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Robert C. Fellmeth

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The Optimum Remedy for Constitutional Breaches: MultiAccessed Civil Penalties in Equity

Robert C. Fellmeth*

I. INTRODUCTION

In the seminal case of *Weeks v. United States*,¹ the prosecution sought to uphold a conviction where the incriminating evidence was allegedly obtained through an unconstitutional search and seizure by law enforcement.² At the time of the *Weeks* trial, there were no effective remedies in place to deter such police exercises.³ Further, the federal mechanism lacked the means to detect, adjudicate, enjoin, or punish such constitutional violations.⁴ There was no deterrent and, indeed, little disincentive on police excesses.

Lest our founding document become a repository of dead letters and hypocrisies, our constitutional checks must be actualized. But the judiciary, with the important task of providing a check on the other two branches, is inherently passive. It does not tax or spend, enact laws, or adopt rules applicable outside its own domain. Its power to interpret the law is confined to cases brought to it by

* Price Professor of Public Interest Law, University of San Diego Law School. Mr. Fellmeth served as a deputy district attorney in the San Diego Office of the District Attorney from 1973 to 1982. Since 1982, the Office periodically retains Mr. Fellmeth as an outside consultant. Since 1987, Mr. Fellmeth periodically serves as counsel to the San Diego County Deputy District Attorney's Association. In addition, Mr. Fellmeth taught at the National College of District Attorneys. Mr. Fellmeth is also the co-author of a treatise on white collar crime. See THOMAS A. PAPAGEORGE & ROBERT C. FELLMETH, CALIFORNIA WHITE COLLAR CRIME (1995).

1. 232 U.S. 383 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

2. *See id.* at 385-86.

3. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 672 (1998) (noting that the exclusionary rule was applied "because it was the only means by which [police] abuses could be deterred effectively," which suggests that no other deterrents existed).

4. *See id.*

others. Even within this rubric, constitutional doctrines pertaining to ripeness, mootness, justiciability, advisory opinions, and real controversies limit judicial check as to those cases it receives. And as to those it may act upon, its power is largely limited to granting the prayer of a party or refusing it. Accordingly, in 1914, the *Weeks* Court took the only remedial action it could by overturning the conviction and ruling that the evidence obtained by law enforcement in violation of constitutional standards could not be used against a defendant at trial.⁵ What other remedy was available to the Court?

Although the Court often lacked enthusiasm for the exclusionary rule,⁶ over the next forty-seven years Congress and state legislatures failed to formulate a more direct and satisfactory remedy.⁷ Accordingly, in 1961, when the Court faced the question of applying a remedy to the state courts throughout the nation, it had little choice.⁸ In *Mapp v. Ohio*,⁹ the exclusionary rule as a remedy for constitutional breaches was extended to the states through the Fourteenth Amendment,¹⁰ and it has since become the primary means to enforce constitutional compliance by public officials, particularly police authorities at local, state, and federal levels.¹¹

The remedy of excluding evidence for police constitutional transgressions was not created *tabula rasa*. Were the Court to have the same broad, proactive authority as Congress and state legislatures have had and retain, how might it have proceeded logically? The first thing the Court probably would consider is the purpose of a remedy: to provide redress for, halt, and, ideally, deter wrongdoing. A remedy should be measured based on its efficacy in accomplishing its goals while minimizing collateral harm unrelated to its purposes. As such, if presented with the problem of the police breaching constitutional standards, a decisionmaker with comprehensive options would seek a remedy to halt such practices by providing an effective disincentive sufficiently focused to prevent harm to outside persons or interests. There are numerous theoretical remedies which might be measured along such a paradigm, such as sanctions imposed on individual officers, their police departments, or even the larger political jurisdiction that governs state agents transgressing applicable standards. These sanctions could involve, for example, criminal prosecution, damage awards, civil penalties, and employment

5. See *Weeks*, 232 U.S. at 389-99.

6. See Perrin et al., *supra* note 3, at 672 (noting the Supreme court's "apparent dislike for the rule" and the lack of viable options).

7. See *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (pointing out that a number of states had already adopted some form of the exclusionary rule by 1961 and citing as significant the California Supreme Court's claim that it has "'failed to secure compliance with the constitutional provisions'" (quoting *People v. Cahan*, 282 P.2d 905, 911 (Cal. 1955))).

8. See Perrin et al., *supra* note 3, at 672 (noting that the Court, in its reluctance, bypassed two earlier opportunities to extend the rule in *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Irvine v. California*, 347 U.S. 128 (1954)).

9. 367 U.S. 643 (1961).

10. See *id.* at 655.

11. See Perrin et al., *supra* note 3, at 673 ("[A]s we approach the millennium, the exclusionary rule remains the primary 'remedy' for police misconduct.").

sanctions.¹² They could be overseen or decided by an agency, a separate court, existing courts, or an independent citizen review board.¹³

As discussed below, the exclusionary rule, as a remedy, scores low on both of the basic criteria for measuring remedy efficacy: it lacks effective connection to the wrong addressed,¹⁴ and it imposes considerable collateral costs on others.¹⁵ Its shortcomings make the exclusionary rule less preferred than a long list of options that more directly impacts the persons engaging in unconstitutional behavior and that would hold them accountable based on the nature and prior record of such breaches.¹⁶ However, before passing judgment on the courts, consider their position: it is the only remedy they have. The blame for the current reliance on a remedy, which is not only ineffective, but also imposes considerable external costs, rests squarely with the Congress and the state legislatures that have the authority to formulate such options, but have failed to do so. This Article analyzes some of the current options proposed¹⁷ and concludes that there is an optimum option which would avoid the external costs of the exclusionary rule, serve its purposes to secure police compliance with constitutional standards more directly and effectively, and lie within sufficient judicial control to allow its substitution for the exclusionary rule.¹⁸ As outlined below, and in a model statute attached,¹⁹ the best option is a multiaccessed civil penalty sanction in equity imposed against the department or the agency employing those who violate such standards.²⁰

12. See generally *id.* at 736-53 (discussing the viability of various options to the exclusionary rule). Note that all of these suggested remedies involve sanctions. The efficacy of sanction versus reward to influence human behavior is the subject of social psychological examination. The generic advantages of rewards are considerable because sanctions require ascertainable standards, violation, detection, adjudication, and imposition. Each of these elements can be difficult to attain when constitutional standards are applied to the police. Further, persons do not always rationally calculate consequences when making decisions, and they tend to optimistically estimate the likelihood of sanction. Ironically, evidence of a sanction's ineffectiveness in influencing police behavior can be seen in the difficulties faced by the criminal justice system itself in accomplishing compliance with the law among the citizenry. A more creative range of options, which are beyond the scope of this Article, might explore how reward systems that are inherently more effective in influencing human behavior could be employed to stimulate police compliance with constitutional standards.

13. See, e.g., *id.* at 743-53 (proposing an administrative agency review of alleged constitutional violations).

14. See *infra* Part II.A.

15. See *infra* Parts III-VI.

16. See *infra* Part II.B.

17. See *infra* Parts IX-X.

18. See *infra* Parts XI-XII.

19. See *infra* Part XIII.

20. See *infra* Parts XI-XIII.

II. EFFICACY TO PROTECT CIVIL LIBERTIES

Most of the public criticism surrounding the exclusionary rule has emphasized the collateral cost of disallowing relevant and otherwise admissible evidence. Critics of the rule argue that it hampers the truth seeking function of the trial and results in the release of guilty defendants who are then able to prey upon future victims. But an equally relevant consideration should be the rule's failure to accomplish the end it seeks. Failing to discuss the rule's efficacy as intended allows critics to ignore options which may provide an enhanced incentive for police constitutional compliance. Hence, political discourse often proposes simply the elimination of the exclusionary rule without a substitute remedy. Other critics addressing the purpose of the exclusionary rule suggest that existing remedies are satisfactory. Because the evidence substantially contradicts the effectiveness of the exclusionary rule, the straight elimination advocates have undermined the general credibility of exclusionary rule critics, including those who favor both the reduction of collateral consequences and the enhancement of civil liberties. A coequal critique of the exclusionary rule as an unmeritorious safeguard of constitutional compliance brings with it the implicit obligation to provide a substitute remedy to improve that protection.

A. *Disincentive Adequacy and Connection to Wrong*

In addition to the costs, the exclusionary remedy is singularly unimpressive as a deterrent to police misconduct. It does not take a reading of the evidence discussed below to reach such a conclusion. The nature of the remedy itself in the law enforcement context has serious limitations. Imagine yourself a police officer who deeply cares about apprehending and punishing criminals. This is the mind set presumed by the remedy for its efficacy because the worst case scenario is the failure to secure a conviction. But the reality of law enforcement experience often means a difficult choice: the breach of a constitutional limit through aggressive investigation, or the loss of an arrest. Often, the intrusion will create the evidence warranting arrest. Indeed, that is the very situation relied upon for the exclusionary rule's efficacy.²¹ If the denial of evidence suppressed pursuant to the exclusionary rule is irrelevant to an arrest or a conviction, the sanction will not provide a remedy for the police officer's conduct. Hence, at its strongest, the sanction will apply when the evidence is necessary for conviction and, *a fortiori* for arrest.

Imagine then the actual situation of the sanction at its most effective: if the officer breaches the Constitution and searches prior to adequate probable cause, he may discover whether there is evidence to arrest; if he does not, someone he believes may be a criminal will walk. If the officer is wrong and there is no

21. See *Mapp v. Ohio*, 367 U.S. 643, 645 (1961).

evidence, then there is no exclusionary rule sanction. If the officer is correct and discovers evidence, he may then arrest the presumed criminal. Even though this initial evidence is inadmissible according to the exclusionary rule, the arrest may lead to other evidence which is found to be independent of the constitutional breach by the court, including possibly a confession, admissions of others, or evidence from an independent source, and not subject to proscription under the exclusionary rule. The defendant may plead or suffer conviction notwithstanding the exclusion of the evidence giving rise to the initial arrest.

Under the worst possible case scenario, the evidence is excluded, and the defendant walks. But from the police officer's perspective, that would be the likely result without the constitutional breach. Moreover, even with such an eventuality, the police officer achieves the arrest of the criminal, fingerprinting, mug shots, the ignominy of skin search and jailing, and arraignment. Where there is a felony involved, the officer achieves a preliminary hearing, pretrial motions, and felony arraignment. Then the defendant is subjected to a trial and often to incarceration during the entire period leading up to the trial.²²

To summarize, the anticriminal orientation of the police officer, which the exclusionary rule relies upon, precludes its efficacy. It will hurt criminals much more to subject them to the above listed travails than to allow them to walk in the here and now of a decision not to search or interrogate. It is conceptually a "heads I win, tails you lose" proposition.²³

The remedy should not lead a rational police officer to be greatly influenced by its prospect. Apart from this threshold difficulty, the remedy has additional practical failings.

22. Although the defendant is entitled to a speedy trial for this reason, the police officer knows as a practical matter that the defendant's counsel will ask that such time be "waived," particularly if there is a strong case for the exclusion of evidence requiring the defense attorney to prepare appropriately.

23. The remedy can make a rational difference where the officer suffers the dismissal of a case in comparison to a reasonably expected conviction. That is, the hypothetical police officer will be relatively disappointed where he has sufficient evidence for a conviction and expects one, only to find that an unconstitutional search resulted in a dismissal. However, such a scenario ordinarily occurs where there is evidence which is contaminated gratuitously or unnecessarily by police constitutional breach. Even here within such a narrow situation, if the evidence already exists for the conviction of a defendant and the search occurs later and cannot contaminate or lead to its exclusion, the officer effectively has a free ticket.

B. Disincentive Coverage: How Many Breaches Does the Rule Address?

The exclusionary rule provides a possible remedy reaching only some instances of police constitutional breach. In all cases where no incriminating evidence is found, there will be no sanction because the existing remedy depends on the exclusion of what is found or learned. Ironically, the searches with the least justification are likely to dominate these police intrusions, as the lack of resulting evidence suggests. In all cases where evidence is obtained but there is a confession or, alternatively, admissible evidence is found, there is not an effective sanction. In all cases where the defendant pleads or where no motion to exclude is brought, there will be no sanction.

