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The Exclusionary Rule: Fix It, But Fix It Right

A Critique of *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*

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For when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created, that is, to settle disputes promptly and peaceably, to restrain the strong, to protect the weak, and to conform the conduct of all to settled rules of law. If criminal procedure is unable promptly to convict the guilty and promptly acquit the innocent of the specific accusations against them, and to do it in a manner that retains public confidence in the accuracy of its results, the deterrent effect of swift and certain punishment is lost, the feeling of just retribution disappears, and belief in the efficacy of the system of justice declines.¹

Justice Macklin Fleming

I. INTRODUCTION

For police and prosecutors, Justice Fleming's observation remains as true today as when written a quarter of a century ago. As a judicially created remedy for Fourth Amendment violations, the exclusionary rule produces arbitrary results that frustrate the administration of justice and undermine public confidence in the criminal justice system. The evolution of search and seizure issues into an extraordinarily complex body of law, with countless subtleties and exceptions, has not lessened concerns about the exclusionary rule's value. Notwithstanding calls for reform by law enforcement and the support of a growing number of lawmakers, defining the specific parameters of any search and seizure reform has proven to be a difficult task.²

1. MACKLIN FLEMING, *THE PRICE OF PERFECT JUSTICE* 6 (1974).

2. See John K. Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 PROSECUTOR 348, 352 (1980). In the 104th Congress, Republican Congressman McCollum from Florida and Republican Senator Thurmond from South Carolina introduced separate bills seeking to reform the exclusionary rule. See S. 54, 104th Cong. § 3508 (1995) (Thurmond); H.R. 666, 104th Cong. § 3510 (1995) (McCollum). Senate Bill 54, which was introduced by Thurmond, provided in pertinent part:

Evidence which is obtained as a result of a search or seizure shall not be excluded in a proceeding in a court of the United States on the ground that the search or seizure was in violation of the Fourth Amendment to the Constitution of the United States, if the search or seizure was undertaken in an objectively reasonable belief that it was in conformity with the Fourth Amendment. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable belief, unless the warrant was obtained through intentional and material misrepresentation.

Under these circumstances, Professors L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase, and Ronald W. Fagan, the authors of *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule* (Pepperdine Study),³ must be commended for their new research and willingness to make a specific reform proposal. While we agree the exclusionary rule must be reformed, expanded civil administrative liability for law enforcement, in our collective opinion, is not the answer.⁴ Holding peace officers civilly liable for technical violations of search and seizure law overlooks the underlying cause of the exclusionary rule morass⁵--an overly complex body of law that seeks perfect procedure rather than correct results which achieve justice.

In commenting upon the Pepperdine Study, this Critique first discusses significant flaws in the authors' empirical study that undermine the validity of the study's conclusions.⁶ The Critique then examines the complexity of search and seizure law and the corresponding unrealistic demands it places upon peace officers.⁷ Next, the Critique analyzes the inherent problems and inevitable costs associated with expanded civil administrative liability.⁸ Finally, the Critique proposes the use of a balancing test as an option and presents a list of considerations to guide future empirical research on this subject.⁹

II. FLAWS ASSOCIATED WITH EMPIRICAL STUDY

The authors of the Pepperdine Study argued that the exclusionary rule was intended to deter police misconduct and to ensure judicial integrity by preventing

S. 54 § 3508. House Bill 666, which was introduced by McCollum, provided in pertinent part:

(b) Evidence Not Excludable by Statute or Rule.--

(1) Generally.--Evidence shall not be excluded in a proceeding in a court of the United States on the ground that it was obtained in violation of a statute, an administrative rule or regulation, or a rule of procedure unless exclusion is expressly authorized by statute or by a rule prescribed by the Supreme Court pursuant to statutory authority.

(2) Special Rule Relating to Objectively Reasonable Searches and Seizures.--Evidence which is otherwise excludable under paragraph (1) shall not be excluded if the search or seizure was carried out in circumstances justifying an objectively reasonable belief that the search or seizure was in conformity with the statute, administrative rule or regulation, or rule of procedure, the violation of which occasioned its being excludable.

H.R. 666 § 3510.

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

4. *See id.* at 743-44 (proposing administrative disciplinary procedures for nonintentional police misconduct).

5. *See id.*

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Parts V-VI.

courts and juries from considering ill-gotten evidence.¹⁰ After reviewing a series of previously published studies,¹¹ the Pepperdine Study concluded that the exclusionary rule has increased the number of suppression motions, although not necessarily the rate at which guilty criminals have been released and the cost of case processing.¹² Most importantly, the Pepperdine Study argued that previous research evidence indicates existing remedies for violation of the rule cannot and do not effectively deter police misconduct.¹³ Despite the latter conclusion, the Pepperdine Study correctly pointed out that previous attempts to study the rule's deterrent effect have produced ambiguous results.¹⁴ Consequently, the Pepperdine Study designed an extensive new survey of police officer opinion and knowledge to test whether the exclusionary rule can and does deter police misconduct.¹⁵

Although we understand the intuitive appeal of some of the authors' conclusions concerning their research and are inclined to agree with them on several issues, the authors' findings may not be justified given their research design, results, and the fit of the conclusions to the nature of the evidence obtained.

A. *Consequences Are Not the Same as the Decision Rule*

One of the basic arguments presented in the Pepperdine Study is that the exclusionary rule cannot deter police misconduct if officers are incapable of making legally correct decisions in specific search and seizure situations.¹⁶ If police officers do not know which actions to take or to avoid in specific circumstances, then how can the rule be expected to deter misconduct?

To understand the present critique of the Pepperdine Study, the application of the concept of deterrence to police officers' search and seizure activities must be explicated. The concept of deterrence in the case of police officers, whose job requires the searching and gathering of evidence, is different than deterrence in the case of criminal behavior. In the latter case, an effective sanctioning system seeks to reduce the probability of actions such as robbery and murder to zero. In the former case, the goal of the exclusionary rule is not to reduce the probability of all search and seizure activities to zero, rather, the goal is to reduce the rate of particular methods of search and seizure, namely, those that are too aggressive or violate a citizen's rights, while increasing the rate of other methods of search and

10. See Perrin et al., *supra* note 3, at 674.

11. See *id.* at 684-710.

12. See *id.* at 711.

13. See *id.* at 710.

14. See *id.* at 710-11.

15. See *id.* at 712.

16. See *id.* at 675.

seizure. In other words, it would be unsatisfactory to reduce overzealous search and seizure activities to zero by employing a deterrent system that eliminated all evidence gathering attempts even though such an outcome would be strong proof of the deterrent system's effectiveness.

This reasoning implies that any attempt to control search and seizure activities consists of at least two parts. The first part consists of evaluating the nature of the sanctions that will be delivered when unwanted behavior is detected and whether those sanctions are strong enough to motivate police officers to avoid inappropriate forms of search and seizure. However, the sanctions should not be so strong that they totally inhibit police officers from performing desired actions.¹⁷ The second part involves the ease with which both the officers and those who would deliver the sanctions can distinguish between appropriate and inappropriate, or legal and illegal, forms of search and seizure. These are separate and distinct aspects of the deterrence system. For example, adding or taking away consequences to police officers for an illegal search without changing the law that defines whether an action constitutes an illegal search is one way to reform the current system. Alternatively, changing the law while maintaining evidence suppression as the primary motivational sanction is another way to reform the system. Both the sanctions for violating the law and the law that defines when those sanctions will be delivered are independent aspects of the exclusionary rule. As such, each can affect the extent to which the exclusionary rule acts as a deterrent.

A system for controlling police officer behavior that rests on delivering negative consequences for incorrect action should have several obvious properties. First, the sanctions should be sufficiently negative to encourage police officers to avoid those actions that would lead to sanctions. Second, the sanctions should be applied consistently for both individual officers and among different officers within

17. Although not normally a part of the criminal justice system, another aspect of the size and the type of sanctions that are necessary to control inappropriate search and seizure are the rewards that are delivered. Rewards are generally administrative in nature. One administrative method of controlling police conduct is the emphasis that some local police departments place on collecting evidence, reducing crime, arresting suspects, and providing a strong presence in high crime areas. Such local police policy may encourage police officers to engage in crime-- reducing activities that may be illegal, precisely because such actions have the desired effect on crime rates. For example, New York City's recent Police Commissioners, William Bratton and Howard Safir's emphasis on stopping and searching citizens. For even the most minor violations has been credited with helping to reduce crime. See U.S. NEWS AND WORLD REPORT, *The Crime Bust*, May 25, 1998. At the same time, some citizen groups are claiming that the new policies have resulted in violations of the civil rights of various ????. See U.S. NEWS AND WORLD REPORT, *Those NYPD Blues*, April 5, 1999. Another administrative control procedure is whether local departments selectively reward correct, as opposed to incorrect, search and seizure activities. Some departments might simply value aggressive policing independent of the effects this form of policing might have on conviction rates. They may view the high rate of probation and charge reduction as evidence that the primary deterrent to crime is aggressive police activity and not the culprit's fear of rarely delivered and highly delayed criminal sanctions. See LAWRENCE S. WRIGHTSMAN ET AL., *PSYCHOLOGY AND THE LEGAL SYSTEM* 12-13 (3d ed. 1998).

a department.¹⁸ Finally, the sanctions should be delivered with celerity.

