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Administrative Replacements: How Much Can They Do?

Laurie L. Levenson*

I. INTRODUCTION

After an exhaustive review of empirical studies of the exclusionary rule (including their own), Professors Timothy L. Perrin, H. Mitchell Caldwell, Carol A. Chase and Ronald W. Fagan (Pepperdine Study) propose in their Article, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*,¹ an alternative to our current approach. Rather than applying the exclusionary rule, the Pepperdine Study proposes that in all but the most egregious situations an administrative process should be used to review alleged violations of civilians' constitutional rights during searches and seizures.² While I agree with these distinguished scholars that the exclusionary rule, as presently implemented, is far from perfect, I am reluctant to embrace their proposal for several reasons. My primary concern is that an administrative system would not accomplish the goal of reforming police behavior, but would only add an additional level of administrative frustration to those who feel that their rights have been violated. As a rule, government bureaucracies have not been particularly effective in addressing individuals' problems. Before we invest in yet another government bureaucracy, it is worthwhile to examine what the likely impact of such an administrative remedy would be and whether it is worth the investment.

Because I am not an expert in statistical studies or interpretation, I proceed on the assumption that police misconduct continues notwithstanding the Court's

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1. L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669 (1998).

2. *See id.* at 673.

adoption of the exclusionary rule in *Mapp v. Ohio*.³ Moreover, I agree that it is a worthwhile goal to obtain maximum police compliance with constitutional standards for searches and seizures. In my own experience as a former federal prosecutor, I found the reasons for police violations of constitutional rights range from an honest misunderstanding of the constitutional standards to a flagrant disregard for defendants' constitutional rights. Thankfully, the majority of instances were the former, rather than the latter. I also found that courts were generally reluctant to exclude evidence, if the exclusion would result in releasing a defendant who was clearly guilty of the charged offense. Thus, search and seizure law was made on a case-by-case basis, making it nearly impossible for an officer to know exactly what standard would be applied by the court at the time of a suppression hearing.

In adopting a new approach to the exclusionary rule, it is important to adopt a procedure that would accomplish the following goals: (1) deter police misconduct; (2) provide efficient and effective processing of misconduct claims; and (3) preserve the integrity of criminal proceedings. Unfortunately, the proposed administrative process has significant weaknesses in accomplishing each of these goals—there are so many weaknesses that it seems imprudent to adopt it as a satisfactory alternative to the exclusionary rule. While I agree that the exclusionary rule may be somewhat broken, it is not broken enough to adopt this alternative process.

II. PROBLEMS WITH THE PROPOSED ADMINISTRATIVE REMEDY

Before detailing the administrative process proposal remedy, the Pepperdine Study identifies problems with the current exclusionary rule that it finds, to put it mildly, most unsettling.⁴ These problems include the current system's incentive to officers to perjure themselves and judges' willingness to ignore such lying in order to avoid imposing the exclusionary rule.⁵ The Pepperdine Study further concludes that the exclusionary rule has not effectively deterred officers from misconduct because there is a recognition among police officers that courts will generally not impose the exclusionary rule.⁶ Finally, the Pepperdine Study identifies a frustration among those whose rights have been violated because citizens have no effective way to raise their claims.⁷

The real question is whether the proposed administrative remedy will fix any of these problems. I rather doubt it. Consider, first, the problem with officers lying

3. 367 U.S. 643 (1961).

4. See Perrin et al., *supra* note 1, at 674-78.

5. See *id.* at 677.

6. See *id.* at 677-78.

7. See *id.*

during suppression hearings so that the evidence they seized will not be excluded.⁸ The Pepperdine Study assumes that officers lie so that they will not suffer the embarrassment of having evidence they seized be suppressed in a trial and a suspect then released because of the officers' misconduct.⁹ It is just as likely, however, that officers will lie in an administrative hearing to avoid the embarrassment of a negative ruling and the costs of an administrative sanction. There is absolutely no evidence that a police officer will be any less motivated to lie in an administrative hearing, where their reputation and job position are at risk, than in a criminal proceeding where the court threatens to exclude evidence. Moreover, if a misconduct complaint is not raised in the trial court, an officer may feel that any Fourth Amendment violation was not sufficient to put the justice process at risk. To the extent that officers care about the goal of the justice process, even that incentive to tell the truth will be removed. Overall, nothing in the Pepperdine Study demonstrates how an administrative proceeding will cure or even reduce the problem of police perjury.