C. Evidence of Ineffectiveness

One goal of the exclusionary rule is to provide a remedy to discourage constitutional violations by police.²⁴ The measure of the rule's efficacy to that end are records of police violative behavior. To what extent is such behavior actually discouraged? The ideal measurement is an examination of police practices. Where the police are respecting the rights of the citizenry, one would expect citizen approval of them to increase within those high crime communities where most police and citizen contact occurs. One would expect over time, as an effective remedy is employed, fewer complaints of abusive behavior by police. One would expect fewer motions to exclude evidence and certainly fewer such motions granted. Numerous variables may interfere with such measures, and each has measurement difficulties.²⁵ However, is there any evidence that the exclusionary rule remedy has produced a steadily declining amount of unconstitutional police intrusions? Are the numbers of motions to exclude declining because of altered police practices? Is the number of appellate reversals falling based on the remedy's application (as opposed to looser standards defining constitutionality)? Is there a more positive perception of police practices within the inner cities of the nation to indicate growing police compliance with and respect for the constitutional limitations on their practices? After thirty-seven years, where is the evidence?

24. See *Mapp*, 367 U.S. at 657-60.

25. For example, granting fewer motions to exclude evidence or granting fewer appellate reversals based on erroneous admission of evidence gathered pursuant to constitutional breaches by police can be influenced by changing definitions of constitutional police practices. The good faith exception, for example, may lead to fewer motions, dismissals, or reversals, but does it reflect different police practices and less intrusion into citizen privacy or simply a changing standard for application of the remedy?

It may be argued persuasively that police today are more carefully selected, better trained, more professional, more racially integrated, and better educated than in prior years.²⁶ What is remarkable is the continuing extent of police misbehavior in the trial and the appellate court record of the nation, despite these encouraging sociological changes in the police.²⁷ One would imagine that these sociological changes combined with an effective remedy would produce greater police compliance than the current record reveals.

III. COLLATERAL COSTS

The following consequences of the exclusionary rule are termed unintended "collateral costs" because they are not connected to the primary purpose of the rule, which is the control of police behavior. All other things being equal, a remedy is superior to others when it achieves the same or better constitutional compliance while avoiding or minimizing such costs.

A. System Influence

A criminal sanction is our system's most extreme remedy. It is reserved for behavior that most endangers our values. Usually, criminal sanctions seek to protect the weak from private predators, such as the bullies and exploiters who abuse, attack, and take from children, the elderly, or anyone weaker than themselves. These serious sanctions are intended to hold persons accountable for the harm they cause others. But, the criminal justice system is more than a restitutionary vehicle. Cases are filed in the name of the "People" and reflect the desire to prevent and deter such harmful acts. Such prevention benefits from the accountability of persons committing such acts, from their punishment and removal from society if incorrigible, and from the prevention that flows from deterrence. That deterrence, in turn, depends largely on the perceived certainty of punishment.²⁸

26. See Paul R. Joseph, *The Case for the Exclusionary Rule*, 14 HUM. RTS. 38, 43 (1987) (asserting that police today are better trained as a result of the exclusionary rule).

27. See Perrin et al., *supra* note 3, at 691-711 (summarizing various studies analyzing arrest and conviction statistics, return of seized property, and suppression motions gauging the effectiveness of the exclusionary rule and concluding that "*Mapp* has probably made officers more aware of the Fourth Amendment, and has increased the number of warrants they obtain, although it is less certain that it has actually affected their performance of their duties").

28. Arguably, the perceived odds of receiving any punishment at all influence human behavior more than the severity of the penalty. Where there is perceived certitude of sanction, the sanction need not be extreme. On the other hand, if one believes apprehension or conviction is unlikely, the nature of the

As the criminal justice system becomes burdened by collateral proceedings culminating in the release of persons who would otherwise be adjudged guilty, that perceived certitude suffers. This dynamic is not limited by the relatively small number of persons who are not convicted or whose convictions are reversed due to operation of the exclusionary rule. As discussed below, many more cases are affected earlier in the process by the exclusionary rule's prospective application, particularly in decisions not to file or to take lesser pleas. Moreover, it is the perception of risk that affects risk assessment by those considering criminal acts, and the numerous contests involving exclusion of evidence, regardless of results, inevitably affect that perception.

Collateral proceedings to determine the wrongdoing of police tend to have two damaging consequences in this regard. First, they introduce an additional variable that can preclude conviction and sanction. The hypothetical criminal already knows that he is going to have to be apprehended and that evidence must show him guilty beyond a reasonable doubt. Now, a third element is added: the police must not have breached any of the many and often confusing doctrines of the Fourth, Fifth, and Fourteenth Amendments to the Constitution, and possibly their state counterparts. Aware that only a small percentage of criminal acts result in apprehension, this additional variable further lessens the fear of sanction and its accompanying deterrent effect.

Second, the introduction of police behavior examination in the very same proceeding where the defendant is being judged introduces additional elements of "gamesmanship" that further undermine respect for the judicial system.²⁹ In most cases, a guilty defendant hurt someone. At the risk of a maudlin expression, in a civilized society people should care about one another. Where harm is caused, is there value to contrition, apology, request for forgiveness, and a chance to "make it up?" Arguably, such instincts are among our most redeeming features as humans, and a society properly nurtures them, or at least provides a chance for their manifestation. Instead, we oft times turn the criminal trial and the appellate process into a "them against us" process, in which the evils of the state are aligned against the virtually defenseless victim—not the citizen raped, beaten, robbed, or murdered, but the defendant.

Concededly, there is little such additional cost where the guilt of the defendant is legitimately contested; indeed, there will then be a vigorous contest as there should be. But the criminal trial is not so confined, and appellate practice is less limited to *bona fide* contentions.³⁰

penalty may not be influential.

29. Of course, constitutional breaches by the police also undermine legitimate respect for the system. However, we are not implying toleration of a police violation, but rather dealing with the violation in a separate proceeding with its own purpose and customized sanction. See *infra* Part XIII.

30. Ironically, one serious result from our fictionalization of such a contest in a large number of cases is the failure of some legitimately innocent defendants to have an effective hearing. This approbation is particularly applicable to the appellate process, where writs and appeals appear to be de

B. *The Truth-Seeking Trial*

The parties with a stake in the outcome extend beyond the police and the criminal. The immediate, prior, and perhaps uncharged victims have a stake, those who may be victims in the future have a stake, and society at large has a stake. Apart from the abstract interest of the people in compliance with their enacted laws, there are practical impacts: a system of reliable and predictable guilt determination adds to our security and our willingness to comply with laws that we may be able to violate successfully but for our own self-restraint and categorical respect for our public institutions.

Every political jurisdiction acknowledges the importance of the criminal justice system in committing substantial resources to achieve an accurate judgment. We care about applying the law to what happened, and have devoted resources and thoughtful procedures to determine prior events, including an adversarial process in which the state's allegations can be challenged as warranted, with mechanisms ranging from notice of charges and evidentiary rules, to the right to counsel and cross examination. We want to know the empirical truth with as much certainty as possible. Knowing who did what, when, how, and why allows us to apply the law justly.

The exclusionary rule can remove otherwise reliable evidence from the triers of fact entrusted to determine what happened.³¹ Accordingly, such exclusion can compromise the basic truth seeking function of the trial and may stimulate unjust results.³² Defenders of the exclusionary rule point to the small number of convictions overturned based on the exclusion of admissible evidence, particularly

rigueur for all. When there are so many, what happens to the few that legitimately deserve careful scrutiny and reversal? Do such cases suffer credibility contamination from their inclusion in a large potpourri of similarly framed, but disingenuous arguments and contentions?

31. See Perrin et al., *supra* note 3, at 672 (stating that the exclusionary rule excludes highly probative evidence in a criminal trial).

32. American jurisprudence emphasizes a possible need to let many go free to prevent the wrongful conviction of a few. However, the exclusionary rule does not juxtapose risk of wrongful incarceration against possible freedom for the guilty. The latter is an inescapable choice between two alternatives which influences the burden of proof and certainty required for conviction. Rather, the exclusionary rule is intended to achieve a result outside of the convict or not convict paradigm—the control of police behavior. Where that control is achievable by means other than the exclusionary rule, it may be achieved free from the distortion of trial fact finding capacity. The preference for freeing some who are guilty over incarcerating even a few who are innocent derives from the horror of punishing the innocent. It does not minimize the harm flowing from the former, which can have its own horrible consequences and which warrants strong justification if undertaken.

when subtracting those who are convicted on retrial or who plead.³³ They argue that the present remedy works without substantial inequity overall.³⁴

One problem with the *de minimis* harm contention is the implication that the rule provides little deterrence to constitutional violations by police. The exclusionary rule assumes that the police care about securing conviction and that the exclusion of relevant evidence, in threatening that interest, provides a powerful inducement to comply with the Constitution. However, if there is little collateral harm because defendants suffer close to the same fate, notwithstanding the exclusionary rule, how much of a deterrent can it be? Nor does an advantage flow from disparate police perception because those involved in a case generally know its outcome. If there is little outcome change based on their investigative techniques, why should they be thusly influenced?

C. Preliminary Decisions to Issue

In fact, the exclusionary rule impacts police behavior more than the low proportion of “walk free” defendants might indicate.³⁵ The overall impact of the rule in compromising accurate and consistent punishment for criminal offenses is substantially more extensive than is indicated by the studies discussed below.³⁶ The studies generally fail to accurately measure the most important part of the exclusionary rule’s impact—decisions to arrest, file cases (“issue” cases by offices of the district attorney), and plea bargains occurring prior to trial based on police investigative technique issues. In each of these three decision-making arenas, the impact of the exclusionary rule is far more momentous than dismissals or reversals at the more visible and countable trial or appellate court levels.

Supervising police and public prosecutors recognize the possibility of evidence exclusion. Prosecutors do not relish losing cases because of the failure to gain the admission of relevant evidence. Although a police official may be at fault, prosecutors often view their task as convicting persons who are guilty. Further, a professional attorney is properly trained to evaluate the facts and apply the law, which includes the exclusionary rule. If a prosecutor, functioning as “issue deputy” (assigned the task of issuing or filing criminal pleadings), recognizes constitutional problems in a police investigation, he or she may refuse to issue the case or issue only those counts where the evidence is relatively uncontaminated.

33. See Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 606 (stating that the exclusionary rule has a “truly marginal effect on the criminal court system”).

34. See *id.* at 607 (“If these minuscule costs are compared with the benefits . . . I can only conclude that there should be no change in the status quo.”).

35. See *infra* Part VII.

36. See *infra* Part VII.

D. Impact on Plea Bargaining

Following the “issuance” of a criminal case (court filing after an arrest), typically by an office of the district attorney, defense counsel will become involved. After obtaining discovery, the defense counsel examines the record for any evidence of police breach across a complex domain of Fourth and Fifth Amendment case law. As the data below indicate, the resolution of most cases occurs through plea bargains rather than trials.³⁷ Often, while arguing for a plea bargain, defense counsel includes, and often focuses upon, the investigation infirmities, which may jeopardize the conviction of their clients because of the application of the exclusionary rule. Such arguments are considered legitimate because the strength of a case is a major factor in compromising counts or penalty.

In my experience as a deputy district attorney, and in working with prosecutors and law enforcement over the past thirty years, the influence of police constitutional error is considerable on decisions to issue a case, which crimes to charge, and the bargained disposition of a case. As the high percentage of cases subject to plea bargain disposition that I have witnessed suggest, their total impact vastly exceeds the influence of those few cases subject to exclusionary rule reversal. Accordingly, a reasonable conclusion supports the notion that the deterrent impact on police behavior from the rule’s prospective application may somewhat outweigh the indications offered by an occasional trial dismissal or appellate reversal. However, the collateral negative impact of the remedy through arbitrary, inconsistent, and inadequate application of law to the acts of defendants is also substantially more extensive than prior studies which count post filing proceedings.