Two additional properties of an effective sanctioning system arise because the delivery system is mediated by human judgment. In order to achieve regularity, those who are in control of the sanctions, such as the trial court judges in the case of evidence suppression, must be able to decide consistently which exemplars deserve to be sanctioned. Without such consistency, police officers will find it difficult, if not impossible, to learn the precise standards of behavior against which they are being judged.¹⁹ In addition, the authors of the Pepperdine Study indicated that, if the officers are rarely provided with feedback about how their actions are being judged by those in control of the sanctions, it is unlikely that they will learn the precise standards being used to judge the appropriateness of their actions.²⁰

B. Flawed Conclusions

In the Pepperdine Study, the authors provided police officers from several different departments within Ventura County, California, a list of hypothetical fact scenarios involving search and seizure and *Miranda* warning problems.²¹ The survey instructions asked the officers to read these scenarios and choose one of several different answers.²² In each case, the authors considered one of the answers to be correct.²³ The authors reported that the police officers chose the correct answer about sixty-five percent of the time.²⁴ The authors used this relatively poor performance as evidence that police officers could not possibly be deterred by the

18. Consistency for individual officers and among a department's officers is important for several reasons. If officers are differently sanctioned for similar behavior, it is likely that both morale and rule adherence would suffer. If the rule is perceived by the officers to be inconsistently applied, it would be difficult for them to follow the rule because no rule would, in applied fact, exist.

19. Here the standards to which we are referring are those actually being used in the department to evaluate police officers. It should be obvious that such standards may or may not match the law. For example, departments could hold officers to higher standards than the law requires or they could fail to discipline illegal search and seizure activities that result in excluded evidence. If a department's policy included the strong belief that aggressive officers deter crime and that the occasional exclusion of evidence is merely one of the costs of aggressive police work, such departments might fail to reprimand police who work on the edge of search and seizure violations.

20. See Perrin et al., *supra* note 3, at 675 ("If the ruling is not made known to the officer, or if the basis for the ruling is not made clear to the officer, the officer cannot learn from his 'mistakes,' and the opportunity to deter that officer's future conduct is lost.")

21. See *id.* at 712-14, 727, 669 app. (describing who the questionnaires were distributed to and what types of questions were presented, as well as providing a copy of the questionnaire).

22. See *id.* at 714-16, 669 app.

23. See *id.* at 727. Actually, upon reflection, due to the complexity of the legal issues, the authors of the Pepperdine Study were unable to agree on the correct answer for a subset of the questions and, therefore, accepted more than one answer as correct. See *id.* at 727-32.

24. See *id.* at 728.

exclusionary rule.²⁵ However, this conclusion is too presumptive. The officers' performance might instead suggest that police officers could frequently violate the rule while thinking that they were correctly following it.

Unfortunately, several reasons illustrate how the authors' conclusion does not match their evidence. First, the authors failed to distinguish errors of inclusion from errors of exclusion in both their design and analysis of the study. Second, the authors confused the motivational effects of the consequences of rule violations, such as evidence suppression when an error of inclusion is made and failure to affect crime when an error of exclusion is made, with a high error rate on their test. Finally, the authors made inadequate attempts to determine whether scores on their test were associated with error rates of actual decisions that officers make in the field. We consider each of these issues in turn.

1. Errors of Inclusion Versus Errors of Exclusion

When confronted with actual in-field situations, officers can decide whether or not individual factual circumstances justify seizing, searching, or collecting statements. If search and seizure laws were clear and unambiguous, then determining whether an action is legal or illegal would simply depend on matching the fact pattern to the law. Thus, officers can incorrectly decide not to seize evidence when the law would have allowed it or they can incorrectly decide to seize evidence when the law would not have allowed it.

Many of the hypotheticals contained within the questionnaire allowed the officers the option of deciding whether the evidence was admissible or inadmissible.²⁶ If the officers' errors detected in the questionnaire were primarily examples of failures to seize evidence or collect statements that were legally admissible, the officers' mistaken beliefs that the evidence would be excluded could be deterring them. Thus, an overly strong deterrent system could decrease the rate of legally appropriate actions at the same time it decreased the rate of illegal actions. On the other hand, if the high error rate resulted from the officers' decisions to seize legally inadmissible evidence, the authors' claim that the high error rate reflects the failure of the exclusionary rule to deter may be correct.²⁷ Regrettably, we cannot tell which of these views is more reasonable because the authors failed to design their study in a manner that would allow a test of this issue.²⁸

25. *See id.* at 728, 734-36.

26. *See id.* at 669 app.

27. *See id.* at 736 (confirming that the Pepperdine Study shows the nondeterrent effect of the exclusionary rule).

28. The role of motivation in the relative rate of errors of inclusion (often called false alarms in the psychological literature on decision making) and exclusion (often called misses) has been so thoroughly researched that psychologists have developed Signal Detection Theory, an empirically sound and highly quantitative theory, to describe the relationships. *See, e.g.*, NEIL A. MACMILLIAN & C. DOUGLAS CREELMAN, DETECTION THEORY: A USER'S GUIDE (1991).

An adequate test of this issue requires two types of hypotheticals. One half of the hypotheticals should represent situations in which police officers would be within the law if they seized evidence or interrogated suspects further. The other half should represent situations in which collected evidence or statements would be inadmissible. By presenting both types of hypotheticals, the authors of the Pepperdine Study would have been able to analyze the relative rate of the different types of errors. If evidence suppression is considered a more aversive outcome by police officers than causing the suspect to be arrested or than removing dangerous property (for example, drugs and weapons) from the suspect, then results from such a study should show that officers fail to collect legal evidence more often than they collect evidence illegally.

Although the Pepperdine Study ignored this issue, the responses that officers gave to another item on the questionnaire suggest that the police may be more concerned about seizing evidence that is later suppressed than failing to seize evidence that would be accepted in court.²⁹ In particular, when asked whether their police work was influenced by the threat of evidence suppression, less than twenty percent of the officers said that this possibility was of little or no concern to them.³⁰ The remainder of the officers said that it was an important or a primary concern.³¹ Although by no means conclusive, this data is inconsistent with the authors' conclusion that exclusion is not a deterrent.³² It is possible that officers are so concerned about evidence being suppressed that they err on the side of caution much more frequently than on the side that would violate exclusionary law. An adequate assessment of this issue would have required questioning the officers regarding the relative importance of actions that might have an immediate impact on crime, but constitute technical Fourth Amendment violations (for example, illegally confiscating weapons or drugs) versus Fourth Amendment actions where the officers simply avoid suppression by failing to gather evidence.

In the real world, police officers are confronted with a wide array of factual situations. Sometimes, it will be obvious that evidence can be seized immediately and without a warrant. In other instances, it will be obvious that evidence cannot be legally seized. The rest of the situations will fall between these extremes. The officer has the unenviable task of deciding in each case whether or not to gather evidence. The officer must act quickly, with the knowledge that deciding against seizure may allow a guilty criminal to escape conviction, but that an improper seizure may result in the same outcome due to evidence suppression. The officer's

29. See Perrin et al., *supra* note 3, at 720-21.

30. See *id.* at 720 & n.421.

31. See *id.*

32. See *id.* at 735.

decision depends on how the officer perceives the relative rewards and costs associated with each outcome.

2. Motivation Is Not the Same as a High Error Rate

As suggested earlier, the way the consequences of evidence exclusion motivate officers is a separate issue than from the ability of the officers to distinguish legal from illegal search and seizure examples. It is quite possible for people to make mistakes when given a few carefully designed test hypotheticals that emphasize the more ambiguous aspects of the law, but still have a sufficiently accurate sense of the rule to follow it correctly in the huge majority of real-world examples. This is possible for two reasons. First, difficult or ambiguous examples may only occur at an infrequent rate in the daily experience of most police officers; therefore, the opportunity for error might be minimal. Second, there are many real-world examples of people following rules to the letter without knowing every nuance of those rules.

The authors of the Pepperdine Study reported some results about the number of times that officers were confronted with difficult evidence collection issues, but their results are far from complete.³³ In particular, although more than half of the officers reported that the evidence they collected was never suppressed, approximately seventy-five percent of the officers reported testifying in a suppression hearing.³⁴ Additionally, the average number of times that the officers testified in such hearings was between fifteen and eighteen times over their entire careers.³⁵ The authors did not collect data about the total number of times that the officers seized and gathered evidence or about the number of times the officers decided not to collect evidence for fear of its exclusion. Therefore, it is impossible to compute the rate at which officers confront difficult search situations and the proportion of times they were actually deterred from collecting evidence. On the other hand, an average of fifteen to eighteen hearings per career seems relatively low in comparison to the conservative estimate of an average of one hundred search and seizure decisions per year.³⁶ In short, it is possible that officers are frequently deterred by the threat of exclusion in many real-world situations where the legality of evidence is unambiguous. Unfortunately, the authors failed to collect the data

33. *See generally id.* at 722-25 (presenting the results of survey questions regarding the respondents' appearance at suppression hearings, which is only an indirect reflection of how frequently officers were faced with making a questionable seizure).

34. *See id.* at 722 & nn.423-24.

35. *See id.* at 722.

36. *See generally* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1995. This publication reported that in 1995 there were 586,756 peace officers in the United States. *See id.* at 278. These officers made 15.1 million arrests for the year which translates into approximately 25 arrests per officer. *See id.* at 207. Because most officer contacts do not result in arrest but often involve search and seizure decision making, we believe the figure of 100 Fourth Amendment related decisions per year is quite conservative.

necessary to reach an informed conclusion.

