officers or their employer.¹²³

The proposed administrative process has five significant advantages over the current exclusionary rule. First, the civil administrative remedy would deter police misconduct more effectively than the exclusionary rule by holding officers and law enforcement agencies directly accountable for their misconduct, rather than punishing the system for police errors by handicapping the jury in its search for the truth and prosecutors in their efforts to prove wrongdoing.¹²⁴ Second, the administrative process would provide all victims of police misconduct with a strong incentive to raise such claims, as opposed to the exclusionary rule which only confers standing on those who are actually prosecuted for a crime.¹²⁵ Third, the administrative process would provide a fair, equitable, and efficient process for victims, helping to avoid the pro-law enforcement bias that victims often face with juries, and reducing the high cost and delay endemic to civil judicial remedies.¹²⁶ Fourth, the administrative process would provide a proportional remedy to victims, unlike the exclusionary rule which gives the greatest windfall to the person guilty of the most heinous crime, rather than to the person subjected to the most serious constitutional violation.¹²⁷ Fifth, implementation of the administrative process would increase public confidence

120. See *Board of the County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) (reaffirming that the Supreme Court has "consistently refused to hold municipalities liable under a theory of *respondeat superior*").

121. See CAL. GOV'T CODE § 12987 (West Supp. 1999).

122. See, e.g., *Casey v. Phipps*, 435 U.S. 247, 266-67 (1978) (holding that plaintiffs may not recover "personal damages" for due process violation in absence of proof of actual injury).

123. See Amar, *supra* note 6, at 759, 797-99; Posner, *supra* note 6, at 53-54.

124. See CAL. GOV'T CODE § 12987(a)(3) (West Supp. 1999).

125. See Perrin, et al., *supra* note 4, at 744-45.

126. See *id.* at 751-53.

127. See *id.* at 752.

in the criminal justice system, reducing the number of defendants dismissed based on technicalities and helping to reverse the continuing erosion of the constitutional rights of all persons.¹²⁸

The primary concern about our proposed administrative remedy is the cost and feasibility of creating a new agency to process claims of police misconduct. Undoubtedly, the process we envision would not come cheap, and we do not offer it without serious consideration of that fact. Yet, the current approach is costly too, both in terms of the amount of time courts and lawyers must take dealing with unsupported and wasteful motions to suppress and in terms of the erosion of rights under the Fourth and Fifth Amendments. Some of the unacceptably high cost of the current system can be measured only by the incremental loss of freedom for every citizen, not in dollars and cents. Our proposal, though costly in some ways, would help reverse that pattern.

We believe our proposed administrative remedy addresses the concerns that led to the implementation of the exclusionary rule: specifically, the protection of constitutional rights by deterring police misconduct. It also serves the criminal justice system because it holds criminal defendants accountable for their criminal activity.

128. *See id.* at 753.