Second, the Pepperdine Study is based upon an assumption that an administrative agency is a more effective and efficient forum to resolve police misconduct claims.¹⁰ The Pepperdine Study models their administrative remedy after the California Fair Employment and Housing Act (FEHA) which creates civil remedies for discriminatory housing or employment practices.¹¹ Unfortunately, the authors have not presented any studies that indicate that FEHA has been particularly successful in its enforcement function.

As a rule, the public views government administrative processes with suspicion. Governmental agencies have the reputation of being endless mazes of red tape that rarely produce a result applauded by the applicants. According to a 1996 Gallop survey, seventy-one percent of respondents favored a proposition

8. This problem is identified in several studies. Myron Orfield's 1987 study of 26 Chicago police officers disclosed that almost all the officers admitted that police occasionally lie in suppression hearings. See Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987). In a separate 1992 study, Orfield further reported that a majority of judges and public defenders said that perjury was a major problem in making the exclusionary rule an effective deterrent. See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 98 (1992). Unfortunately, in their own study, the Pepperdine Study abandoned questions regarding how often the responding law enforcement agents committed perjury. See Perrin et al., *supra* note 1, app. at 758-59, 762. Additionally, the Pepperdine Study seems unwilling to accept the responses of 80% of the questioned officers who responded "that they had never even 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." See *id.* at 725.

9. See Perrin et al., *supra* note 1, at 677.

10. See *id.* at 751.

11. See *id.* at 744; CAL. GOV'T. CODE §§ 12900-96 (West 1992 & Supp. 1997).

aimed at "reducing all government agencies."¹² Therefore, it is not surprising that there is a general reluctance to fund new agencies. It appears naïve for the Pepperdine Study to assume that there are or will be proper resources to support the newly proposed government agency. Ongoing government budget difficulties make this unlikely. Moreover, there is likely to be political resistance to a plan to fund an agency whose primary users will be those accused of crimes. Expecting the litigants to fund the agency themselves is even more unrealistic. For those spending tens of thousands of dollars to defend their liberty in a criminal case, paying high fees to file an administrative action will not be an attractive option.

The Pepperdine Study also assumes that the administrative proceedings will be efficiently handled.¹³ This, too, is far from certain. If, as the authors acknowledge, municipalities will ultimately be liable for the sanctions imposed,¹⁴ they are likely to invest considerable resources into fighting such proceedings. Any efficiencies of an administrative proceeding over the current civil system are likely to be diminished if not lost altogether.¹⁵

Further, it is unlikely that an administrative agency would provide an effective outlet to address police misconduct. First, there is a problem with the proposed statute of limitations for the filing of such misconduct actions with the administrative agency. The action must be filed no more than one year after the alleged violation took place.¹⁶ There is a tolling period during the pendency of any related criminal proceeding. The problem with this statute of limitations is that it is not unusual for a prosecutorial agency to take over a year in deciding whether to prosecute a case. If there has been no criminal filing, an aggrieved citizen is going to be extremely reluctant to file a claim and risk the prosecutor's response with an indictment or criminal complaint. If an administrative complaint is filed immediately but stayed pending the criminal proceeding, the defendant who is convicted with the evidence that was not excluded will have difficulty (especially if he is in prison) vigorously pursuing an administrative sanction.

Additionally, the administrative process carries with it less discovery and more relaxed rules of evidence.¹⁷ The Pepperdine Study assumes that these two

12. See Lydia Saad, *Issues Referendum Reveals Populist Leanings*, GALLOP POLL MONTHLY, May 1996, at 2, 3. The public has somewhat more confidence in state government than the federal government, but according to a 1997 Gallup poll, only 18% of respondents had "a great deal of trust in state government," compared to a combined 31% with either "not very much" trust in state government or "none at all." See Lydia Saad, *American's Faith in Government Shaken But Not Shattered by Watergate*, GALLOP POLL MONTHLY, June 1997, at 2, 3.

13. See Perrin et al., *supra* note 1, at 752.

14. See *id.* at 677-78.

15. The question of efficiency is particularly interesting given that the General Accounting Office report concluded that the drain on the criminal justice system by motions to suppress was modest. See COMPTROLLER GENERAL OF THE U.S., GENERAL ACCOUNTING OFFICE, REP. NO. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS app. II at 13 (1979). The drain from a completely new administrative bureaucracy is likely to be higher.

16. See Perrin et al., *supra* note 1, at 747.

17. See *id.* at 743, 745.

modifications will lead to a more efficient means of obtaining remedial measures.¹⁸ One wonders, however, how a complainant will be able to establish a case of police misconduct without the assistance of discovery rules to force disclosure of documents and witnesses who might assist with the complainant's case. In short, it is unlikely that the administrative agency will provide a meaningful outlet for the frustrations of those who have suffered from police misconduct.

