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Moving Further Beyond

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The authors of the Pepperdine Study[1] and Proposal[2] have performed a significant service to the administration of justice. I think the recommendations have merit. I would have the states waive sovereign immunity for official employers in the administrative procedure, put a low cap on damages and allow set but low attorney's fees for the successful complainant. An adverse ruling, whatever the officer's intention, would be placed in the personnel file of the officer.

Going further, we must give more thought to the consequences of unreasonable and confusing rules of law. At the risk of being criticized for anecdotal contribution, I can tell you how law enforcement people often react to those rules. I speak of judicial opinions spinning and picking at search warrant descriptions, articulable suspicion to stop, probable cause to search this or that, what is interrogation and when it stops, what is a search and all the rest. One example is *Alexander v. City and County of San Francisco*,[3] where officers who acted on warrant to enter a home shot a man after he tried to shoot the officers.[4] The court held that this action constituted a possible deprivation of a constitutional right.[5] The warrant authorized entry to inspect, but these officers may have harbored an intent to arrest.[6]

The consequences: police officers lose respect for the courts. They decide that they must do what they think is necessary to protect the public and themselves, and leave the judges to their fine rule-making. When matters reach the necessity of testifying in court, some adjustment of the testimony to satisfy the judge is justified.

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1. *See* L. Timothy Perrin, et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 711-36 (1998).
2. *See id.* at 743-54.
3. 29 F.3d 1355 (9th Cir. 1994).
4. *See id.* at 1358.
5. *See id.* at 1361, 1366.
6. *See id.*

Is that news to anyone? Police have been saying and thinking this way for years. And there is only one answer to the problem, and that is to gain their respect and their willingness to follow reasonable rules of law.

You can send all the questionnaires you want to the people in law enforcement, collect ever so much data, and we can write law review articles *ad in finitum*, but this is an essential part of the answer.

The course taken by the Supreme Court in *Mapp v. Ohio*[7] was understandable. In 1961 the poor and the black citizens were widely abused and extraordinary measures were required. In 1999 we need to reconsider our rules and the interest of both civil rights and effective administration of justice. It will pay to listen to the advice of people like Professor Akhil Amar in his book *The Constitution and Criminal Procedure*.[8]

It has been the custom of the agencies of American government to go their own way instead of uniting to work together to meet common problems. This begins at the top with little or no collaboration between congress, the judiciary and the executive. And it goes all the way to the police, prosecutor, school, family aid offices, and protective services operating separately in the face of our national tragedy of child neglect and abuse.

Police, prosecutors and judges must understand and respect each other. They have different roles, of course. Even between adversaries personal trust is needed, and it is essential between officials of government. The public judges their laws and government by what they see in all officials and, to some extent, even the private practitioners of law. And, again, the integrity of the performance of the police is affected by the wisdom and performance of the lawmakers. Mutual understanding and respect is the beyond to which we must move.

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7. 367 U.S. 643 (1961).
8. *See* AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 20 (Yale Univ. Press 1997).