E. Qualitative Harm

The exclusionary rule causes a qualitatively different kind of harm than the police behavior paradigm it purportedly addresses. First, the police assuredly care about securing the convictions of those they arrest and may empathize with crime victims; however, suffering the death of a child, the loss of years of savings, or the diminishment of health from a violent rape or assault may not be sufficiently represented through the surrogate of police concern about convicting law violators. The persons bearing the direct damage from these crimes are *bona fide* civilian third parties who suffer consequences qualitatively different and arguably more profound than do the police through possible impacts of the exclusionary rule. And

37. See *infra* Part VII.

beyond the parties and future victims to the extent the exclusionary rule leads to a less certain sanction, the rule may undermine the general perceived likelihood of punishment. As argued above, such a reduction lessens to some extent the overall deterrent impact of the criminal justice system *vis-a-vis* potential law violators in general.

Second, one of the purposes of the criminal justice system is to treat citizens consistently. Ideally, a violation of law yields a predictable penalty, applicable regardless of who committed the crime, and varying based only on rational criteria, such as a record of prior offenses. Ideally, results should not vary based on arbitrary factors unrelated to the acts of the defendant. The exclusionary rule introduces such an element. Two defendants with the same record and same defenses committing the same crime are likely to be treated differently where the police erred in obtaining evidence as to one. Where both defendants have competent defense counsel, the likely exclusion of evidence allows a dismissal or the negotiation of a substantially different outcome for one defendant. Such a disparate outcome is not an aberration under common application of the exclusionary rule; rather, the failure of counsel to obtain a substantially different result with such an available (exclusionary) defense would be viewed by the defense bar as substandard practice.

Some supporters of the exclusionary rule view the trial through the prism of "game" mentality, where the game has assumed a role beyond its purposes. The contest is played out between a defendant and the state, which is represented by the police. But there are other parties not represented in such a contest—past victims, future victims, and the rule of law. While the rule of law includes compliance by the police, altering criminal justice outcomes because of police transgressions impose serious collateral costs on third parties.

We are all in some sense isolated from each other. Many of us do not know our neighbors well. Someone two doors down can be the victim of a horrible crime, and we might not even know about it. It is difficult for us, each in our own individual cubicles, to measure the total impact of the exclusionary rule based on the release of dangerous felons; however, prosecutors and the police have some idea of the rule's impact. Although the exclusionary rule was an effort by the Court to "set an example" by allowing the benign Mrs. Mapp to escape prosecution for some racy photographs in her home,³⁸ the exclusionary rule has produced a system enabling thousands of dangerous felons to avoid prosecution or, more likely, escape with a plea to substantially lesser charges.³⁹ Statistically, those released after imprisonment are rearrested an average of 2.8 times each for offenses over the two years of freedom following release.⁴⁰ Those who are equally guilty and are released before trial are not likely to be a less recidivist population.

38. See *Mapp v. Ohio*, 367 U.S. 643, 644 (1961).

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

40. See NATIONAL INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA* 15-16 (1982).

However, if one wishes to measure the harm created by the application of the exclusionary rule from the fidelity of the trial as a seeker of truth to the crimes that are never prosecuted, or to the victims of the crimes by those who were let go as a result, its harmful impact is qualitatively momentous.

IV. OTHER COLLATERAL COSTS: COURT BURDEN AND CIVIL PROCEEDING DELAY

The exclusionary rule is a critical defense tactic used to win dismissal or to increase the bargaining power of a defendant. Many cases are litigated into pretrial motions or to trial because of the uncertainty created by possible exclusion of evidence.⁴¹ Posttrial appeals and writs are often based on similar contentions of police wrongdoing warranting exclusion of evidence.⁴² In addition, the passage of three strikes legislation in California and other jurisdictions has made felony criminal trials more likely given the reduced downside for defendants in "rolling the dice at trial." Therefore, any remotely reasonable contention of police wrongdoing that may invoke the exclusion of evidence is properly and commonly raised by competent defense counsel. Hence, exclusionary rule related proceedings are not necessarily invoked based on their own merits, but are stimulated by the momentous stakes of a defendant quite apart from the privacy intrusion issues of the constitutional breach.

The separation of constitutional breach cases from criminal proceedings will have one important impact on court workload. It is likely to produce fewer contentions of police misconduct absent the false stimulation of the criminal proceedings to which they are bonded by the exclusionary rule.

The burden created by often *de rigeur* litigation of ancillary matters within criminal cases is difficult to quantify with precision. However, criminal matters are given priority over civil cases. The burden on the courts from increases in criminal filings, trials, and appeals has been momentous over the past decade. In California, for example, the criminal proportion of superior court cases has increased fifteen percent over the past decade and thirty-eight percent over the past two decades (to 1995-1996).⁴³ Meanwhile, general civil filings rose seventeen percent from 1975-

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

42. See *id.*

43. See 2 JUDICIAL COUNCIL OF CAL., 1998 STATE COURT OUTLOOK: ANNUAL REPORT 21 (1998) (visited Jan. 27, 1999) <<http://www.courtinfo.ca.gov/reference/documents/98sco-2.pdf>>. Note that the criminal and civil filings together have amounted to 30% to 40% of the total caseload. See *id.* However, the remaining cases are dominated by dissolution, juvenile, and petition actions, many of which are handled by specialized and more summary proceedings. See *id.* The criminal and civil filings that involve possible jury trials tax superior court resources most profoundly, as indicated by the

1976 to 1985-1986, but have now fallen a remarkable forty-three percent over the past decade.⁴⁴ Ten years ago, civil filings were about three times the number of criminal cases; now, they are approaching parity. The priority of criminal cases and their back log has created delays in civil trials. Although major efforts have been made to expedite civil cases, particularly in California over the past five years, as of 1995-1996, about one-half do not reach trial within one year, and twenty percent do not reach trial within three years at the superior court level.⁴⁵ Having to wait over one year to resolve a civil dispute is not an ideal dispute resolution system in any society. The time and expense of the civil process is a serious barrier to small businesses and individuals seeking recompense for wrongs. Were a reallocation of judicial resources of even ten percent made to civil proceedings, additional court attention to civil matters such as discovery abuses and delaying tactics might make the "under one year" time to trial goal for cases filed more achievable.⁴⁶

At the appellate level, the delay and crowd-out from criminal cases is more pronounced. Here, courts of appeals commonly have a three year wait from notice of appeal to final decision in civil cases. In California, the fastest ninety percent of civil cases took 388 days from final briefing to decision in 1992-1993, and in the most recent available statistics, the figure reached 622 days from 1996 to 1997.⁴⁷ This does not include the ten percent of cases lasting longer or the substantial time from notice of appeal to certification of the record to opening, responding and reply briefs, which can add six to eighteen months to this total. Understandably, because of the fact of incarceration and their generically higher priority, the fastest ninety percent of criminal cases took 283 days from full briefing to final decision in 1996-1997.⁴⁸

The increased workload is such that although the decisions are taking longer, less time is spent on each. In California, the total number of dispositions by written opinion has gone from 9000 to 14,000 over the past decade, while the number of justices has not kept pace: the workload per authorized justice in 1987-1988 was 125 cases filed and was 182 in the most recently reported year of 1996-1997.⁴⁹ Much of the increase over the past decade is due to criminal filings with exclusionary rule related issues occupying a major part of that caseload's contentions: in 1992-1993 there were 7195 notices of appeal in criminal cases, and

allocation of relatively small numbers of judges to family and juvenile courts. *See id.*

44. *See id.*

45. *See id.* at 45.

46. The California Judicial Council's goal is to reduce the time between filing and trial to less than one year for 90% of all cases filed in superior court. *See id.* Although new procedures and timelines have cut time to trial significantly, the state remains far short of that goal, with 47% of cases brought to trial within one year (1993-1994) and 52% in the most recently reported year (1995-1996). *See id.*

47. *See id.* at 57. Note that the Judicial Council counts the "90th percentile" time. *See id.*

48. *See id.*

49. *See id.* at 56.

by 1995-1996 the number had increased to 8818.⁵⁰ The California numbers cited are not aberrational; rather, they infer what experienced criminal and civil litigators in courts throughout the nation know well: our civil litigation system is a disgrace in terms of cost and delay, and part of the problem is the crowd-out by a burgeoning criminal caseload. While much of the criminal caseload would remain even with the removal of exclusionary rule litigation, a substantial portion of the criminal caseload would be directly impacted because there would be fewer issues to decide, fewer cases on appeal, and more cases subject to plea bargaining based strictly on evidence relevant to guilt or innocence.

If police misconduct cases were separated from criminal litigation, the reduction in caseload could flow from two sources. As argued above, the incentive of collateral gain for a criminal defendant as to his underlying offense would be gone.⁵¹ Trials would occur less often with less uncertainty in outcome stimulating defendants to gratuitously "roll the dice." In addition, if a substitute remedy separate from the exclusionary rule were more effective at deterring police constitutional offenses, there might be fewer cases spawned at origin—those now deriving from unconstitutional investigation tactics.

A further, important system benefit arises if police misconduct cases stand on their own. Assuming a substitute remedy exists with sufficient incentives to produce deterrence where constitutional wrongs now occur, fewer, more focused cases will result. Cases will no longer ride the coattails of criminal proceedings where contentions and appeals occur as a matter of course. This enhanced quality feature is important. Currently, because of the numerous motions, writs, and appeals filed in an attempt to invoke the exclusionary rule based on police error theories, cases with stronger defenses implying innocence may be discounted by the system.⁵² Where the flow of cases is a flood, the odds grow that the few but important legitimately meritorious defenses will not receive the attention they warrant.⁵³ The credibility of the entire genre of filings becomes suspect, and the trial or the reviewing court develops a mindset to deny motions, writs, or appeals. However, a smaller flow of cases focusing on the application of the law to what the defendant did results in a rich vein of meritorious allegations and stimulates their recognition.⁵⁴

50. *See id.* at 58.

51. *See supra* Part III.

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

53. *See id.*

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

V. OTHER COLLATERAL COSTS: THE PROBLEM OF STANDARD DENIGRATION

It is a longstanding cliché among attorneys that “hard facts make bad law.” Cases where following “the law” produce inequitable outcomes may be avoided by ignoring the law or by altering the law to allow for an equitable result. Virtually every exclusionary rule case involves the equitable prospect of criminal release for offenses that are often terrible and likely of repetition.⁵⁵ That premise is the context in which the Constitution is being interpreted for the protection of citizen privacy interests. It is not an advantageous context for those legitimately concerned about controlling police abuse.⁵⁶

Arguably, the political unpopularity of “the constable erred, free the prisoner” combined with the equities in individual cases have had a palpable role in softening constitutional constraints on police investigations.⁵⁷ This softening is particularly stark in California. Prior to 1982, California set constitutional standards under the state constitution on an independent basis from the federal court interpretation of the United States Constitution.⁵⁸ Some of this difference had a basis in the distinct features of the California Constitution, most notably in Article I, Section 1, which is the guarantee of privacy rights.⁵⁹ But most of the independent state cases decided in the 1970s and the 1980s involved the interpretation of California’s direct counterpart search and seizure and confession provisions.⁶⁰ The federal court interpretation of similar concepts was markedly different and unerringly more accommodating to the police.⁶¹ Whatever the merits of each approach, the electorate responded negatively to the California state court approach.

First, in 1982, the state enacted the Victims’ Bill of Rights initiative amending the state constitution to require the admission of all “relevant evidence” in a criminal case.⁶² This effectively eliminated the exclusionary rule under the state constitution, which meant that only the federal application of the exclusionary rule in *Mapp* would apply to effectuate exclusion, which in turn must be based on federal interpretation of the federal constitution. The state could no longer apply the exclusionary rule based on its different interpretation of California’s constitu-

55. *See id.* at 676.

56. *See id.*

57. *See id.* at 677.

58. *See* *People v. Cahill*, 853 P.2d 1037, 1091 (Cal. 1993).

59. *See* CAL. CONST. art I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy.”).