Even if the rate of ambiguous search situations is high in the daily experiences of officers, the high error rate on the test items³⁷ might not reflect the error rate in the real world because most of us can avoid violations without knowing the nuances of the rules to which we conform. For example, many people do not violate state penal code provisions, but a vast majority would miserably fail a test of the exact rules of the penal code. Few lay individuals would know the distinction between first and second degree murder; thus, they would be unable to correctly answer a series of appropriately constructed hypotheticals. However, this does not mean that the consequences of murdering someone, regardless of degree, will not serve as a deterrent for these individuals. In fact, the lack of a more detailed knowledge might cause most individuals to err on the side of caution. It is conceivable that police officers behave in a similar manner.

3. Paper and Pencil Tests Are Not the Same as Real-World Decisions

Another concern regarding the method of testing officer knowledge with hypotheticals is the predictive validity of responses given. Do answers to the hypotheticals predict how officers would actually behave in search and seizure situations? At least two aspects of the hypotheticals are relevant. One aspect is whether the hypotheticals are representative of the type and the range of actual decisions faced by officers in their daily police activity. The other aspect is whether the police officers' real-world responses to the hypotheticals would conform to their survey answers.

The representative quality of a hypothetical is of considerable importance. It is quite possible that police officers incorrectly answered hypotheticals representing those situations they typically do not face in a given year. Therefore, wrong answers would account for only a small proportion of real-world search and seizure situations. If the authors' hypotheticals over-sampled this small set, their estimates of how often police officers actually violate the rules in a typical year would be highly exaggerated.³⁸ Without relevant representative data, it is difficult to know what significance to attach to the reported error rates.

A well-known problem in psychological measurement is that responses to paper and pencil tests do not always perfectly predict the behavior of the tested

37. See Perrin et al., *supra* note 3, at 735 (reporting that officers answered only fifty percent of search and seizure questions correctly).

38. See *id.* at 727-29 (providing the results of hypothetical situations).

individuals in relevant real-world situations.³⁹ Other evidence is needed to validate the claim that the paper and pencil test accurately measures what it purports to measure. In the present case, although for obvious practical reasons, the authors of the Pepperdine Study did not collect the appropriate data, which would be the actual rate of deterrence in the real world, they did collect some data relevant to the issue.⁴⁰ If the inability to answer hypothetical questions correctly reflects a failure of the rule to deter, then one might expect those officers with greater knowledge to be deterred at a higher rate. The evidence collected by the authors suggests this was not the case.⁴¹ There was no correlation between how well the officers did on the hypotheticals and whether they reported ever having their evidence suppressed.⁴² This finding is inconsistent with the claim that less knowledge of the rule means less ability of the rule to deter. As the authors argued, this lack of association might mean that the exclusionary rule never deters.⁴³ On the other hand, it is equally plausible that this result demonstrates that knowledge of the correct answer to a set of hypotheticals bears no relationship to how police officers actually behave in the field.

C. *What Is the Meaning of Lying?*

The authors of the Pepperdine Study argued that police officers distort reports and possibly perjure themselves as a result of the exclusionary rule.⁴⁴ The authors reached this conclusion in spite of the fact that over eighty percent of all respondents reported having never heard of anyone failing to fully disclose in testimony the circumstances of a search or an interrogation to avoid suppression.⁴⁵ Although the authors correctly pointed out that this high rate might reflect an unwillingness of police officers to admit the truth on the questionnaire, the authors presented little evidence to support this interpretation.⁴⁶ However, it does seem quite natural that police officers, like all humans, would lie about inappropriate actions if the lie decreased the probability or the severity of the negative consequences that would be experienced as a result of their inappropriate actions. Furthermore, it seems reasonable to assume that the motive to lie would increase as the aversiveness of the consequences increased.

39. See, e.g., ICEK AJZEN, ATTITUDES, PERSONALITY, AND BEHAVIOR (1988); ICEK AJZEN & MARTIN FISHBEIN, UNDERSTANDING ATTITUDES AND PREDICTING SOCIAL BEHAVIOR 37-38 (1980); WALTER MISCHEL, PERSONALITY AND ASSESSMENT 74 (1968).

40. See Perrin et al., *supra* note 3, at 719-34.

41. See *id.* at 729-30.

42. See *id.* at 734.

43. See *id.* at 735.

44. See *id.* at 677.

45. See *id.* at 725.

46. See *id.* at 727.

One problem with the above logic is that it is inconsistent with the authors' claim that evidence suppression is not a deterrent.⁴⁷ If the police are not concerned about evidence suppression, either because they rarely are informed about it by relevant personnel or because it simply does not matter to them, then why should they wish to avoid this consequence by perjuring themselves and thereby risk other negative consequences? If evidence suppression is negative enough to be avoided by perjury, then why is it not negative enough to deter officers from conducting illegal searches?

D. Missed Opportunities

One issue that was all but ignored in the Pepperdine Study is the rate at which police officers are falsely accused of violating the Fourth Amendment. Although the authors reported a large discrepancy between the rate at which officers testified in exclusionary hearings and the rate at which the officers' evidence was actually excluded,⁴⁸ these data do not precisely measure the issue of false accusations, whether actual or perceived. This discrepancy could be the result of defense attorneys claiming abuse, even in situations in which they believe none existed, in an attempt to use the exclusionary rule tactically; this can include an attempt to increase delay, to obtain early disclosure, to learn how police officers fare as witnesses, or to avoid being accused of inadequate representation. Determining the actual rate of false accusations by citizens is an important issue, however, given the recommendations made by the authors.⁴⁹ Clearly, an increase in the rate of false accusations of police misbehavior is not a desired consequence of reform. However, it is a possible consequence if the system fails to impose negative consequences on the complainant for false allegations.

Another empirical issue the authors did not sufficiently focus on in the Pepperdine Study was the possibility that police officers receive feedback about their evidence gathering activities from sources other than the courts or prosecutors.⁵⁰ Police departments might employ administrative procedures that provide feedback to officers when their arrest reports are reviewed. If such systems do exist, it is likely they exist because of the exclusionary rule. Thus, the rule might have indirect effects on police officers through police department evaluation and feedback rather than through evidence suppression in court.

47. *See id.* at 735.

48. *See id.* at 722-23.

49. *See id.* at 743-53 (referring to the authors' suggested model to move beyond the exclusionary rule).

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

Finally, although the authors discuss the possibility that the exclusionary rule increases societal costs,⁵¹ virtually no research has been conducted to date that has examined the system from a strict cost-benefit point of view. In particular, the authors presented no evidence showing that their proposed solution would cost less or provide more benefit than the current or other possible reforms. Clearly, there are costs associated with the current system. However, a well-designed cost-benefit analysis would examine the costs incurred and benefits accrued by new reforms and compare those to the current system. Unfortunately, the authors did not present any such evidence.

III. IMPOSSIBLY COMPLEX SEARCH AND SEIZURE LAW

In *Mapp v. Ohio*,⁵² the United States Supreme Court decided to apply the exclusionary rule to the states,⁵³ which unquestionably impacted the development of search and seizure law. Prior to this decision, California had already started developing its own search and seizure rules adopting the exclusionary rule six years earlier in *People v. Cahan*.⁵⁴ The rule's early proponents clearly did not expect Fourth Amendment law to become so complex and unpredictable. In fact, most courts that embraced the rule were quite optimistic about its practicality. Chief Justice Traynor exemplified this optimism when he heralded in the new rule with high hopes, stating that "the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures."⁵⁵

Unfortunately, history has proven that this optimism was misplaced. In the years that followed the *Mapp* and *Cahan* decisions, legal scholars and judges have grappled with the Fourth Amendment's scope and numerous rules affecting privacy issues. Countless judicially created rules have been developed, covering everything from airport detentions to vehicle searches. Heated debate and constant change are the hallmarks of Fourth Amendment law.

Consequently, even the most conscientious, experienced, and hard-working police officers are confronted with an impossibly large body of law. For example, the *California Peace Officers Legal Sourcebook*,⁵⁶ developed by the California Department of Justice as a practical guide for peace officers, contains more than two hundred pages of search and seizure rules in fifty separate topic areas.⁵⁷ The

51. *See id.* at 710.

52. 367 U.S. 643 (1961).

53. *See id.* at 655-60.

54. 282 P.2d 905 (1955).

55. *See id.* at 915.

56. JOEL CAREY, CALIFORNIA DEP'T OF JUSTICE, CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK 1998.

57. *See id.*

abbreviated *Field Guide* version,⁵⁸ which is designed to be carried in a uniform pocket, is no less daunting as it contains 140 pages, in eight-point print, covering a similar number of search and seizure topics.⁵⁹

However, the problem goes far beyond the mere volume of rules concerning Fourth Amendment protections. The law's complexity and unpredictability are also cause for concern. One constitutional scholar aptly described this problem as follows: "Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs."⁶⁰

The authors of the Pepperdine Study briefly noted that Fourth Amendment law "is often murky."⁶¹ The authors cited this problem as further evidence that the law has been contorted primarily to avoid the severe remedy of exclusion.⁶² Despite the truth of this charge, the authors focused too narrowly on the exclusionary rule's end goal of deterrence. In doing so they acknowledged, but largely ignored, a fundamental condition precedent for meaningful deterrence—the possibility of consistently applying sanctions. The authors' primary focus on punishment and education seems misguided when imperfect police procedure is the product of an impossibly complicated body of law.

Confusion over Fourth Amendment law is not limited to police officers. Judges and lawyers also have difficulty interpreting and applying the law in this difficult area. As one commentator noted, "The uncertainty is so great that even skilled criminal lawyers cannot predict with accuracy the application of exclusionary rules in a particular hearing."⁶³ Indeed, the history of Fourth Amendment jurisprudence is replete with repeated disagreement among appellate justices over what is and what is not a proper search.⁶⁴ The procedural history of

58. JOEL CAREY, CALIFORNIA DEP'T OF JUSTICE, CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK 1998 FIELD GUIDE.

59. *See id.*

60. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

61. *See Perrin et al., supra* note 3, at 676.