Other crucial details in the administrative plan raise concerns. For example, while the Pepperdine Study affords the complainant the right to be represented by a state-employed attorney, there is no discussion as to the police officer's right of representation.¹⁹ Presumably, the departments or municipalities would provide representation, but that is not guaranteed, especially in situations where intentional misconduct is being alleged.²⁰

Finally, the proponents of the Pepperdine Study assume that the new proposal would reduce the number of frivolous motions to suppress.²¹ Once again, there is no statistical evidence to support such a claim and it seems, in part, counter-intuitive. It seems much more likely that defendants will continue to file motions to suppress in lieu of the claim for administrative damages whenever their liberty is at stake. At a minimum, the defendant will ordinarily obtain additional crucial discovery regarding the police investigation and an opportunity to cross-examine key law enforcement witnesses before trial.

The last category of arguments the Pepperdine Study make for the administrative process plan is that it will "restore public confidence in the criminal justice system by eliminating the overcompensation of criminal defendants."²² Of course,

18. See *id.* at 751-52.

19. See *id.*

20. Recent events have led local governments to reconsider policies of indemnifying law enforcement officers charged with intentional misconduct. For example, in 1992, Los Angeles City Council members were sued personally for the Chief of Police's misconduct, but with the understanding that the suits against them would be dismissed voluntarily if they voted not to indemnify the Chief for his punitive damages. See Michael Connelly, *Council Sued Over Fatal Police Shooting*, L.A. TIMES, Apr. 2, 1992, at B1. At trial, the federal court affirmed the plaintiff's right to sue the council members individually for damages. See Josh Meyer & Michael Connelly, *City Council Faces Trial in Brutality Case Courts—A Judge Rules the Officials Can Be Held Liable in a \$20 Million Suit Over the 1990 Police Slaying of Three Robbers in Sunland*, L.A. TIMES, July 22, 1992, at B1. The Court of Appeals affirmed the ruling, but review was denied by the Supreme Court. See Henry Weinstein, *Public Officials Face Liability in Police Cases*, L.A. TIMES, Mar. 1, 1994, at B1; David G. Savage, *City Officials Liable to Pay Damages, High Court Rules*, L.A. TIMES, Oct. 12, 1994, at A1. The Pepperdine Study does not detail whether it would be proper for local governments to indemnify officers, nor is it clear that merely paying for the officer's legal representation would put government officials at risk for suit. Nonetheless, there may be general nervousness surrounding proposals to assist law enforcement officers charged with misconduct.

21. See Perrin, et al., *supra* note 1, at 752.

22. See *id.*

proponents recognize that in egregious cases, when the misconduct has been intentional, the exclusionary rule will be needed.²³ However, in less than intentional cases, an alternative is provided.²⁴

It is unclear to me that the line between gross police negligence and intentional misconduct will be as clear as the Pepperdine Study suggests. If, as is likely, the public disagrees with where courts draw this line, the new system will be subject to the same criticism as the exclusionary rule—either too many criminals are receiving the windfall of the exclusionary rule or police misconduct is not being taken seriously enough because it is being foisted upon an administrative agency.

The difficulty in drawing the line between intentional and grossly negligent misconduct is a problem we can easily anticipate. Police rarely set off on a mission to intentionally violate a person's constitutional rights. Rather, the nature of police work often requires snap judgments by police officers, where the line between intentional and negligent conduct becomes blurred.

Consider, for example, the officer assigned to stop crime in a heavily gang infested residential area. Known gang members are seen going in and out a particular house. The officer senses that the streets are heating up and the gang will take some type of imminent illegal activity. Worried that the officer has insufficient probable cause for a warrant and fearing that there is no time to seek one, the officer simply breaks into the house in an effort to get a jump on the brewing situation. Once inside, he spots an armory of weapons. Was his misconduct intentional?

Many would answer yes. Others, however, would be less sure and state that the officer forgot their training and acted with gross negligence. The tendency not to suppress the evidence has little to do with the officer's good faith or lack of good faith, given that the officer's motivations are often difficult to determine. Rather, the court's decision is often more a response to the seriousness of the defendant's criminal activities. With the new proposal, courts will still be inclined not to suppress evidence in cases involving serious crimes. And, even if the administrative officer imposes monetary sanctions, it may still be unlikely that the officer would choose another course of conduct. The problem with officer misconduct is that there is no deterrent sufficient to outweigh officers' concern for their safety.