60. *See* *People v. Blair*, 602 P.2d 738, 747-48 (Cal. 1979); *People v. Zelinsky*, 594 P.2d 1000, 1004-05 (Cal. 1979); *People v. Cook*, 583 P.2d 130, 147-49 (Cal. 1978); *People v. Scott*, 546 P.2d 327, 330-31 (Cal. 1976); *People v. Brisendine*, 531 P.2d 1099, 1113-15 (Cal. 1975).

61. For federal cases that California declined to apply, see, for example, *United States v. Leon*, 468 U.S. 897 (1984); *United States v. Calandra*, 414 U.S. 338 (1974).

62. *See* CAL. CONST. art. I, § 28(d) (receiving approval by the voters on June 8, 1982).

tion. The enactment of this initiative effectively reversed an extensive body of case law and released the police to the more flexible federal standards.

Second, in November 1986, the California electorate fired a shot heard around the courts of the nation, defeating at the polls the three State Supreme Court justices most closely identified with exclusionary rule application—Chief Justice Rose Bird, Justice Cruz Reynoso, and Justice Joseph Grodin.⁶³ That defeat involved the highly charged accusation in statewide advertising that these three justices had restricted the police excessively and had excluded evidence, resulting in the release of dangerous criminals ready to commit additional crimes.⁶⁴

At the federal level, the standards guiding police investigative techniques are becoming increasingly complex. Police investigative techniques are primarily guided by doctrines allowing police searches under numerous conditions. Categories for permissible searches without warrant have been created, such as the basic “search incident to an arrest” or “searches by consent.” However, specific doctrines for a bewildering array of situations have also been created, including the following: the “stop and frisk,” the “emergency doctrine,” the “murder scene exception,” “border searches,” “vehicular roadblocks,” “airport searches,” “regulatory searches,” “vehicle stops and searches,” “inventory searches,” “searches incident to incarceration,” “searches by consent,” seizure of items in “plain sight,” “overflight observation,” and “trash searches.” Courts analyze threshold concepts, such as “reasonable expectation of privacy” and other doctrines, when creating permissible searches without warrant. Although there are arguments to commend or condemn each category of permissible searches without warrant, they are generally drawn in the context of allowing a search that might otherwise be condemned, and the extension of that allowance to a category of police practice. These doctrines give advance notice of permissible searches without warrant. However, it is instructive that very little case law has developed with *malum prohibitum* presumption (for example a “Bedroom Privacy” rule), a “Violation of Bodily Integrity” line, or an “Interference with Family Relations without Notice” bar. Would the courts be more likely to limit the police conduct if the remedy did not involve the politically explosive and often individually inequitable consequences of excluding relevant evidence and reversing a criminal conviction?

63. See Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, § 1, at 8.

64. See *id.*

Civil libertarians see the “good faith exception”⁶⁵ as the culmination of standard softening of the individual’s Fourth Amendment rights against unreasonable searches.⁶⁶ But civil libertarians naively fail to connect the softening of the standard with the exclusionary rule. Such an exception rests on the false premise, which is accepted and promoted by criminal defense counsel, that a trial is a “contest” between the defendant and the state. Seeing only a two party conflict in a multiparty world, the cases serve to compare wrongdoing. If the defendant’s wrong occurred in the context of police wrongdoing, then the higher expectations we legitimately have for the more powerful state should lead us to punish the police by rewarding the defendant. After all, the defendant’s arrest and litigation made possible the detection and sanctioning of this larger societal wrong.

If one accepts such a psychological approach, then one stands to suffer a good faith exception consequence. The theory of this exception is that the police made a mistake, but did not commit a wrong out of evil intent. Hence, where the defendant commits an intentional criminal act and the police merely make a good faith error, a balancing of evil in the two party world of criminal law practice allows us to maintain the conviction. The result of this regrettable approach is no sanction whatsoever against the police for constitutional breaches due to incompetence or for failure to affirmatively “police themselves.” There is no incentive to be careful, to practice preventive community relations, to respect the privacy rights of the citizenry outside of gross negligence or mens rea intrusions.

A remedy that is not based on the exclusionary rule could apply sanctions appropriate to the police wrong, such as lesser penalties for constitutional breaches from error, harsher penalties for violations that emanate from gross negligence, and the harshest penalties for intentional offenses.

VI. OTHER COLLATERAL COSTS: POLICE INTEGRITY

As outlined in a recent law enforcement survey discussed below,⁶⁷ there is evidence of substantially false police testimony designed to fit police seizure of evidence or interrogation of suspects within constitutional parameters to avoid the application of the exclusionary rule.⁶⁸ Such a pattern of altering testimony undermines any impact from the exclusionary rule. To the extent the exclusionary rule applies, it serves to further stimulate false testimony. From the perspective of

65. See *Massachusetts v. Sheppard*, 468 U.S. 981, 990-91 (1984) (holding that the exclusionary rule does not apply in situations where the police officer reasonably relied on a faulty warrant issued by a judge); *Leon*, 468 U.S. at 923-25 (declaring that the good faith rule is a “modification” of the exclusionary rule, not an “exception”); see also Elizabeth Phillips Marsh, *On Rollercoasters, Submarines, and Judicial Shipwrecks: Acoustic Separation and the Good Faith Exception to the Fourth Amendment Exclusionary Rule*, 1989 U. ILL. L. REV. 941, 962-1015 (discussing the good faith exception).

66. See Perrin et al., *supra* note 3, at 736-37.

67. See *infra* Part VII.

68. See *infra* Part VII.

the police, imposing the exclusionary rule works a direct injustice beyond the scope of the officer's personal interest. The shading of events during testimony in order to prevent the release of an arrestee is, to some extent, the product of contempt for the remedy itself. The admission of evidence is viewed as a game to be played by the courts, who may not understand the reality of law enforcement and the horrors that criminals perpetrate on the innocent. To the extent such testimony is adduced, the deterrent impact of the exclusionary rule is moot and the officer opens the door to perjury, a door behind which further lines may be difficult to draw.

VII. THE EVIDENCE OF PRIOR STUDIES

Notwithstanding its importance, the exclusionary rule has been the subject of little empirical research. The empirical research that has occurred is one to two decades old. This collection of research provides only a minor illumination of the exclusionary rule's impact.⁶⁹

A. Pre-1992 Studies

According to Stuart S. Nagel, there has been a marked decrease in police "effectiveness" after the adoption of the exclusionary rule.⁷⁰ In the early 1970s, Dallin H. Oaks and James E. Spiotto conducted the first comprehensive look at the impact of the exclusionary rule by following a series of studies in Chicago, Cincinnati, and Washington, D.C.⁷¹ Oaks determined that the exclusionary rule most impeded narcotics, weapons, and gambling prosecutions.⁷² It was Oak's opinion that the exclusionary rule did not deter police illegality in searches and seizures.⁷³ He therefore suggested that the rule be abolished on the condition that a more effective mechanism be developed to allow adequate court review of cases

69. See Perrin et al., *supra* note 3, at 678.

70. See Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283, 288. Nagel's study consisted of a 1963 survey of randomly selected police chiefs, prosecutors, defense attorneys, judges, and civil rights advocates. See *id.* at 283-84. Mr. Nagel sent out 250 questionnaires and received 113 responses (45%) from 47 states. See *id.* The goal of the study was to measure the differences in police training and practices in states which had an exclusionary rule before the 1961 *Mapp* decision and those which did not. See *id.*

71. See Dallin H. Oaks, *Studying the Exclusionary Rule and Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); see also Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740 (1974) (analyzing the studies conducted by Oaks and Spiotto).

72. See Oaks, *supra* note 71, at 683-89.

73. See *id.* at 675.

involving the Fourth Amendment.⁷⁴

Spiotto compared Oaks's results to the record in Chicago in 1971 and found that approximately thirty percent of the narcotics, weapons, and gambling cases were dismissed due to search and seizure problems soon after charges were filed in court.⁷⁵ Spiotto found that seventy-eight percent of defendants bringing motions to suppress had a prior record and, ironically, that those defendants had a significantly greater chance of having a motion to suppress sustained than those without criminal records.⁷⁶ Thus, Spiotto concluded that "the exclusionary rule permits many defendants with criminal records to escape punishment for offenses actually committed but few who have no previous contact with the criminal justice system."⁷⁷

Bradley C. Canon conducted a number of surveys concerning the exclusionary rule, the most important being a 1973 survey of police, prosecutors, and public defenders in major cities.⁷⁸ Canon found that between 1967 and 1973 there was an increase in the use of search warrants and similar procedures restricting the police in searches.⁷⁹ Canon concluded that the exclusionary rule had some deterrent impact on police misconduct in search and seizure.⁸⁰

In 1978, in response to a congressional request, the General Accounting Office (GAO) surveyed all criminal cases processed by thirty-eight U.S. Attorney's offices.⁸¹ The GAO took two data samples.⁸² The first consisted of cases that were formerly presented for prosecution during a two month period in 1978, and the second sample consisted of cases closed during the same period.⁸³ Of about 2800 closed cases, 29.8% involved search and seizure issues, but only 10.5% of the defendants filed Fourth Amendment suppression motions.⁸⁴ Of those cases going through trial, however, 32.6% involved search and seizure motions to suppress.⁸⁵ For those cases where motions were granted, the likelihood of acquittal or dismissal was tripled from fifteen percent to forty-five to fifty percent.⁸⁶ In sum, although one in eight felony defendants who go to trial have their cases dismissed by the court or are acquitted by a jury, statistics showed that where search and

74. *See id.* at 755.

75. *See* Spiotto, *supra* note 71, at 255.

76. *See id.* at 255-56.

77. *Id.* at 257.

78. *See* Bradley C. Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?*, 62 JUDICATURE 398, 401 (1979).

79. *See id.*

80. *See id.*

81. *See* COMPTROLLER GENERAL OF THE U.S., GEN. ACCOUNTING OFFICE, REP. NO. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, (1979) [hereinafter COMPTROLLER'S REPORT].

82. *See id.*

83. *See id.* at app. II at 6.

84. *See id.* at app. II at 8-9.

85. *See id.* at app. II at 10.

86. *See id.* at app. II at 13.

seizure motions exclude evidence the rate of dismissal or acquittal was close to fifty percent.⁸⁷

As discussed above, beyond the problem of dismissal or acquittal at trial is the rejection by prosecutors of a case at the outset if there are search and seizure issues that may result in critical evidence being excluded.⁸⁸ The GAO study suggested that U.S. Attorneys rejected very few cases on the basis of search and seizure issues, finding only 1.3% rejected for that stated primary reason.⁸⁹ But the GAO study is misleading, and this distortion has been seized upon by proponents of the exclusionary rule who claim that for purposes of rejecting a case at the outset, the exclusionary rule has little impact.⁹⁰ First, compliance with search and seizure standards is more likely with the FBI and other federal law enforcement officials than may be the case with the local police departments functioning under state law. Substantial resources are spent in training federal law enforcement officials. Second, the scope of allowable search at the federal level is often much broader given the range of federal crimes prosecuted. For example, wide latitude is given for border and immigration searches. Finally, prosecutors are given many options on which to base a case rejection. Prosecutors, who work closely with law enforcement, are understandably hesitant to reject a case with a written record that a police officer is responsible. Where the exclusionary rule will fatally apply, the common and more generic "insufficient evidence" rationale or even other entries allows prosecutors to choose another category as the rejection basis.

In 1982, the National Institute of Justice (NIJ)⁹¹ completed a study which warranted revision of the GAO results. This study is important because it focuses on the far more prevalent state court forum utilized for criminal prosecutions. This study found that a significant number of felony cases are rejected for prosecution in California because of search and seizure problems.⁹² Specifically, the study illustrated that the total felony arrests reported in California from 1976 to 1979, close to five percent were rejected due to the likelihood of evidence exclusion.⁹³ Furthermore, the study found the percentage to be even higher in the larger cities.⁹⁴ For example, in two Los Angeles County offices in 1981, the rates of rejection based on search and seizure problems were 11.7% and 14.6%.⁹⁵

87. *See id.*

88. *See supra* Part II.C.