62. *See id.*

63. MACKLIN FLEMING, OF CRIMES AND RIGHTS 156 (1978).

64. *See generally* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984) (discussing Fourth Amendment cases in depth). *Compare* *Boyd v. United States*, 116 U.S. 616, 637-38 (1885) (holding that the admission of private papers of the defendant was unconstitutional because the defendant was forced to provide them in violation of the Fourth Amendment), *with* *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that evidence obtained in violation of the Fourth Amendment should not be excluded where the police officers acted in good faith), *and* *United States v. Doe*, 465 U.S. 605, 610 n.8 (1984) (rejecting the argument that evidence of personal business records should be excluded as violating "a zone of privacy" created by the Fifth Amendment).

a recent United States Supreme Court decision, *Arizona v. Evans*,⁶⁵ is a good example of this phenomenon. In *Evans*, an Arizona trial court granted Evans' motion to suppress evidence.⁶⁶ The Court of Appeals reversed the decision and allowed the evidence to be admitted.⁶⁷ The Arizona Supreme Court disagreed and excluded the evidence.⁶⁸ Finally, the United States Supreme Court held that the evidence was admissible.⁶⁹

Another interesting example of judicial uncertainty involved a recent search and seizure experiment conducted by New York Supreme Court Judge Harold Rothwax.⁷⁰ Judge Rothwax provided to a gathering of appellate justices the fact patterns of two recently decided, but not yet widely circulated, United States Supreme Court Fourth Amendment cases and asked the judges to decide the suppression issue.⁷¹ Not surprisingly, the overwhelming majority of judges reached decisions contrary to the Supreme Court's holding in both cases.⁷²

If judges have difficulties making correct decisions, is it reasonable to expect police officers to possess a comprehensive understanding of permissible conduct under the Fourth Amendment? Moreover, is it realistic to expect the threat of punishment and increased law enforcement training to solve this problem? Judges possess law school educations and extensive legal experience. They also make most decisions after time consuming study and reasoned analysis. On the other hand, police officers rarely possess significant legal education and often must make decisions in a matter of seconds under circumstances where their own safety, or that of a citizen, is in peril.

The results of the police officer survey conducted by the authors of the Pepperdine Study support the conclusion that search and seizure law has become too complex.⁷³ Police officers answered only fifty-three percent of the search and seizure questions correctly.⁷⁴ The law students completing the survey did only slightly better, answering only fifty-five percent of the search and seizure questions correctly.⁷⁵ Even more compelling is the authors' acknowledgment that they

65. 514 U.S. 1 (1995).

66. *See id.* at 5.

67. *See id.* at 6.

68. *See id.*

69. *See id.* at 16.

70. *See* HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 56 (1996).

71. *See id.* at 58.

72. *See id.* at 58-59.

73. *See* Perrin et al., *supra* note 3, at 727-32.

74. *See id.* at 728. This figure refers only to hypothetical questions concerning search and seizure issues. *See id.* Officers scored substantially higher on interrogation questions answering seventy-four percent correctly. *See id.* Officers answered sixty-five percent correctly on combined interrogation and search and seizure questions. *See id.* This latter figure was referred to in the "Flaws Associated with Empirical Study" section of this Critique. *See supra* Part II. The significant variance in correct answers between interrogation and search and seizure hypotheticals seems to further support the conclusion that search and seizure law is too complex.

75. *See* Perrin, et al., *supra* note 3, at 730.

debated the correct answer to at least two of the hypothetical questions and chose to exclude one of the questions because of uncertainty about the law.⁷⁶ It is also telling that the survey found little correlation between education and performance.

Under these circumstances, no one can reasonably dispute that Fourth Amendment law is too complex and unpredictable. To seek increased accountability for police officers without first addressing this larger issue of uncertainty is not only misguided, it is unfair.

IV. EXPANDED CIVIL LIABILITY IS NO SOLUTION

The proposal to expand police civil liability as a more certain method of deterring Fourth Amendment violations is not new. This option to the exclusionary rule has been the subject of debate among both constitutional scholars and law enforcement professionals for some time.⁷⁷ However, the authors of the Pepperdine Study have put a new twist on this civil liability proposal.⁷⁸ The authors' recommendation to create a limited administrative remedy for violations falling outside the "good faith" standard certainly represents a new and innovative approach.⁷⁹ While we commend their thoughtful work and scholarly contribution to the exclusionary rule debate, we must voice our strong objection to this concept.

As practitioners routinely dealing with the fallout from police search and seizure decisions, we believe such a proposal constitutes a step in the wrong direction. The impact and the cost of expanded civil administrative liability will not be borne solely by police or even prosecutors; ultimately, the public as a whole would suffer the brunt of this flawed policy change. This proposed remedy is clearly not the panacea some believe it to be. Expanded liability overlooks existing remedies, sends the wrong message to law enforcement, heightens unfairness, and adds yet another layer of costly bureaucracy to a system that is already unduly complicated and overburdened.

76. See *id.* at 727.

77. See William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternative*, 1975 WASH. U. L.Q. 621, 690-701 (discussing traditional tort remedies as a substitute to the exclusionary rule); Edward J. Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative*, 47 L.A. BAR BULL. 91, 95-99, 121-24 (1972) (discussing civil liability of officers and police departments as a substitute to the exclusionary rule); see also Amar *supra* note 60, at 800-11 (proposing options to decrease the ambiguous nature of the Fourth Amendment); Van de Kamp, *supra* note 2, at 349-51 (claiming that the exclusionary rule has been widely criticized with various formulated options).

78. See Perrin et al., *supra* note 3, at 740-43 (outlining other remedies suggested for the exclusionary rule and adding the new remedy of civil administrative relief).

79. See *id.* at 746.

When it comes to Fourth Amendment law, we expect far too much of police officers.⁸⁰ Is it fair to hold police officers and their departments responsible for not following the law when the law itself is uncertain and impossibly complex? We believe it is not.

Under current civil law, peace officers have “qualified immunity” when performing their duties.⁸¹ Under this standard, officers may still be held liable for money damages if their conduct was not objectively reasonable in light of clearly established legal principles.⁸² On the other hand, judges are given “absolute immunity” for decisions concerning the issuance of search and arrest warrants.⁸³ Prosecutors similarly enjoy absolute immunity for charging decisions and other court related functions.⁸⁴ These protections are based on sound policy “designed to free the *judicial process* from the harassment and intimidation associated with litigation.”⁸⁵

Both judges and lawyers often make mistakes when interpreting and applying search and seizure law. While we do not advocate elimination of immunity for judges or prosecutors, we must point out the terrible inconsistency in the Pepperdine Study remedy: it simply makes no sense to hold police officers, who must often make instantaneous Fourth Amendment decisions, accountable for errors, while judges and prosecutors are held harmless, even though the latter officials typically make decisions equally invasive of privacy under far calmer

80. See *supra* Part III.

81. See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (holding that an FBI agent is protected by qualified immunity if he can establish that a reasonable officer could believe a search comported with the Fourth Amendment, even if it actually did not); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (stating that government officials performing discretionary functions are usually shielded by qualified immunity, as long as conduct does not violate clearly established rights which a reasonable person should have known); *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (holding that the police officers are entitled to qualified immunity if they show their conduct did not violate clearly established rights which a reasonable person should have known).

82. See *Anderson*, 438 U.S. at 639 (“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns in the ‘objective legal reasonableness’ of the action.” (quoting *Harlow*, 457 U.S. at 819).

83. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (holding that judges in courts of general jurisdiction are not liable in civil actions for their judicial acts, even if done maliciously or corruptly); see also *City of Santa Clara v. County of Santa Clara*, 81 Cal. Rptr. 643, 646 (Ct. App. 1969) (“It is a long-established rule that a judge is not to be held answerable in damages for acts performed in his judicial capacity.”); *Lewis v. Linn*, 26 Cal. Rptr. 6, 9 (Ct. App. 1962) (stating that a judge is not liable in damages for acts performed in his official capacity, as long as any reasonable ground for the assumption of jurisdiction is shown).

84. See *Burns v. Reed*, 500 U.S. 478, 504 (1991) (holding a state prosecutor absolutely immune from liability for damages under a § 1983 action for participation in a probable cause hearing); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (holding a prosecutor absolutely immune from civil suits for damages under § 1983 when he acted within the scope of duty by initiating and prosecuting a criminal case); see also CAL. GOV'T CODE § 821.6 (West 1995) (codifying absolute immunity of public employees acting within the scope of their employment).

85. See *Burns*, 500 U.S. at 494 (citing *Forrester v. White*, 484 U.S. 219, 226 (1988); *Imbler*, 424 U.S. at 430).

circumstances.⁸⁶

Regrettably, this contemplated change also ignores a significant line of United States Supreme Court decisions holding that police officers and other public officials should not be subject to civil liability for the violation of extremely abstract rights or legal rules that are not clearly established.⁸⁷ This standard has not unduly limited the volume of lawsuits against peace officers. For example, one Ventura County law firm that represents departments employing 1165 police officers reports defending 175 lawsuits in a ten year period involving allegations that peace officers violated a plaintiff's constitutional rights.⁸⁸ These numbers translate into a one in seven chance of an officer being sued in any ten year period. When these figures are further extrapolated against the number of peace officers statewide (75,274), they reveal that approximately 1000 lawsuits against peace officers are filed every year in California.⁸⁹

Nor do we agree with the contention that the law's requirements and the unwillingness of juries to award substantial money damages indicate a need for a better remedy. A recent sixteen million dollar award in a police brutality case against the Los Angeles County Sheriff's Department indicates that jurors are not reluctant to impose significant penalties in meritorious cases.⁹⁰ Instead, the failure of many cases is a reflection of the large number of frivolous lawsuits filed against police officers. Due to the severity of this problem, the California Legislature adopted a new law in 1996 making it a misdemeanor to file a knowingly false claim against a peace officer "with the intent to harass or dissuade the officer from

86. See Perrin et al., *supra* note 3, at 744; *supra* notes 81-85 and accompanying text.

87. See cases cited *supra* note 85. Justice Scalia's opinion in *Anderson v. Creighton*, 483 U.S. 635 (1987), is particularly instructive. He summarized this general rule as follows:

It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

See *id.* at 640 (citations omitted).