On the other end of the spectrum, there is another problem with establishing a system where intentional violations are punished by suppression rulings but unintentional violations, even if they could be identified, are punished administratively. If a police officer acted with the type of malice described by the Pepperdine Study, criminal civil rights prosecution, not suppression of evidence, should be the punishment.²⁵ Proponents of the Pepperdine Study complain that aggrieved parties do not have the means to seek civil remedies.²⁶ Prosecutors, however, can and

23. *See id.* at 753-54.

24. *See id.* at 743-44.

25. *See id.* at 753-54.

26. *See id.* at 738.

should prosecute cases where police officers act willfully and wantonly, with the specific intent to deprive a suspect of his constitutional rights. One wonders whether judges who may find such a standard met in order to suppress evidence will be reluctant to do so for fear of triggering criminal prosecution against officers. Judges are loath to label such officers as criminals, even where they have acted improperly.

It is hard to pinpoint what changes will instill public confidence in the criminal justice system. None of the exclusionary rule studies seems to address this issue. Will, in fact, the public have more confidence when it realizes that defendants, even those convicted of a serious crime, have walked away with significant financial rewards? Will the fact that administrative law judges, as opposed to judges elected by the public, decide these issues affect public confidence? Will the public respect a system that has an exclusionary rule that allows criminals to walk free, even if it is limited to those situations where there has been egregious police misconduct? Without a study answering these questions, it is premature to conclude that the proposed administrative remedial system addresses the fundamental problems created by the exclusionary rule.

III. CONCLUSION

It is always easier to raise questions about another person's proposal than to design one of your own. The Pepperdine Study has taken a bold step toward offering a solution to the problems with the exclusionary rule. At most, I can only raise questions about that proposal and the assumptions underlying it. I believe, however, that it is imperative that the proponents answer these questions before the Pepperdine proposal can be seriously considered or adopted.

Additional empirical studies must be conducted to determine public attitude toward the current implementation of the exclusionary rule in comparison with the proposed administrative procedure. This is the weak link in the Pepperdine Study. Without citation or support, the authors proclaim:

The natural effect of lost prosecutions is that many Americans are increasingly hostile toward, or skeptical of, a criminal justice system that frees a guilty criminal on what they perceive as a technicality. The public perceives the rule as a device used by cunning defense attorneys to obtain an undeserved windfall for their guilty clients.²⁷

27. Perrin et al., *supra* note 1, at 677.

How do they know? Perhaps the public has a greater understanding and appreciation for the exclusionary rule than the proponents have acknowledged. There are no studies to tell us one way or another.²⁸

The issue of what to do with the exclusionary rule is not just one for academics, jurists and law enforcement. The final say as to whether the system is broken and whether it should be fixed needs to come from the people who are affected the most—those on the street who could be the victims of such actions. For now, I'll await their judgment.

28. It is interesting that in gathering information the Pepperdine Study focused on studies that are based upon responses of four groups:

- (1) those based upon responses to surveys of police officers;
- (2) those based upon responses to surveys of parties other than police officers involved in the criminal justice system;
- (3) analysis of statistics regarding arrests, convictions, return of stolen property, and suppression motions; and
- (4) direct observation of police officers in the field.

See id. at 679. No general study of public attitudes was addressed. The cited study that came closest to soliciting public attitudes was the 1963 Nagel study which turned to 19 American Civil Liberties Union officials, four unknowns, 22 police chiefs, 27 prosecuting attorneys, 17 judges and 24 defense attorneys for their attitudes. *See* Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 283-84. It seems common practice for law review authors to assume that the public disfavors the exclusionary rule without statistical evidence to support such a claim. In fact, while the public overwhelmingly believes that the courts do not treat criminals harshly enough, the public is also reluctant to surrender the protections of the Fourth Amendment in the interest of crime control. *See* Leslie McAneny, *The Gallop Poll on Crime*, GALLOP POLL MONTHLY, Dec. 1993, at 18, 30. In the 1993 Gallop Survey on Criminal Justice issues, 81% of those surveyed opposed allowing warrantless searches of their homes and 63% opposed wiretaps of those suspected of crimes. *See id.* at 32. By comparison, Americans overwhelmingly favor increased restrictions on bail and parole. *See id.* at 31. Based upon the statistical evidence presented so far, it certainly cannot be said with certainty that there is an overwhelming public cry for revision of the exclusionary rule.