89. *See* COMPTROLLER'S REPORT, *supra* note 81, at app. II at 11.

90. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2, at n.6. (3d ed. 1996).

91. *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 40, at 1.

92. *See id.* at 10.

93. *See id.*

94. *See id.*

95. *See id.* at 11.

The NIJ study revealed some additional facts. The study reported that 45.8% of the 2141 defendants who escaped prosecution for felonies in California in 1976 and 1977 because of the exclusionary rule were rearrested within two years of their release.⁹⁶ These 981 released individuals accounted for 2713 rearrests, and 1270 for felony offenses.⁹⁷ The defendants who were rearrested had an average of three rearrests each during the follow-up period.⁹⁸ The study notes that analysis of the nature of the felony rearrests statewide reveals that, although many of the rearrests were for drug crimes, the majority were for personal or for property crimes or for other felony offenses.⁹⁹ The message is clear: approximately 1000 felons each year are let go, and most of them commit additional felony offenses, including such crimes as murder, robbery, and burglary, within the two year period after their release.¹⁰⁰ The NIJ report illustrates that "this study found a major impact of the exclusionary rule on state prosecutions."¹⁰¹

The California statistics likely understate the impact of the exclusionary rule in the charging of criminal cases. Prosecutors are hesitant to cite search and seizure as a major reason for rejecting a case at the outset. They generally prefer to cite "lack of prosecution" or "insufficient evidence"¹⁰² in order to not directly insult officers with whom they must work on a daily basis. While working with the San Diego Office of the District Attorney in 1982, I conducted an informal survey of complaint issuance in San Diego, in which I surveyed 150 rejected potential felony cases. The survey found that fifty-one of the issuances involved clear exclusionary rule problems.

Thomas Y. Davies has critiqued the NIJ study based primarily on the possible bias of the Los Angeles Office of the District Attorney as a source of the 1982 rejection data.¹⁰³ Davies also criticized the study based on the ambiguity as to what indicators were used to designate an exclusionary rule based rejection.¹⁰⁴ Davies further criticized the two Los Angeles offices as atypical.¹⁰⁵ Davies noted that the offices reported between 11.8% and 14.6% of rejected arrests resulting from prospective application of the exclusionary rule.¹⁰⁶ Davies determined that these

96. *See id.* at 13.

97. *See id.*

98. *See id.* at 15-16.

99. *See id.* at 16.

100. *See id.*

101. *Id.* at 2.

102. *See id.* at 9.

103. *See* 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, 617-19; Perrin et al., *supra* note 3, at 706-07.

104. *See* Davies, *supra* note 103, at 617-19.

105. *See id.*

106. *See id.* at 632.

statistics were more than double the statewide percentage of 4.8%.¹⁰⁷ However, the Davies critique is flawed in important respects.¹⁰⁸

Davies's final calculation of total system cost illustrates that in 2.35% of all cases, including police releases, rejections, and all court dismissals, the release or nonprosecution of an arrestee was based on an exclusionary rule application.¹⁰⁹ The small percentage of post filing dismissals, approximately one percent, attributed to the exclusionary rule is likely accurate.¹¹⁰ However, the 1.4% calculation for all police releases and prosecution rejections substantially understates impact at this early stage.¹¹¹ We would place the total percentage in the four percent to six percent range.

However, applying the conservative numbers of Davies to recent male arrest data yields the dismissal of 40,087 felony arrestees annually, including 12,381 arrests for violent crimes.¹¹² The number of crime victims, which includes deaths, injuries, and monetary losses, disproportionately impacts the impoverished and lower middle class and is difficult to fix with precision; however, it is momentous by any standard of measurement. Under the conservative assumptions of Davies, and given known high rates of recidivism for those who are convicted and serve time, the exclusionary rule release of arrestees is annually responsible for a substantial number of homicides, robberies, forcible rapes, and arsons.¹¹³

These consequences arguably exclude the more extensive effect—the issued cases where less severe or later developing exclusionary rule implications lead to plea bargains to lesser charges and dropping of counts, special allegations, or

107. *See id.* Few prosecutors serving the function of "issue deputy," who decides whether to file or reject a case, would dispute the 12% to 15% share of rejected cases involving prospective exclusionary rule application as a floor. *See id.* However, a more realistic estimate is that approximately one-third of rejected cases involve the exclusionary rule.

108. There is no evidence that the Los Angeles offices distorted the data or are unrepresentative. Rather, they are large offices and reasonably representative of the state as a whole in terms of police relations and types of offenses. In contrast, the lower percentage data relied on by Davies to criticize the Los Angeles figures are themselves suspect. As discussed above, due to the fault directed at police with whom prosecutors work, which is implicit in exclusionary rule based rejections, prosecutors understandably use the more general categories of rejection in the lower percentage data.

109. *See Davies, supra* note 103, at 654-56.

110. *See id.* at 655.

111. *See id.*

112. *See* U.S. DEPT'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION STATISTICS: MALE ARRESTS, DISTRIBUTION BY AGE, 1995, at tbl. 39 (1996). The 2.35% proportion of arrestees posited by Davies is multiplied by the 1995 male arrests of 1,705,681 for property and violent crimes, with 526,833 of this total ascribed to the violent crimes of homicide, forcible rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson. *See id.*

113. *See Davies, supra* note 103, at 631-44.

priors.¹¹⁴

Within the past decade, one of two widely reported studies includes the 1991 limited survey by Craig D. Uchida and Timothy S. Bynum, which is an examination of a sample of search warrants from seven sites in 1984 and 1985.¹¹⁵ Unsurprisingly, they found that few were successfully traversed.¹¹⁶ The study found that eighty-six percent of all warrants were executed and that these warrants led to arrests sixty-six percent of the time.¹¹⁷ Only thirteen percent of primary warrants (searches directed at defendants) were contested, and motions to suppress evidence seized were granted in 0.9% of the cases.¹¹⁸ Uchida and Bynum failed to report the cases which may have suffered prosecutorial rejection based on anticipated traversal or other exclusionary rule problems from the thirty-four percent of the warrants that did not result in arrest.¹¹⁹ Search warrants are only involved in a small percentage of criminal arrests. Most searches subject to suppression dispute are those incident to an arrest.

B. 1998 Pepperdine Study

Most recently, the L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase, and Ronald W. Fagan Study (Pepperdine Study) received responses concerning law enforcement perceptions and competence pertinent to the exclusionary rule from 296 sheriff deputies and 115 police officers in Ventura County, California, and 55 police officers from throughout California attending a search and seizure continuing education seminar.¹²⁰ The survey counted 19.7% of respondents measuring the exclusion of evidence as a "primary concern" in their work, and 59.3% placing it as an "important concern."¹²¹ The numbers declined to 15.4% and 53.3% respectively when focusing on their interrogation of suspects involving Fifth Amendment issues.¹²² Just over fifty percent of the five search and seizure hypothetical questions, which were designed to test knowledge were answered

114. See *id.* at 668-70 (discussing other aspects of the "costs" of the exclusionary rule, including whether the exclusionary rule affects plea bargains).

115. See Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Loss Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1035 (1991).

116. See *id.* at 1064-65. The process for challenging a search warrant is often called a "traversal motion." The movant carries a difficult burden in challenging an issued warrant. Usually, the movant must establish the falsity of facts relied upon within the affidavit supporting the warrant. Further, if the affidavit establishes sufficient probable cause with such erroneous facts struck, it will withstand challenge. Finally, in most jurisdictions the traversal motion is held before the same court which issued the underlying warrant. Hence, a movant must demonstrate that the magistrate or the court issuing the warrant was misled or erred.

117. See *id.* at 1052 tbl. 2.

118. See *id.*

119. See *id.*

120. See Perrin et al., *supra* note 3, at 713.

121. See *id.* at 721 tbl. 1.

122. See *id.* at 721 tbl. 2.

correctly, and approximately seventy-four percent of the five interrogation questions were answered correctly.¹²³ The data suggested that fifty-five percent of officers had suffered exclusion of evidence gathered during their respective investigations at least once, and of those more than two-thirds were informed of the exclusion by the prosecutor or heard it in court.¹²⁴ In the Pepperdine Study, officers were asked five hypothetical questions to test their knowledge of current search and seizure law.¹²⁵ Interestingly, the study found no statistically significant differences in results among those who had suffered exclusion.¹²⁶ The evidence indicates that even after evidence is excluded against an officer, there is little motivation to improve knowledge for better compliance. The survey also found some officers giving false testimony to fit evidence seizure within constitutional parameters.¹²⁷

The survey also explored police officer views of options to the exclusionary rule, including criminal prosecution, monetary fines of officers, police employment termination or discipline short of termination, monetary damages after suit or hearing, and required education.¹²⁸ Only the lenient required education secured substantial support, with 36.5% favoring it, while 57% favored continued reliance on the exclusionary rule.¹²⁹

C. Summary

Based on a review of the concededly paltry prior studies and surveys extant, what is the evidence of benefit from the exclusionary rule? In looking at the NIJ figures, one is struck by the relative steadiness of cases rejected for search and seizure reasons from 1976 to 1979.¹³⁰ In 1976, 1057 cases were rejected, and in 1979, 1014 were rejected.¹³¹ The total number of felony cases rejected increased very little.¹³² There is no evidence that the numbers have declined since. Although Canon concluded that the initial use of the exclusionary rule increased search

123. See *id.* at 728 tbl. 6.

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

125. See *id.* at 713-14.

126. See *id.* at 724 (stating that "officers *without* prior exclusions had a mean score of 2.86" on the search and seizure questions, and "those *with* prior exclusions had a mean score of 2.94").

127. See *id.* at 725-27.

128. See *id.* at 732, 733 tbl. 7.

129. See *id.* The survey did not include the remedy proposed herein, which is court imposed civil penalties on the police agency or the department employing the officers.

130. See NATIONAL INST. OF JUSTICE, *supra* note 40, at 10.

131. See *id.*

132. See *id.*

warrants and changed police practices,¹³³ it is easy to overestimate its impact. In fact, if the exclusionary rule worked to deter police behavior, we would not see a relatively steady percentage of cases rejected on these grounds, nor would we see search and seizure issues raised and decisions confirming such problems within the appellate courts. If the exclusionary rule was effective would there not be an empirical effect on police behavior, complaints about police, numbers and percentages of prosecution rejections, or of motions or writs granted? Where is the record of progressive pressure on police behavior to limit constitutional breaches to trivial or at least lower levels?

The Pepperdine study concluded that the exclusionary rule remedy lacked effective deterrent impact, noting as follows:

The rule's failure as a specific deterrent is demonstrated in two ways: (1) the apparent absence of any formal procedure . . . notifying officers when they have had evidence subsequently excluded by the court,¹³⁴ and (2) the failure of the officers who had previously had evidence excluded to outperform other officers on the hypothetical questions. The exclusion of evidence, if it is to provide any specific deterrence, must be a learning experience for the officer. . . .

Similarly, the rule lacks any significant general deterrent effect, as is recognized by the officers themselves.¹³⁵

Lacking evidence of progressive efficacy, a substitute remedy is needed, particularly one able to avoid the considerable collateral costs of the exclusionary rule.

VIII. THE ELEMENTS OF AN OPTIMUM REMEDY

Any substitute remedy to the exclusionary rule should be analyzed rationally against the existing rule and other options. Seven elements warrant inclusion in such a comparative examination. Each element is commended by either standard efficacy measurement or by the jurisprudential reality of judicial responsibility to actualize a check over executive branch constitutional abuse.

A. *Judicial Control*

Any substitute remedy must remain substantially under judicial branch control for several reasons. First, there is a commonly expressed concern about judicial contamination or complicity where the court admits evidence gathered in violation

133. See *supra* notes 78-80 and accompanying text.

134. Note the implications of this finding vis-a-vis the remedy proposed herein: the lack of concern of police agencies over constitutional compliance by their officers. See *infra* Part XI.B.4. The remedy presented below provides a clear incentive to substantially revise that failure by directing sanctions at the agency. See *infra* Part XI.B.4.