88. The Oxnard, California, Law Offices of Alan E. Wisotsky represent four separate Ventura County police agencies employing a total of 1165 police officers. At our request, this firm surveyed their cases over the last ten years that involved representation of individual officers and their departments.

89. See CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, CURRENTLY EMPLOYED PERSONNEL (1998).

90. See Martin Berg & Anne Marie Stolley, *Court Affirms Record \$15.9M Against County*, L.A. DAILY J., May 6, 1998, at 1.

carrying out his or her official duties."⁹¹

One recent case stands out as a particularly offensive example of the type of police lawsuits that clog our court system. In *Bianchi v. Bellingham Police Department*,⁹² a convicted mass murderer sentenced to multiple life terms in both Washington and California filed a 42 U.S.C. § 1983 action.⁹³ The lawsuit was filed in 1988 and alleged that the police lacked probable cause when they arrested him nine years earlier in 1979.⁹⁴ Despite the nine year delay, the Court of Appeals tolled the statute of limitations and allowed the case to proceed.⁹⁵

The proposal to expand liability also ignores the level of police officer administrative accountability that exists under current law. For example, section 832.5 of the California Penal Code requires all agencies that employ peace officers to establish a procedure for the investigation of citizen complaints.⁹⁶ These complaints can cover an entire spectrum of conduct, including everything from rudeness to false arrest or criminal behavior.⁹⁷ While these internal administrative processes do not permit recovery of damages by aggrieved citizens, such proceedings carry potentially severe ramifications for the subject police officer, namely, termination. Under California employment law, peace officers are rightfully held to a much higher standard of conduct both on duty and off duty than are most occupations.⁹⁸ Thus, when a department investigation validates a citizen

91. See CAL. PENAL CODE § 148.6(b) (West Supp. 1999). In its entirety, this subdivision provides the following:

(b) Every person who files a civil claim against a peace officer or a lien against his or her property, knowing the claim or lien to be false and with the intent to harass or dissuade the officer from carrying out his or her official duties, is guilty of a misdemeanor. This section applies only to claims pertaining to actions that arise in the course and scope of the peace officer's duties.

Id.

92. 909 F.2d 1316 (9th Cir. 1990).

93. See *id.* at 1317.

94. See *id.*

95. See *id.* at 1319.

96. See CAL. PENAL CODE § 832.5(a). This section provides in pertinent part:

(a) Each department or agency in this state that employs peace officers shall establish a procedure to investigate complaints by members of the public against the personnel of these departments or agencies, and shall make a written description of the procedure available to the public.

Id.

97. See *e.g.*, *Pena v. Municipal Ct.*, 157 Cal. Rptr. 584, 587 (Ct. App. 1979) ("Many, if not most, allegations of police misconduct are also violations of various criminal statutes." (citing David J. Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, 11 U.S.F. L. REV. 587, 608 (1997))).

98. See *e.g.*, *Thompson v. State Personnel Bd.*, 247 Cal. Rptr. 210, 212 (Ct. App. 1988) (affirming an officer's dismissal for his participation in a barroom fight while off duty); *Anderson v. State Personnel Bd.*, 239 Cal. Rptr. 824, 826 (Ct. App. 1987) (sustaining a highway patrol officer's dismissal for appearing nude while off duty in the view of neighborhood children); *Titus v. Civil Serv. Comm'n*, 181 Cal. Rptr. 699, 703 (Ct. App. 1982) (upholding the discharge of a sheriff lieutenant); *McCain v. Sheridan*, 324 P.2d 923, 926 (Cal. Dist. Ct. App. 1958) (holding that a police officer may be discharged for less serious violations of criminal statutes governing citizens generally).

complaint, the officer is subject to discipline which may include termination. California case law contains numerous examples of sustained discipline where this heightened standard influenced the outcome.⁹⁹ Because these administrative processes carry the very real prospect of termination and lost income they constitute a more meaningful influence on officer behavior than does a money damages remedy. This is particularly true because California law requires agencies to indemnify officers for all damages except punitive damages.¹⁰⁰

Section 832.5 further requires the agency to retain records of the complaints and the investigations for a period of at least five years.¹⁰¹ The number of complaints against peace officers are tracked and reported on an annual basis by the California Department of Justice.¹⁰² In 1996, for example, 19,376 citizen complaints were filed against peace officers in California.¹⁰³ Only 2728, or fourteen percent, of these complaints were deemed sustained.¹⁰⁴ Because there are 75,274 full-time peace officers in California,¹⁰⁵ the total number of citizen complaints translates into one complaint for every four peace officers each year. From our perspective, these figures not only reflect a high level of police scrutiny, they also demonstrate the willingness of citizens to file false accusations against law enforcement. In an effort to address this problem, the California Legislature approved legislation in 1995 making it a crime to knowingly file a false citizen complaint under California Penal Code section 832.5.¹⁰⁶

Expanded civil administrative liability will also fail to accomplish the intended objective of reducing police perjury. The presumed correlation between the exclusionary rule and police perjury is not entirely supported by the Pepperdine Study.¹⁰⁷ Even assuming there is a correlation, we fail to see how the imposition of expanded civil administrative liability would reduce the incidence of police perjury related to search and seizure issues. The authors of the Pepperdine Study acknowledged that the "'punishment' of exclusion of evidence does not fall upon

99. See cases cited *supra* note 98.

100. See CAL. GOV'T CODE § 820.2 (West 1995).

101. See CAL. PENAL CODE § 832.5(b).

102. See *id.* § 13012(d).

103. See CALIFORNIA DEP'T OF JUSTICE, CRIME & DELINQUENCY
IN CALIFORNIA 104 (1996).

104. See *id.*

105. See CALIFORNIA COMMISSION, *supra* note 89.

106. See Act of Oct. 4, 1995, ch. 590, 1995 Cal. Legis. Serv. 3547 (West) (adding California Penal Code section 148.6). Section 148.6 provides in pertinent part that "[e]very person who files any allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the *allegation* to be false, is guilty of a misdemeanor." CAL. PENAL CODE § 148.6(a)(1) (emphasis added).

107. See *supra* Part II.

the shoulders of the police officer."¹⁰⁸ Moreover, only two percent of the officers who participated in the Pepperdine Study chose monetary fines as a substitute to the exclusionary rule;¹⁰⁹ thus, civil liability will likely increase perjury because of the risk such liability poses to an officer's financial well-being. Certainly, the prospect of losing one's home to an administrative finding of liability would be a far greater motive to lie for the average police officer than suppression of evidence in a single case.

Finally, we have grave concerns that such an expansion of liability will ultimately work the greatest hardship on the public itself. Notwithstanding the Pepperdine Study's plan to limit total damages,¹¹⁰ exposing officers and their departments to the perils of a separate administrative process and the risk of monetary damages will inevitably have a chilling effect upon aggressive and necessary law enforcement activities. While this impact might reduce the incidence of errors of inclusion (violations of search and seizure rules), we believe it is far more likely to increase errors of exclusion (failure to affect crime) because of the fear of liability. This process may also further discourage qualified and desirable candidates from seeking employment as peace officers.

The authors' proposal to create a new state agency modeled after the California Department of Fair Employment and Housing (FEH)¹¹¹ is particularly troubling. Under this proposal, the public will unquestionably suffer the very tangible costs associated with adding yet another layer of government bureaucracy. From our perspective, FEH fails to provide a compelling administrative model for police officer oversight. While this agency serves a valuable purpose, its work comes with a significant cost. The FEH has a \$19.3 million budget, employs 304 staff members, and operates thirteen separate district offices throughout California.¹¹² The agency was also the subject of a highly critical report by the Bureau of State Audits that cited significant inefficiencies and delays in the Department's complaint investigations and processing.¹¹³

108. See Perrin et al., *supra* note 3, at 675-76.

109. See *id.* at 733 tbl.7.

110. See *id.* at 749.

111. See *id.* at 744-46 (citing CAL. GOV'T CODE §§ 12900-96 (West 1992 & Supp. 1997)).

112. See *Department of Fair Employment and Housing Provides Recourse Against Harassment and Discrimination*, CAPITOL WKLY., July 6, 1998, at 6.

113. See CALIFORNIA BUREAU OF STATE AUDITS, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING: ITS COMPLAINT PROCESSING NEEDS MORE EFFECTIVE MANAGEMENT S-1 (1997).

V. THE REASONABLENESS OF A BALANCING TEST

A. *Practical Problems*

The authors of the Pepperdine Study cited several serious practical problems associated with the application of the exclusionary rule.¹¹⁴ First, the rule is costly.¹¹⁵ Second, the rule motivates police perjury, and thus, fails to achieve its primary purpose of deterrence.¹¹⁶ Finally, the rule's rigid application often produces irrational and unfair results that undermine both public safety and public confidence in the criminal justice system.¹¹⁷ Each of these practical problems are obviously relevant to the parameters and the objectives of any reform proposal. Thus, it is important to further analyze these issues in the context of the authors' recommendation to contract the exclusionary rule's scope while expanding civil liability for police officers.