135. Perrin et al., *supra* note 3, at 734-35 (footnotes omitted).

of constitutional standards. Accordingly, such contamination is mitigated where the court is empowered to coextensively implement a substitute remedy. Where that remedy is more effective and direct than the exclusionary rule, the court will be replacing one remedy with a more effective option. At the same time, the court avoids a different kind of contamination that is arguably as debilitating to court legitimacy as are constitutional breaches—the possible compromise of an accurate finding of fact through denial of reliable and probative evidence to the trier of fact, with a possible erroneous outcome resulting.

Second, because the power to protect against constitutional violations lies with the judiciary, it must be given control over a remedy's implementation. As a practical matter, an institution is best able to give up important authority where it controls the new substitute in its stead.

B. Remedy Retention

Criminal courts should be able to trigger a remedy for constitutional breaches which occur within the course of their own proceedings. As noted above, supporters of the exclusionary rule argue that the rule is required to prevent a court from becoming a party to a constitutional violation.¹³⁶ Such a problem is ameliorated where the court itself can trigger and adjudicate a remedy based on facts arising from a case before it.

Retaining control over the remedy in at least the same group of cases currently subject to exclusionary rule sanction is important for the independent reason that it is a natural detector of such abuses. As argued above, it is not the entire universe of such abuses, but it is a sample where evidence is efficiently available concerning police methodology.¹³⁷ As a practical matter, it would not serve constitutional compliance to exclude a major source of detection from some deterrent producing remedy.

C. Adequate Coverage or Reach

While an optimum remedy will allow imposition where violations are detected in criminal matters, as is currently the case, it should also include a broader reach of cases in which incriminating evidence is not discovered. Although it may be impractical and counterproductive to adjudicate every police encounter with citizens or even every citizen objection to a police action, coverage should extend beyond the current limited group of cases where (1) there is a discovery of

136. See *supra* Part VIII.A.

137. See *supra* Part VIII.A.

incriminating evidence, (2) the evidence is important to the prosecution of the case, (3) charges are filed, (4) the evidence's admissibility is litigated, and (5) evidence is excluded which affects the resulting judgment.

D. Accessibility

A scope beyond the criminal cases when seized evidence is introduced requires access to the remedy by persons other than criminal defendants. Such access can be too liberally granted. Ideally, it is balanced to provide incentive and opportunity for a sufficient number of cases to produce a deterrent impact on constitutional violations without generating meritless or marginal cases.

E. Nexus to the Constitutional Breach

The sanction authorized by the remedy must match the nature of the constitutional breach. Violations that are serious should generate a harsher sanction than those which are less intrusive. In addition to the degree of violation, the extent of the violation (numbers of persons or events covered), the intent element involved in its commission (good faith error, gross negligence, or intentional transgression), and the prior record of the person or entity sanctioned should all be considered in determining the degree of sanction to be imposed. A just system produces a graduated response based on the above listed factors.

F. Effective Deterrence

The remedy must be directed at persons or entities able to effect violative behavior. Ideally, it is imposed in a manner producing an incentive to comply with constitutional standards and is enforced by important actors producing that compliance.

G. Due Process and Fairness

The alternative to the exclusionary rule must provide the traditional opportunity of due process for any person or entity subject to its sanction.

The lodestar of these criteria is the effective influence of police behavior to comply with constitutional standards. Effective is here defined as deterring violations as directly and precisely as possible, with the penalty increasing consistently with that purpose.

IX. TRADITIONAL OPTIONS

A. *Historical Proposals*

1. Private Civil Rights and Privacy Damage Actions

Private common law tort, civil rights, and privacy damage actions¹³⁸ suffer from serious flaws. First, the damages due to the victim of a police intrusion may not be easily quantifiable and may not relate to the societal interest compromised by constitutional breach. Second, the entire universe of exclusionary rule imposed cases are excludable based on jury antipathy for the award of damages to a criminal. Finally, there are practical impediments to remedy implementation, because access to the courts for civil redress is expensive. Only where a class action format allows the accumulation of damages, or where attorney's fees are allowed under a private attorney general doctrine, is access likely. Counsel is generally unavailable to pursue cases where personal damages are less than \$50,000. An improper search and seizure is unlikely to produce easily documented damages on a scale likely to attract a contingency fee attorney. Payment of hourly based fees is unrealistic for any such case unless damages are substantial and close to certain.

The civil remedy option now extant, or as often proposed for strengthening, fails on most of the above criteria. The civil remedy lacks judicial control. The judiciary is unable to initiate a civil damage action, even when it receives evidence in a criminal or civil case indicating that such an action will lie. The court lacks jurisdiction. Furthermore, in a damage action critical issues are left to jury decision. Substantial damages are likely to correspond to successful searches finding incriminating evidence. Hence, the remedy depends on a jury award of compensation to criminals. In addition, the sanction neither fares well in terms of accessibility, nor does the remedy necessarily relate to the "constitutional offense" that is the heart of the prohibition. That is, private damages do not necessarily match the privacy interests offended by police excess, and they are usually limited to relatively trivial amounts.¹³⁹ Moreover, the positing of a minimum liquidated

138. See, e.g., 42 U.S.C. § 1983 (1994); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Perrin et al.*, *supra* note 3, at 739-40.

139. See *Hague v. Committee for Indus. Org.*, 101 F.2d 774, 790 (3d Cir. 1939), *modified*, 307 U.S. 496 (1939); see also Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 500 (1955) (discussing why plaintiffs do not receive substantial awards when damaged

damage amount would not overcome the fatal disadvantage due to both of lack of accessibility of an overall nexus between the societal interest at stake and the measure of the sanction applied.

2. Criminal Prosecution

Criminal prosecution is realistic only in extreme cases in which there are constitutional abuses that invoke criminal law jurisdiction, for example police shootings or beatings. As the notorious Rodney King case indicated, securing convictions of police officers, even in allegedly extreme circumstances and with apparently compelling evidence, is problematic. Beyond the narrow scope of constitutional violations covered by this mechanism is the reality of an ongoing working relationship between police agencies and the public prosecutor upon whom such prosecutions rely. While many offices of the district attorney undertake such cases in good faith, constitutional reliance on such a remedy is problematic.

3. Employee Sanction

Direct sanctions directed at individual officers who violate constitutional standards have important advantages—they focus on the persons involved, may have strong deterrent impact, and can remove renegade or recidivist police offenders from law enforcement. However, substantial reliance on such a remedy has numerous practical difficulties. First, it is not within the control of the judiciary.¹⁴⁰ Second, it interplays with labor relations law and labor management contract agreements. Third, it may gravitate toward the creation of scapegoats where police practices are agency wide. Fourth, it is unclear what kind of entity could decide such cases independent from entanglement with the officers involved. Finally, it is not settled who would initiate such cases to give it sufficient accessibility so that the odds of a consequence from a constitutional breach are high enough to have deterrent impact.

X. A CRITIQUE OF THE PEPPERDINE STUDY

The brief critique above of the exclusionary rule, and of the inadequacy of existing civil remedies, is largely shared by the authors of the Pepperdine Study.¹⁴¹ The authors instead propose a creative and interesting administrative remedy to substitute for the exclusionary rule.¹⁴² But there are serious theoretical and

by illegal police activity).

140. See *supra* Part VIII (listing the characteristics of an optimum remedy).

141. See Perrin et al., *supra* note 3, at 750-53 (discussing how the administrative scheme would deter police conduct).

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

practical problems with their proposal, or with the use of administrative remedies, as the vehicle for police constitutional compliance in general. Unfortunately, they regrettably confine their remedy to good faith searches¹⁴³ and allow the exclusionary rule to continue where searches are conducted in “knowing and intentional” violation of the defendant’s constitutional rights.¹⁴⁴

A. The Maintenance of Evidence Exclusion for Intentional Violations

The Pepperdine Study appears to fill a developing gap in current remedies. While the exclusionary rule would continue to serve as a remedy for violations not subject to the good faith exception,¹⁴⁵ the latter cases, instead of escaping sanction, would be subject to a substitute administrative remedy.¹⁴⁶ The distinction drawn is justified by reference to the “contamination” argument allegedly compelling continued court refusal to admit evidence obtained through a breach of constitutional standards beyond “innocent error.”¹⁴⁷

The proponents of the administrative option properly characterize it as more effective in deterring police violations that are intentional or negligent than the exclusionary rule. However, the authors then fail to apply their own reasoned finding by leaving the ineffective exclusionary rule as a supplemental remedy to be applied in every case where there is an intentional violation of a constitutional standard. The rationale is a concern over compromising “judicial integrity” in admitting wrongfully obtained evidence.¹⁴⁸ This flawed analysis ignores the compelling case for an overall substitute for the exclusionary rule. The “court integrity” concern also ignores the considerable collateral costs of the exclusionary rule, including the betrayal of adjudicative truth-seeking purpose. This latter consequence is itself a source of serious judicial integrity compromise.

Carving out separate remedies based on the police actor’s degree of innocence further increases the distractive examination of issues ancillary to a criminal case’s proper focus, which is the guilt or innocence of the defendant. It requires another factual determination subject to contest, writ review, or appeal: Was this case of police investigative practice properly decided through the exclusionary rule, or was it innocent error and properly invoking only the proposed administrative remedy?

143. *See id.* at 740. The good faith exception would also cover warrantless searches if the officer had a good objective belief that exigent circumstances existed. *See id.*

144. *See id.* at 753.

145. *See id.*

146. *See id.* at 741-54.

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

148. *See id.*

And if the offense is intentional, it means we now have two separate proceedings examining police behavior and applying separate sets of sanctions.

B. Lack of Direct Court Control

As argued above, a substitute to the exclusionary rule must secure from the court the surrender of the exclusionary rule in lieu. The administrative remedy is inherently incapable of achieving such a result because it is not within the control of the judiciary. Indeed, this may be one reason why the remedy is confined to the good faith cases likely to be rejected by the court for exclusionary rule application. However, if one wishes to go beyond that circumscribed supplement and instead implement a legitimate substitute, the judiciary must control the remedy. The administrative remedy vests the initial decision making and decisions to initiate cases with the executive branch, the very branch accused of wrongdoing. Although one executive agency can be arranged to check another, as intended by the Pepperdine Study,¹⁴⁹ that check is not one the judiciary should properly rely upon because it may be corrupted by legislative or executive decisions outside of its purview.

C. Administrative Structure Problems

The Pepperdine Study creates a new structure modeled after the California Fair Employment and Housing Act,¹⁵⁰ creating a typical administrative decision making model pursuant to the existing Administrative Procedure Act (APA).¹⁵¹ The Department of Fair Employment and Housing “serves an enforcement function, investigating claims of discrimination and prosecuting [their violation administratively].”¹⁵² A commission oversees the agency and serves the final agency adjudicative function.¹⁵³

The process would work in a manner similar to the discipline systems of the thirty-nine agencies within the Department of Consumer Affairs.¹⁵⁴ The process depends substantially upon the submission of claims to an agency administrative element, a “department.”¹⁵⁵ The department investigates cases and decides whether to pursue such private claims.¹⁵⁶ Where the agency’s department decides to pursue

149. *See id.* at 744-53.

150. *See* CAL. GOV’T CODE §§ 12900-12996 (West 1992 & Supp. 1999); Perrin et al., *supra* note 3, at 744 (citations omitted).

151. *See* CAL. GOV’T CODE §§ 11500-11529; Perrin et al., *supra* note 3, at 745 (citations omitted).

152. *See* Perrin et al., *supra* note 3, at 744 (citing § 12930 (West 1992 & Supp. 1997)).

153. *See id.* (citing § 12935).

154. *See id.*

155. *See id.* at 744-45 (citing § 12960).

156. *See id.* at 745 (citing §§ 12963, 12965).

the matter, it brings an action before an administrative law judge (ALJ).¹⁵⁷ As is customary, the ALJ writes a proposed decision to the commission overseeing the agency, which makes a final administrative adjudicatory decision.¹⁵⁸

Because a judicial body has not reviewed the decision either constitutionally or pursuant to the APA, review is normally available by petition for writ of administrative mandate in superior court.¹⁵⁹ Appeal may then be taken to the court of appeal, with petition to the supreme court.¹⁶⁰

The problems with this structure are apparent from its description. Far from being streamlined or efficient, it relies upon the most inefficient and irrational mechanism humanly possible for the resolution of human disputes: the APA system of adjudicative enforcement.¹⁶¹ First, the system appoints as the critical and final administrative adjudicator a "Commission," which oversees the operations of the agency deciding whether or not to prosecute.¹⁶² To recapitulate, the agency conducts an investigation which will not necessarily involve any of the elements associated with due process. Based on a unilateral investigation, it will decide to prosecute on behalf of a claimant.¹⁶³ An ALJ, presumably from the independent Office of Administrative Hearings, will hear the matter.¹⁶⁴ But the decision of the ALJ is merely "proposed" and will be transmitted as such to the Commission, which will make the final decision.¹⁶⁵ Hence, the Commission, which sets policy and hires agency personnel, decides a case prosecuted by its own agents. This is due process?

157. See § 11512 (West 1992 & Supp. 1999); Perrin et al., *supra* note 3, at 745-46 (citing §§ 12965(a), 12969 (West 1992 & Supp. 1997)).

158. See *id.* at 746 (citing § 11517(b)).

159. See CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1999); see also CAL. GOV'T CODE § 11523 (West 1992 & Supp. 1999) (allowing judicial review of administrative decisions by "filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure"); Perrin et al., *supra* note 3, at 746 n.539 (describing the process of judicial review).

160. See CAL. CIV. PROC. CODE § 1094.5.

161. See Perrin et al., *supra* note 3, at 743-50 (stating that "[u]nder our proposal, all individuals injured by police misconduct would have access to a civil administrative process").

162. See *id.* at 745 (stating that after an individual files a complaint of police misconduct, "a preliminary review of the complaint [would determine] whether it alleged facts sufficient to constitute a violation" (citing CAL. GOV'T CODE § 12963 (West 1992 & Supp. 1997))).

163. See *id.* (acknowledging that the investigation by an agency investigator amounts to the lone method of "determining the prima facie validity of the claim" (citing § 12963)).

164. See *id.* at 746 (stating that an ALJ would determine the claim based on facts and law (citing § 11517(b))).

165. See *id.* (stating that the administrative law decision would "be submitted, along with the record, to the adjudicative arm of the agency for adoption, modification, or rejection" (citing § 11517(b))).

In order to assuage the obvious flaws in such a process, the APA provides for extensive judicial review,¹⁶⁶ which raises the second structural problem with reliance on an administrative option. The first hearing is heard by an ALJ, presumably an independent judge directly observing the witnesses, which is appropriate for a trier of fact given the role of demeanor and inflection in making findings of fact and weighing credibility. As commonly occurs in California's administrative enforcement systems, the matter is then submitted as nothing more than a proposed decision to the Commission, which is a group of political appointees that are usually persons without legal training and almost invariably persons who were not present when the evidence was presented.¹⁶⁷ Based on nothing more than a review of a written record and brief oral argument, the Commission is empowered to make a final decision.¹⁶⁸

Following these two formal proceedings, judicial review begins at the superior court level, followed by appellate court review and possible supreme court petition, as noted above.¹⁶⁹ Hence, the entire process can involve five separate legal proceedings. Meanwhile, if there is an underlying criminal case deciding not monetary damages but the rather serious matter of incarceration, it will be decided by a three step contested process, four steps if one counts the preliminary hearing in felony cases. As the timelines discussed above indicate, particularly on the civil side, the administrative process does not promise increased efficiency, but inefficiency.¹⁷⁰ That inefficiency may be increased where the opposing counsel, as here, are institutionally retained and have the resources to pursue all available remedies. A proceeding of this type takes six to eight years.¹⁷¹

D. Lack of Nexus Between Remedy and Constitutional Wrong

How are cases generated that take advantage of the proposed Pepperdine Study's administrative option? Attorneys are not promised fees to generate such cases.¹⁷² Presumably, citizens will individually file claims in hope of securing some compensatory award.¹⁷³ This arrangement raises the same lack of nexus

166. See § 11523 (West 1992 & Supp. 1999) (allowing judicial review by writ of mandate within 30 days); see also Perrin et al., *supra* note 3, at 745 (noting that if a complaint is found to be baseless by the agency investigator then the complainant still has judicial remedies available (citing § 12965(b) (West 1992 & Supp. 1997))).

167. See Perrin et al., *supra* note 3, at 746 (stating that the ALJ's decision would be submitted to the agency "for adoption, modification, or rejection" (citing § 11517(b))).

168. See *id.* (citing § 11517).

169. See *supra* notes 159-160 and accompanying text.

170. See *The Need for a New APA*, CAL. REG. L. REP., Summer 1989, at 6, 6 (describing the inefficient process by which the administrative law process operates in reality rather than in theory). But see Perrin et al., *supra* note 3, at 751-52 (discussing the efficiency of the proposed administrative scheme due to the "streamlined administrative process").

171. See *The Need for a New APA*, *supra* note 170, at 6.

172. See Perrin et al., *supra* note 3, at 745.

173. See *id.* (citing CAL. GOV'T CODE § 12960).

problems that exist in the civil damage remedy context. While this arrangement eliminates the jury bias against compensating an individual disproportionately, it fails to achieve a strong nexus between remedy and wrong. Nor is the direction of disproportionate damages to a single individual a better option than a remedy directing penalties customized to the police wrong for a socially beneficent purpose, such as the crime victim fund or even the state's general fund. Will the cognizable damages to an individual, who happens to file a claim, match the degree and nature of public harm accruing from a police incursion? There may be some relationship between the two concepts, but if this relationship can be measured with direct accuracy and without the impediment of damage concept baggage, why not so measure it?¹⁷⁴

The option proposed in the Pepperdine Study allows for punitive damages, with a \$10,000 cap for first offenses and increasing up to \$50,000 for multiple violations.¹⁷⁵ The absolute maximum of \$50,000 is facially inadequate where a large department has spawned multiple, extreme, and repeated violations of the Constitution. Further, the assessment is based on punitive damage concepts, which in California requires outrageous behavior in extremis for any assessment whatsoever by current statutory restriction.¹⁷⁶ In addition, the damages accruing would form a disproportionate windfall to the claimant, providing a false incentive to file claims apart from the merits; moreover, this is not necessary to generate bona fide reports of violations.¹⁷⁷

Finally, the damages may well not come from the agency in the optimum position to discourage constitutional breaches (for example, the police department employing the offenders), but under current practice, would be assessed against the general fund of the city or the county.¹⁷⁸ The design of this remedy is overly focused on compensation rather than deterrence, and in the context of a wrong, not amenable to redress under compensation principles.

174. See *infra* Part XI (discussing the proposed option).

175. See Perrin et al., *supra* note 3, at 749 (noting that such a cap may "be appropriate, provided it is sufficiently high to deter the most egregious violations of the Constitution"(citing § 12987(a)(3))).

176. See *id.* (citing § 12987(a)(3)).

177. The proposal adds an undefined power to enter "cease and desist orders" against persons of entities responsible for violations. See *id.* at 749 & n.555 (citing § 12987). There are numerous problems with the proposal as framed. One cannot issue any order against an entity who was not a party to the proceedings giving rise to the controversy. Further, it is unclear how the Commission is to obtain jurisdiction absent claimant applications. Unlike a typical administrative agency, this one would not have licensing power over those sought to be influenced. That failure creates serious jurisdictional difficulties in the execution of the proposed remedy as a practical matter. This failure is accentuated by the alleged power to use "contempt or sanction" authority over those who violate such orders.

178. See *id.* at 748.

E. The Administrative Process Is Unsuitable to Its Assigned Task

The APA process is essentially designed to expedite a hearing.¹⁷⁹ Discovery is limited to facilitate evidence review at the initial ALJ hearing.¹⁸⁰ The agency adopts rules and standards, detects violations of those standards, and prosecutes violations using a panoply of available remedies usually involving license related sanctions.¹⁸¹ The authors of the Pepperdine Study correctly cite the California Fair Employment and Housing Act's somewhat different model.¹⁸² Like the Pepperdine Study, the California Fair Employment and Housing Act Model involves an agency essentially deciding a dispute between two other parties.¹⁸³ Its resources are essentially arranged to allow the weaker party a reasonable chance to have a complaint examined and applicable law applied.¹⁸⁴ It is more realistic to create an agency able to occupy the field of fair housing practices than for one to occupy the much more complex and involved field of constitutional compliance by the police across the host of doctrines listed in the discussion above.¹⁸⁵ This is an area of expertise already possessed and exercised extensively by existing courts. Because those courts will get any such case that is reviewed judicially, what is the benefit of superimposing a group with no greater expertise for additional preliminary proceedings, even if not steeped in the self-serving conflict of judging their own agency's decision to go forward?

The two major arguments in support of the Pepperdine Study proposal appear to be the filtering process available through ALJ hearings outside existing crowded court dockets and the chance to even the playing field by providing claimants with publicly paid counsel who will filter out weak claims through their own investigation independent from the claimant's.¹⁸⁶ However, these advantages must be measured against the difficulties listed above. Moreover, they may be achievable through proper incentives to bring actions in existing courts in a manner allowing for the broad substitution of the existing exclusionary rule with a court controlled remedy adjustable to the police misconduct encountered, including full due process, and directed at the entity capable of assuring maximum deterrent impact.

179. *See id.* at 745 (citing CAL. GOV'T CODE §§ 11500-11529).

180. *See id.* (citing *Walnut Creek Manor v. Fair Employment & Hous. Comm'n*, 814 P.2d 704, 715 (Cal. 1991)).

181. *See id.* at 744-47 (citations omitted).

182. *See id.* at 744 (citing §§ 12900-12996).

183. *See id.* (citations omitted).

184. *See id.* (citations omitted).

185. *See supra* Part II.

186. *See Perrin et al., supra* note 3, at 745-46, 751-52.

XI. THE OPTIMUM REMEDY: MULTIAccessed CIVIL PENALTIES IN EQUITY

Regardless of the nature or degree of the officer's breach, the defendant's crime and society's interest in preserving a truth-seeking judicial process remains. An option exists that ameliorates most of the administrative law deficiencies, lessens the private damage remedy and the problems with other options, and allows criminal courts to admit into evidence all reliable evidence without the false distinction of the state of mind of the officer gathering it. That difference in police mens rea properly influences the remedy we apply to the police, but does not justify varying the process in deciding crime and punishment when there are implications well beyond the purview of police practices.

The optimum remedy capable of meeting these ideal elements is an action in equity for civil penalties directed at police agents violating constitutional standards. This option has analogous precedents much more promising than the administrative remedy proposed,¹⁸⁷ and, importantly, retains a critical direct role for the courts in constitutional enforcement. The courts understandably will not abandon the exclusionary rule without a substitute remedy to ensure constitutional compliance, and such an option is best vested in them.¹⁸⁸

Because the court would sit in equity, it would be empowered to enter injunctions against police practices and to fashion restitution for injured citizens. The restitution concept would allow appropriate relief to be granted to all persons injured, not merely those individuals who are party plaintiffs. Further, the civil penalty focus would allow the court to fashion remedies according to the nature and extent of the wrong for a measured response thereby creating a deterrent impact.

Such a court-focused option was in fact drafted and introduced in California as Senate Bill 728 by Senator Robert Presley (Democrat, Riverside), but the bill was not enacted.¹⁸⁹ If California Senate Bill 728 was passed, it would create a statute prohibiting constitutional affronts, but by a means separate and apart from

187. See CAL. BUS. & PROF. CODE §§ 17200-17209 (West 1997 & Supp. 1999) (illustrating the successful use of civil penalties under a similar format in the enforcement of the Unfair Competition Act, especially sections 17206 and 17207).