1. Criminal Justice System Costs

We agree with the authors of the Pepperdine Study that the exclusionary rule imposes a direct cost upon the criminal justice system. However, most of the research concerning this issue has tended to focus on the societal costs associated with the rule's impact on case filing decisions, rejections, and dismissals.¹¹⁸ Unfortunately, there is little empirical study of the actual cost that the rule exacts on the criminal justice system in the daily administration of criminal case workload. Costly legal research and writing, litigation of suppression motions, and delay are but a few of the rule's expensive by-products. These costs are a matter of legitimate concern which merit additional research, study, debate, and consideration.

Resources allocated to the criminal justice system, including law enforcement, the courts, prosecutors and public defender offices, are finite. As practitioners in this system, we believe considerable resources are devoted to researching,

114. See Perrin et al., *supra* note 3, at 674-78.

115. See *id.* at 677.

116. See *id.*

117. See *id.*

118. See, e.g., NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA (1982); 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, 671-77; Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 606-09.

analyzing, and litigating search and seizure questions. Concern over the rule's consequences impacts virtually every stage of pretrial case processing. Case investigation, filing decisions, probable cause hearings, indictment proceedings, numerous pretrial motions, and suppression hearings are more costly because of this concern.

This process also inevitably produces delays. Because prosecutors have the burden of proof,¹¹⁹ such delays often help the defense and hurt the prosecution. With the passage of time, memories fade, witnesses are lost or die, and evidence deteriorates. Of course, delays also impact the accused who often must remain in custody during lengthy pretrial proceedings. Finally, delays cause victims of crime to suffer because of the system's failure to promptly deliver justice or deliver justice at all. While these costs are difficult to quantify, they are real and should not be ignored.

The case of *People v. Mohawk*¹²⁰ represents a particularly egregious example of the unacceptably high costs associated with the exclusionary rule. This case involved an extremely brutal murder allegedly committed by two codefendants. Before trial, the defendants litigated a seven month motion to suppress under California Penal Code section 1538.5,¹²¹ in which one of the authors of this Critique represented the People. At the hearing, the defendants called the affiant for the search and arrest warrant and conducted a direct examination for three weeks which consisted of a sentence by sentence inquiry into the affidavit. Following the lengthy hearing, the judge denied all motions to suppress and withdrew from the case. The new judge then granted a change of venue motion partly due to the publicity which had accrued during the section 1538.5 motion. After the case was moved to Los Angeles County, new attorneys took over for both sides. The defendants were ultimately acquitted. The lapse of time and the death of a key prosecution witness significantly weakened the People's case. Subsequently, both defendants were convicted of a federal bank robbery and served time in federal custody.

These costs do not always end with a defendant's conviction and sentencing. Search and seizure issues are a very common argument raised and litigated in criminal appeals. Criminal appeals often take years to litigate, and even decades for capital cases. Both parties must devote significant resources to the research and briefing of these issues. The court and their staff must also devote resources to the review and decision making process on each search and seizure question.

The exclusionary rule also imposes an "opportunity cost." To the extent society devotes resources to costly search and seizure issues, it reduces the resources available for other purposes both within and outside the criminal justice system. For example, reducing the costs associated with these motions would

119. See CAL. PENAL CODE § 1096 (West Supp. 1999).

120. No. CR-10965 (Cal. Super. Ct. Ventura County 1976).

121. CAL. PENAL CODE § 1538.5 (West 1992 & Supp. 1999).

inevitably increase resources available for other important government services such as incarceration of dangerous felons, community policing, drug prevention, and education programs.

While the authors' proposal to narrow the scope of the exclusionary rule may indeed reduce some of these criminal justice system costs, we believe that any such cost savings will be more than offset by the huge costs associated with expanded civil liability for police officers. This approach is likely to increase, not decrease, costs associated with search and seizure issues.¹²² These costs are both tangible and intangible.

2. Deterrence and Police Perjury

The authors of the Pepperdine Study expressed grave concern over the exclusionary rule's perceived tendency to motivate police perjury as further evidence of the rule's failure to achieve its intended purpose of deterrence.¹²³ Previous studies, survey data impressions, and anecdotal evidence discussed in the Pepperdine Study were cited as validating this concern.¹²⁴ While we agree that some amount of police perjury occurs, the authors' empirical evidence on this issue is somewhat deficient. Additionally several practical considerations substantially undercut the proposal to expand civil liability as a means of remedying this problem.

First, the sporadic and arguably ineffective enforcement of perjury laws likely contributes to the incidence of perjury. While witness deception may be common, successful perjury prosecutions are quite rare. Perjury law contains numerous technical requirements that makes proof of this charge far more difficult than laypersons realize.¹²⁵ The inherent nature of a perjury charge, which is based on words spoken at a different hearing, also makes the charge vulnerable to legal, factual, and equitable defenses such as nuance and simple miscommunication. Most importantly, jurors have shown considerable reluctance to return perjury convictions, except in the most airtight and compelling cases.

Indeed, even the recent controversy involving allegations that President Clinton lied under oath concerning alleged sexual misconduct reveals much about the public's attitude towards perjury. Most polls revealed that a substantial

122. See *supra* Part IV.

123. See Perrin et al., *supra* note 3, at 677.

124. See *id.* at 679-83, 709-11, 725-27.

125. See Richard Amerian & George R. Baffa, Comment, *Proof of Perjury: The Two Witness Requirement*, 35 S. CAL. L. REV. 86, 87 (1962).

majority of the public believed that the President actually committed perjury.¹²⁶ Notwithstanding this consensus, the polls also showed that the public felt this conduct was irrelevant to his performance in office, should not constitute grounds for his removal, and did not warrant further investigation.¹²⁷

Second, there is inadequate evidence from which to conclude that the incidence of police perjury is higher for search and seizure issues than in other areas. For example, if evidence suggested a high incidence of police perjury in excessive use of force cases, one might logically conclude that civil liability will encourage more, not less, perjury.

Finally, the law's complexity and distasteful exclusion of relevant evidence encourages a level of hypocrisy and disingenuity, not just in police officers, but in the entire criminal justice system. Thus, any reform must necessarily focus on the system as a whole, not just a single component. One constitutional scholar offered a compelling description of the rule's pervasive impact on candor stating as follows:

The exclusionary rule renders the Fourth Amendment contemptible in the eyes of judges and citizens. Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated. In the popular mind, the Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities. When rapists are freed, the people are less secure in their houses and persons – and they lose respect for the Fourth Amendment. If exclusion is the remedy, all too often ordinary people will want to say that the right was not really violated. At first they will say it with a wink; later, with a frown; and one day, they will come to believe it. Here, too, unjustified expansion predictably leads to unjustified contraction elsewhere.¹²⁸

3. Harmful Impact of Unduly Rigid and Technical Application of the Exclusionary Rule

The exclusionary rule's inflexibility and tendency to produce unfair and irrational results has been the subject of considerable debate and dissatisfaction.¹²⁹ We believe that this practical problem is, in part, caused by a flawed legal policy which seeks to enforce complex rules of conduct (search and seizure law) with a simple, but rigid punishment (exclusion). This approach is inherently inconsistent; a singular right or wrong punishment cannot fairly address the broad spectrum of

126. See Eric Pooley, *Breakdown on the Road to History*, TIME, Aug. 10, 1998, at 56; Susan Page & Jill Lawrence, *If Clinton Did It, Should He Just Admit It? Some Aides Say "Mea Culpa" May Be Best Route*, U.S.A. TODAY, Aug. 4, 1998, at 6A.

127. See sources cited *supra* note 126.

128. Amar, *supra* note 60, at 799 (footnote omitted).

129. See *id.*; Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence*, 62 JUDICATURE 214, 220-27 (1978).

potential Fourth Amendment violations. Simply stated, the law lacks proportionality; the punishment often does not fit the crime. To be truly meaningful, reform must strike a better and more just balance between the rule and the consequence.

The authors of the Pepperdine Study acknowledged this inflexibility and proposed limiting the punishment of exclusion to willful police violations.¹³⁰ This is an important distinction because it fashions a reasoned link between the nature of the violation and the severity of the punishment. Certainly, knowing and intentional violations of a citizen's privacy are more serious than mere negligent or unknowing technical violations. Thus, by adding a mens rea criteria, the authors injected a measure of additional common sense into the law. However, even this change is subject to unduly rigid application. There are some circumstances where exclusion for even knowing violations could produce results that are harmful to public safety and confidence. For example, the murder weapon used by a serial killer would be excluded under this approach if it was discovered by an overexcited rookie police officer who disregarded the need for a search warrant and forced his way into the suspect's residence.

The authors also proposed expanding police civil administrative liability as a further means of deterring misconduct without chilling enforcement altogether.¹³¹ Authorizing a range of fines and civil sanctions tied to the severity of the violation has a certain appeal because it seemingly addresses the inconsistency between complex rules and simple punishment. However, this change also has serious problems.¹³² Expanding civil liability in practical terms means harsher, more severe punishment for police officers. Imposing increased punishment without a corresponding simplification of the Fourth Amendment morass is fundamentally unfair.

These proposals unquestionably reflect considerable thought and empirical study concerning the practical problems associated with the exclusionary rule. Moreover, such reform, if implemented, might even move Fourth Amendment law and procedure in a direction that better protects both public safety and privacy. Despite this potential, the Pepperdine Study still retains much of the inflexibility and inequities found in the current law. As practitioners we believe there are a multitude of factors that rightfully merit consideration in exclusionary rule decision making.

130. See Perrin et al., *supra* note 3, at 753.

131. See *id.* at 750.

132. See *supra* Part IV.

B. *The Balancing Test Option*

Options between the extremes of retaining the exclusionary rule as presently constituted and the total abolition of the rule exist. For example, the prospect of establishing a good faith exception for all searches and seizures similar to that which exists for search warrants was given serious consideration in Congress.¹³³ In our view, adoption of a balancing test represents a more appealing, just, and comprehensive solution to the current state of complex Fourth Amendment law and procedure. In fact, we urge scholars and public policymakers to undertake serious study and evaluation of this potential option.

Under current law, the rule is most commonly enforced in an all or nothing fashion. If the evidence was obtained unlawfully, it is typically suppressed, regardless of the nature of the violation, seriousness of the crime, or uncertainty of the law. We question whether relatively minor or nonmalicious violations should automatically lead to total exclusion, no matter how probative the evidence or serious the public interest in the outcome of the case.

Therefore, a balancing test would appear to be far more reasonable and acceptable than the current all or nothing rule. Under such a test, if a judge finds that an illegal search and seizure occurred, he or she could consider a multitude of factors in determining the appropriateness of suppression. We suggest that the balancing might include, but not be limited to, the following potential factors:

(1) *The magnitude of the illegality*: For example, an unjustified intrusion into a private home at night where a number of people were present is an illegality of far greater magnitude than an entry during the day into an unoccupied garage.

(2) *The good faith of the officers*: Analogous to the present rule regarding search warrants, an officer's honest, but erroneous belief in the legality of his conduct would mitigate in favor of admission of the evidence. This criteria could take into account the extent to which the belief was reasonable, even if later determined to be erroneous.

(3) *The importance and probative value of the evidence*: This assumes that evidence which is essential should be subject to suppression less than evidence which may constitute additional corroborative evidence.

(4) *The degree to which the admissibility of the evidence is likely to effect the integrity and validity of the fact finding process*: Similar to criteria number three, this would require an assessment of the risk of a factually and legally erroneous verdict were the evidence to be excluded.

(5) *The seriousness of charged offenses*: This consideration would include, but not be limited to, the extent of harm suffered by innocent victims, for example, serious physical injuries or death, amount of theft, or fraud, the level of the accused's sophistication and planning, and the nature of the charged offense.

133. See *supra* note 2 and accompanying text.

(6) *The likely effect on public safety of inadmissibility*: This criteria would require examination of public safety concerns which represent a significant and legitimate factor for consideration. For example, on the extreme, the possible release of a clearly guilty serial killer or habitual child molester would strongly mitigate against suppression of vital evidence.

(7) *The extent to which a serious injustice would result from admissibility*: For example, acquittal of a rapist or a child molester would rate much higher on the scale than the possible unjustified acquittal of a shoplifter or a possessor of minor amounts of dangerous drugs.

(8) *Clarity of the law*: Whether a reasonably close question existed as to the specific search and seizure issue under review is an important consideration. This would take into account some of the factors discussed earlier, such as complexity of the law, the extent to which the law was clear, and the uniformity of past judicial decisions. It is analogous to considerations that are taken into account in granting bail on appeal where the likelihood of success on appeal is to be given weight.¹³⁴

(9) *The extent to which the officers should have known at the time of their conduct that it was illegal*: Besides some of the criteria mentioned above, this would include consideration of the amount of time the officers had to weigh and consider their actions, the officer's experience level, and the extent of training the officer received. These factors might account for the officer's failure to know the precise Fourth Amendment law or suggest that they should have known the specific rule at issue.

(10) *The extent to which the officers' conduct was an invasion of personal privacy and the magnitude of that invasion*: For example, the presence or absence of unjustified harm to innocent citizens would be a relevant consideration.

(11) *The extent to which good faith consideration of public safety and officer safety influenced their decision*: For example, in *New York v. Quarles*,¹³⁵ the United States Supreme Court created a public safety exception for the *Miranda* warnings requirement.¹³⁶

The proposal and the use of a balancing test for Fourth Amendment considerations is by no means unique. For example, in *People v. Scott*,¹³⁷ the California Supreme Court dealt with the issue of whether a court-ordered body intrusion violated the Fourth Amendment.¹³⁸ In *Scott*, the lower court ordered the defendant to submit to a prostatic massage by a physician in order to produce seminal fluid which would determine whether the defendant infected the incest

134. See CAL. PENAL CODE § 1272.1(c) (West Supp. 1999).

135. 467 U.S. 649 (1984).

136. See *id.* at 655-56.

137. 578 P.2d 123 (Cal. 1978).

138. See *id.* at 127-29.

victim with trichomoniasis.¹³⁹ The California Supreme Court formulated and applied a balancing test and ultimately determined that the intrusion was constitutionally unjustified.¹⁴⁰

Specifically, the court held that the balancing test included the following factors: “the reliability of the method to be employed, the seriousness of the underlying criminal offense and society’s consequent interest in obtaining a conviction, the strength of law enforcement suspicions that evidence of crime will be revealed, the importance of the evidence sought, and the possibility that the evidence may be recovered by alternative means less violative of Fourth Amendment freedoms.”¹⁴¹

The court held that the above “considerations must, in turn, be balanced against the severity of the posed intrusion.”¹⁴² Therefore, “the more intense, unusual, prolonged, uncomfortable, unsafe, or undignified the procedure contemplated, or the more it intrudes upon essential standards of privacy, the greater must be the showing for the procedure’s necessity.”¹⁴³

Some of these considerations are obviously analogous to the factors we have proposed for an exclusionary rule balancing test. It is also important to point out that some scholars have postulated that the courts already silently employ many of these considerations to stretch the law in serious cases, allowing admission of evidence that a literal application of the exclusionary rule would have precluded.¹⁴⁴

The United States Supreme Court has also used some of these same balancing considerations in the *Miranda* area. In *Harris v. New York*,¹⁴⁵ the Court held that voluntary statements obtained in violation of *Miranda* could be admitted in rebuttal to impeach a defendant who testified falsely.¹⁴⁶ The Court reasoned that under these circumstances the desire to discourage rather than reward perjurious testimony outweighed the traditional Fifth Amendment considerations that warrant *Miranda* warnings.¹⁴⁷

Subsequently, in *Quarles*, the Court wisely adopted a “public safety” exception to the *Miranda* rule.¹⁴⁸ In that case, police apprehended a rape suspect wearing an empty shoulder holster and asked him about the gun without administering *Miranda* warnings.¹⁴⁹ He responded by indicating the location of the

139. *See id.* at 125.

140. *See id.* at 127-29.

141. *See id.* at 127 (citations omitted).

142. *See id.*

143. *See id.*

144. *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, 76 (1992).

145. 401 U.S. 222 (1971).

146. *See id.* at 226.

147. *See id.* at 224-25.

148. *See* *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

149. *See id.* at 652.

gun.¹⁵⁰ The Court held that this incriminating response was admissible, stating as follows: “[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”¹⁵¹ Interestingly, unlike *Harris*, the use of the information obtained was not limited to situations where a defendant had testified and the evidence was offered in rebuttal.¹⁵² Rather, it could be offered in the prosecution’s case-in-chief.¹⁵³

The use of a balancing test is also more consistent with the key protection the Fourth Amendment affords citizens: the freedom from “unreasonable searches and seizures.”¹⁵⁴ As some scholars have lamented, today’s search and seizure law has lost sight of this most fundamental principle and constitutional limitation.¹⁵⁵ Adoption of a balancing test, in our view, would focus the inquiry on this key principle of reasonableness. By doing so, it would also restore the respect for the Constitution’s limitations that Justice Harlan urged in his dissent in *Mapp*:

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.¹⁵⁶

VI. SUGGESTIONS FOR FURTHER STUDY AND POLICY

Research on the exclusionary rule can have at least two distinctly different goals.¹⁵⁷ In one case, the objective would be to examine whether the exclusionary rule, as it currently exists, is working. Here, the emphasis would be on examining

150. *See id.*

151. *See id.* at 657.

152. *See generally id.*

153. *See generally id.*

154. *See* U.S. CONST. amend. IV. The Fourth Amendment provides the following:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

155. *See* Amar, *supra* note 60, at 759.

156. *See* 367 U.S. 643, 686 (1961) (Harlan, J., dissenting).

157. *See generally* Louis H. Mayo & Ernest M. Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predicative Function*, 33 GEO. WASH. L. REV. 318 (1964) (providing an extensive list of research goals).

whether the system functions as legal theory argues it should. This seems to be the goal of virtually all of the research cited in the Pepperdine study.¹⁵⁸ In the other case, after specific and sometimes competing reforms are proposed, the goal would be to determine the relative cost-benefit ratios of the different proposals relative to each other and to the current system. However, the latter type of research simply does not exist.¹⁵⁹ In this section of the Critique, we offer an array of suggestions for future research which will more satisfactorily and reliably examine the usefulness of the exclusionary rule.

A. *Studying Whether the Current System Functions as Intended*

To determine empirically whether the exclusionary rule functions as intended requires consensus regarding its intended purpose. The primary concern of judges writing exclusionary rule decisions seems to have evolved over the years into the deterrence of unlawful police behavior.¹⁶⁰ “The ‘prime purpose’ is to prevent ‘future unlawful police conduct’ and not to secure a ‘personal constitutional right’ of the defendant.”¹⁶¹ Determining whether the exclusionary rule accomplishes this goal is admittedly quite complicated and difficult. While we acknowledge this difficulty, we still believe improved empirical study is possible. We recommend that future studies consider the following:

(1) *Research must compare the rate of illegal police violations with the rate at which police engage in other behaviors that have desirable consequences:* No standards exist that define an acceptable rate of unlawful police conduct in balance to the accepted police goal of providing public safety. As a result, it is difficult to know whether the exclusionary rule has succeeded in reducing the rate to an acceptable level. Data about the rate at which police officers admit to or are accused of violations are therefore ambiguous without more information. For example, what would we make of a study that finds that police officers admit engaging in an average of three illegal searches per year? Do we focus on the fact that this rate is above zero, or do we marvel at the fact that it is less than ten per year? If we adopt the former view, it could be that no system of control would be able to reduce the violation rate any further without seriously interfering with the crime control functions of the police.

(2) *Research must consider how to weigh both different types of illegal police activity and the rate of those activities relative to the rate of legal police actions that increase public safety:* Unfortunately, addressing the first recommendation by setting a standard for the number of violations per officer, per year, is not satisfactory. Good research needs to be cognizant of the fact that different illegal

158. See Perrin et al., *supra* note 3, at 678-710.

159. See discussion *supra* Part II.D.

160. See WALLACE D. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS, AND TEXT 273-349 (1984).

161. *Id.* at 310 (quoting *United States v. Calandra*, 414 U.S. 338, 347-48 (1974)).

police actions are not equally damaging to citizen rights. As we have argued in our discussion of the balancing test option, breaking down doors without a search warrant is not the same thing as asking a suspect about his involvement in a crime without supplying *Miranda* warnings.

(3) *Research should be designed to eliminate as many other causal explanations for illegal police activity as possible:* The notion of deterrence is inherently comparative. Thus, before a consequence is considered a deterrent, it is necessary to show that the rate of behavior is less when the deterrent is present than when it is not present. As a result, it is possible for the threat of exclusion to serve as a deterrent even though it does not reduce the rate of unlawful police activity to zero. We can test whether there is any relative deterrent effect by comparing systems with and without exclusionary rules, either over time as the law has changed or across jurisdictions that have different laws. However, such comparisons are fraught with ambiguity because the different times and places may be different in so many other ways irrespective of the presence or absence of exclusionary rules.¹⁶² In an ideal world, social and legal policy would always be evaluated using the same "randomized clinical trial" procedures used in the evaluation of new medical procedures. That is, different counties or cities could be randomly assigned to different systems of control. Some would function with exclusionary rules and some would not. If the exclusionary rule deters, then the rate of illegal actions should be lower on average in those counties or cities with the rules. Unfortunately, from a scientific point of view, true randomized trials concerning the exclusionary rule are not practical due to equal protection considerations. Given this limitation, comparing the exclusionary rule's operation in this country versus the operation of differing systems in place in other countries, for example, England, Australia and Canada represents an imperfect but highly useful option. An even better analysis would compare jurisdictions before and after major policy changes affecting their search and seizure rules.

(4) *Research should examine the method by which changes in police behavior are achieved because different methods might be differentially susceptible to outside influence or to the production of unintended consequences, such as police perjury:* It is not clear whether deterrence refers simply to a reduction in the rate of illegal police activity or to a specific form by which such a reduction is achieved. For example, judicial concern for illegal police activity might have an impact on the way in which police departments deliver rewards and punishments to police officers. These departmentally brokered consequences may be the direct cause of a reduction in illegal police activity. In this way, knowledge that evidence is

162. See generally DONALD T. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963).

suppressed may not, by itself, deter police officers. However, the rest of the system might change in a manner that causes a reduction in the rate of illegal police activity. Furthermore, if the illegal police behavior is under the control of indirect effects, it might be possible to improve the system further by taking positive steps to support those effects, such as discussing the balancing test factors at regular officers' meetings.

(5) *Research should make every effort to include the following considerations:*

The rate at which police avoid suppression problems by handling criminal activities on the street rather than in the courts.

The rate at which police officers commit perjury.

The rate at which defense attorneys raise suppression motions to achieve tactical advantages.

The rate at which citizens accuse the police of unlawful evidence gathering activity, including false accusations.

The rate at which reviewing agencies in police departments and the prosecutor's office reject cases that they would otherwise accept were it not for suppression problems.

The rate at which the guilty go free after filing due to suppression of evidence.

Criminal justice costs due to research and writing, delay, and appeals that result from the exclusionary rule.

If future research is to elucidate the nature of factors that control police behavior, then it will have to carefully measure more than the rate of illegal police activity. Because a major function of the police is to maintain public safety by collecting evidence of wrongdoing, it is important that the research measure both the rate at which police engage in overzealous searches and the rate at which they fail to collect evidence that could have been obtained legally.¹⁶³ In addition, as with all public policy, it is important to measure any unintended consequences of the law. In the present case, it is necessary to compare a number of outcome measures across legal units with and without the exclusionary rule. Collection of these measures should include information about the severity of criminal activity with which they are associated. For example, are defense motions more likely to be invoked in more severe criminal cases than in less severe cases?

Comparison of these measures across units that have and do not have, or that vary their emphasis on, exclusionary rules would provide a rich source of data to evaluate claims and counter-claims made about the effectiveness of exclusionary rules. Such data would also provide evidence about the possibility that exclusionary rules produce negative unintended consequences.

One of the major difficulties in conducting adequate research of unlawful police conduct is the fact that much police activity is not directly observable. This problem is further exacerbated because individual officers have a huge amount of

163. See discussion accompanying *supra* notes 157-62.

discretion in their daily activities.¹⁶⁴ Thus, significant changes in the way in which police departments collect evidence about officer behavior might be necessary before adequately valid measurements can be taken.

B. *Cost-Benefit Analyses*

We have proposed a different policy change than contemplated by the Pepperdine Study. How should one decide which would be a better system? Research that only examines police behavior in a system with the exclusionary rule is not capable of determining which of the proposed new policies would produce better consequences or whether either would be superior to the current system. Unfortunately, truly adequate evidence requires that costs and benefits of the three different systems be compared. In an ideal world, this would involve randomized trials in which different legal units were randomly assigned to different systems, or the different systems were tried at different random times within a small number of larger legal units. Obviously, all of the relevant costs and benefits would be measured in each case. Although we are well aware that this kind of research is unlikely to occur, we felt making the need for it known was an important service. Without such research, we will never know whether the costs and benefits of our proposal are really better than other proposals or the current system.

Because randomized trials concerning the exclusionary rule, even in the form of pilot projects, are beyond our reach, does this mean that we should give up? The answer is no because other research is possible and useful. Comparing the systems of other jurisdictions may prove highly useful.¹⁶⁵ The limitations of such proposed research designs simply reduce one's confidence in the conclusions drawn from them. At a minimum, future research should focus on collecting and developing measurement systems that capture all of the costs and benefits of attempts to control illegal police behavior. In this way, baselines can at least be established before new policies are implemented. By comparing the ratio of costs to benefits before and after the policy change, one would be able to track changes in both costs and benefits as the policy change took hold. Although there would be some inherent ambiguity in concluding that it was the policy change that produced observed changes in the cost-benefit ratio and not something else that happened to coincide with the policy change, one could determine whether the costs and benefits shifted in expected directions as the system adapted to the change in

164. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 14-16 (1967) (noting that police discretion consists of "unarticulated improvisation" that is unobstructed by both the supervisors and the courts).

165. See discussion *supra* Part VI.A (discussing research considerations in future studies).

policy. Hopefully, costs would go down, and benefits would go up.

We take the position that all major policy changes should include very clear and precise descriptions of the cost and benefit measures that will be used to evaluate whether the policy is producing intended outcomes. If police perjury or prosecutor's preparation time for suppression hearings are potential costs, then the policy should require that a system for measuring these costs be in place well before new rules are actually imposed. In addition, it would be necessary to continue taking these measurements well after the policy had been changed. After all, it is possible that it takes time for people in the system to learn the new policy or, sadly, to figure out how to get around it. Finally, it is worth noting that such measurement systems would be much better if they included data derived from direct observation of the actual behavior of the relevant actors rather than data based exclusively on posthoc paper and pencil self-reports.¹⁶⁶

VII. CONCLUSION

To maintain both public confidence and safety, justice, at its core, must be a truth seeking process. Unfortunately, the exclusionary rule has operated to distort and, in some cases, conceal the truth. For this reason, like most law enforcement professionals, we believe that the rule must be significantly reformed. Indeed, we are pleased that a growing number of scholars and even judges appear to share this view. It is now time for this debate to move beyond the preliminary question of whether to reform and focus instead on identifying the best and most effective method for reform.

The authors of the Pepperdine Study have made a significant contribution to this debate. While we have criticized some of their methods and conclusions and taken issue with their proposal for reform, we believe their initial work will aid future empirical study and public policy debate on this most difficult issue.

We also firmly believe that a balancing test holds great promise as a potential reform of the exclusionary rule. By allowing the court to consider a multitude of factors, the balancing test will focus a court's review where it rightfully belongs—on justice. In doing so, it strikes a more meaningful balance between the government's responsibility to protect its citizens from crime and the Fourth Amendment's prohibition of unreasonable governmental intrusion.

166. See, e.g., EUGENE WEBB ET AL., *NONREACTIVE MEASURES IN SOCIAL SCIENCES* (2d ed. 1981) (discussing the importance of collecting measures of behavior other than paper and pencil self-reports).