188. Apart from the merits of judicial control, any proposal to eliminate the exclusionary rule and the power associated with it may meet resistance if it cedes jurisdiction to another entity.

189. See S. 728, x Leg. 1993-1994 Reg. Sess. (Cal. 1993), available in WL Comm. Rep. CA S.B. 728. The measure was drafted by the instant author and sponsored by the Center for Public Interest Law. Senator Presley, a former sheriff, is a political Democrat with strong traditional liberal support and is equally concerned about civil liberties and effective law enforcement.

the exclusion of otherwise reliable and probative evidence from criminal proceedings.¹⁹⁰ This bill would grant to the court equitable powers, including awarding civil penalties, to recompense and deter constitutional offenses by penalizing the agency controlling the police, rather than crime victims and the people of California through the exclusion of evidence.¹⁹¹ It would establish a system allowing access to the court by outside counsel or through court initiation.¹⁹²

A. *Official Description of California Senate Bill 728*

The expressed purpose of the exclusionary rule provision is to “permit reliable evidence to be admitted in court while providing a penalty for those who improperly seize the evidence.”¹⁹³ Accordingly, “California Senate Bill 728 would create a statute that makes sense in that it prohibits illegally or improperly obtained evidence but it does not necessarily exclude such evidence where it is reliable.”¹⁹⁴

The proposed bill provided the following:

1. Expressed purpose of the exclusionary rule provision

This bill would create a civil penalty system to punish and deter constitutional offenses, penalizing the department or agency controlling the police, rather than the people of California by completely excluding evidence and allowing a criminal to walk. And the penalty is enforced by the court, as is the exclusionary rule; it is enacted as a more effective on point remedy, without collateral costs.

2. All unlawfully obtained evidence would be admissible if relevant and non-privileged

This bill would provide that a court would be required to admit all relevant non-privileged evidence, and could not exclude otherwise admissible evidence from criminal proceeding because of the violation of constitutional standards in its acquisition.

Thus, evidence obtained through an illegal search and seizure in violation of the Fourth Amendment or evidence obtained through a forced or coerced confession in violation of the Fourth Amendment would be admissible in criminal proceedings under California law.

3. Civil penalty procedure proposed by the bill

(a) Civil action by private citizen

This bill would permit any person to file a civil suit in superior court against any state or local public agency whose employees or agents have violated the constitutional rights of any citizen during the course of a criminal investigation.

The action would be in equity. Thus, there would be no right to a jury trial. No damages would be awarded to the petitioner.

However, the bill would provide that where the court found that a violation of

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *Id.*

constitutional rights to had occurred, it could do either or both of the following:

- (1) Issue an injunction commanding no further violations.
- (2) Impose immediate civil penalties payable by the agency employing or directing the offender of up to one hundred thousand dollars (\$100,000) per violation.

This bill would provide that where the violation occurred also in violation an effective injunction against that agency, a civil penalty of up to two hundred fifty thousand dollars (\$250,000) per violation could be imposed against the agency employing or directing the offender.

The amount of any civil penalty imposed by the court would depend upon the court's consideration of all of the (1) the flagrancy of the violation of constitutional rights, (2) the degree of intrusion of the state, (3) the lack of justification for the intrusion, (4) physical harm to persons or property damage occurring as a result of the unconstitutional intrusion, (5) the opportunity for a warrant or other permissive process knowingly and inexcusably avoided by the offender, and (6) the prior record of such intrusions by the agency employing or directing the offender.

Any civil penalty would be paid to the Crime Victim's fund administered by the California Board of Control. A civil penalty could only be imposed upon the law enforcement agency, not the individual officer who violated the person's constitutional rights. No civil penalties would be paid to the individual who was the subject of the seizure.

The bill also provides that a successful petitioner would be awarded attorney fees and costs.

(b) Court initiated civil penalty procedure

The bill would permit a court to initiate a civil penalty proceeding on its own motion upon a finding of probable cause that a law enforcement agency violated the constitutional rights of a criminal defendant. Upon a finding that a violation had occurred, the court would be entitled to impose the same civil penalties as in the civil action described above.

(c) Special prosecutor

The bill would permit the court to appoint a special prosecutor to litigate court-initiated civil penalty proceedings. The special prosecutor would be vested with all powers of the Attorney General.

The compensation for the special prosecutor would be paid by the law enforcement agency accused of committing the violation.¹⁹⁵

195. *Id.*

B. How California Senate Bill 728 Would Work

1. Judicial Control: Option Applied to Exclusionary Rule Cases

The proposed remedy would allow a criminal trial court to act *sua sponte* to initiate a proceeding if the evidence in a case indicates a police violation of the Constitution. Thus, the “court complicity” concept is fully addressed, and the court deciding whether to admit evidence has the authority to act decisively on the collateral issue of penalizing the police for their violations of law. There is precedent for court appointed special counsel for that purpose.

2. Sanction Nexus to Degree of Police Constitutional Violation

The remedy of civil penalties has numerous advantages over other sanctions. The remedy does not accrue disproportionately or arbitrarily to an individual. It is not tied to damages; rather, the remedy of civil penalties is related to the public offense intended to be deterred. It varies based on the factors listed above, representing society’s interest in deterring such police practices. The greater the offense and need for deterrence, the greater the penalty. The court decides the amount sitting in equity, and this amount will be subject to judicial review to ensure some consistency between jurisdictions, but will not rely on the jury or notions of private damage and possible private enrichment. At the same time, injunctions may be entered and restitution may be ordered to recompense all of those injured through police practices, not merely those who file actions based on restitutionary principles rather than the more problematic concept of damages. In both cases, a court decides the final remedy without a jury.

3. Sanction Scope Beyond Exclusionary Rule Cases

In addition, other cases may be brought to collect penalties by private counsel outside and beyond the scope of the current confined scope of exclusionary rule application. The amounts obtained do not accrue to the local jurisdiction sued and cannot be “shell game” replaced; rather, they must be taken from the agency’s own account. The amount accrues to a separate crime victim fund that currently exists. However, the likelihood of such additional suits is realistically predictable. A meritorious case will yield attorney’s fees for plaintiff’s counsel. Further, under the “private attorney general doctrine” in California, a multiplier above market levels is possible.¹⁹⁶ Such a balancing is likely to yield additional enforcement with a minimum of spurious filings. Aggrieved citizens will be able to initiate cases that

196. See CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp. 1999); see also *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) (stating that a court may award attorneys’ fees to a successful party).

do not focus on the plaintiff's character, but instead on police actions. The plaintiff will not receive a monetary award, but the plaintiff will have a contingency attorney at no cost to vindicate a public wrong. The contingency attorney has a natural incentive to pursue only meritorious cases because unmeritorious cases result in time and expense, not compensation.

4. Targeting the Police Agency for Deterrent Impact

Under the civil damage or administrative options, funds tend to come from the general fund of the city or the county of the police agency involved. However, under the proposed remedy, funds come from the entity that is most likely to sanction the individual officers, the police agency, which is effectively responsible for police practices. The funds may not be replenished, and such a sanction is taken far more seriously than a county general fund assessment from a civil rights judgment. It comes from the sacrosanct budget of the department—the source of new equipment, raises for employees, expansion, new vehicles, and larger offices.

Under existing law, police aggression that is severe, injurious, or lethal is properly targeted with criminal sanctions and employment firings. Such extreme departure from acceptable police practices is likely to encounter a check from another agency (for example, the FBI) or even a prosecutor (for example, district attorney, state attorney general, or U.S. attorney). Furthermore, such a departure from acceptable police department practices may trigger an employment action firing.

Missing from these remedies for extreme departures is the more common need to counter the large scale, gradual movement of police behavior toward constitutional breach. Such a movement gradually slides from respect for the Constitution to the macho strutting "make my day" mode of policing; thus, the line between "negligent" but good faith intrusion and "knowing violation" of constitutional rights becomes blurred. Certainly the delineation of one from the other presents a difficult burden of proof, as the prosecutor of any specific intent crime will attest.

The gradual transformation of a police department from its common "to serve and protect" motto to something more uncomfortable is easy to understand for those who have been a part of law enforcement. Police officers deal with victims and criminals. Day after day officers see the pain and suffering of law violators. Officers apprehend people who are not only hostile, but also violent and dangerous. It is easy to slide into viewing certain people as "pukes," a term commonly used for suspects. It is not necessarily the product of racism or even of discrimination. It may, and often does, emanate from understandable and laudable empathy for the victims. The officer is on their side. The officers may be increasingly angry and contemptuous for those they view as the tormentors of the weak and vulnerable. Such officers are not internalizing our worst instincts, but perhaps our best. The

problem becomes the reflection of the contempt that can surface on a class of persons with some indicia associated with the reviled group. Not only may the indicia be inaccurate, but the mode of investigation can change very gradually so that at some point it passes a line. The trick is to draw the line, but not so finely that the job cannot be accomplished because the officers are, by and large, protecting the weak and defenseless from predators; instead, the line should be drawn as clearly as possible in advance and in an effective manner. The sanction against the department does that. It does not jump on the head of an individual when the problem is the gradual slide of a large number. It affects the higher officials most able to draw the line for all concerned and powerfully motivates them to do it.

5. The Quid Pro Quo: Surrender the Exclusionary Rule

The civil penalty proposal sets up a contract with the courts. As indicated by Chief Justice Burger in his eloquent critique of the exclusionary rule, a legislatively formulated option might be substitutable for the exclusionary rule should one arise.¹⁹⁷ California Senate Bill 728, as introduced on March 3, 1993, proposed an option that was within the control of the courts and exercisable in every case where the exclusionary rule might apply.¹⁹⁸ California Senate Bill 728 is scheduled to sunset unless affirmatively extended or unless the court implements its terms as a substitute for the exclusionary rule. However, there is enough time allotted before the bill's sunset to allow court consideration of it as a categorical option. The proposal constitutes an offer by the legislative branch to the judicial: here is a better way to do it; we have given you substantial control over it; will you accept it in lieu? Such an offer serves as a bridge between otherwise separate branches that must communicate and agree on matters which interrelate.

XII. THE POLITICAL DIMENSION

A. *The Surprising Reversal of Expected Positions*

As noted above, the civil penalty in equity option to the exclusionary rule was drafted in bill form by this author and introduced in the California legislature in

197. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-24 (Burger, J., dissenting). However, note that the Chief Justice has advocated the expansion of the good faith exception, essentially suggesting no bona fide substitute for the exclusionary rule, while properly criticizing the Congress and state legislatures for failing to provide such an option. See *id.* at 420-22 (Burger, J., dissenting). The implication of the dissent is that should such an option be presented, the exclusionary rule should properly yield to it.

198. See Cal. S. 728.

1993.¹⁹⁹ The measure was heard before the Senate Judiciary Committee on May 18, 1993 and failed by two votes to win passage to the floor.²⁰⁰ On June 2, 1993, the proposed bill was amended and all exclusionary rule provisions were removed.²⁰¹

The political line-up for and against the measure has been counterintuitive and baffling. One would think that a remedy which could more effectively redress, halt, and deter police transgressions would bring the support of the civil liberties community. Ironically, the opposite was the case.²⁰² However, law and order Republican Committee members, presented with a remedy which would remove the exclusionary rule and substitute a much more powerful and clearly effective disincentive to police constitutional breaches, voted for the bill.²⁰³ Liberal Democrats voted against the bill.²⁰⁴ One logical conclusion exists: the exclusionary rule has achieved reified status as an object of obeisance or a symbol of scorn quite apart from its serious consequences.

B. Accommodation to the Exclusionary Rule

There is another explanation for the particularly disappointing Pavlovian defense of the exclusionary rule by persons allegedly defending civil liberties. Many of the visible collateral costs of the exclusionary rule have been accommodated through its many years of imposition. The number of guilty defendants who are convicted and then set free to commit highly visible crimes is not large.²⁰⁵ As discussed above, most of the costs from failure to apply criminal sanctions occur in prefiling or pretrial stages where they are not visible or are

199. *See id.* Originally the bill was introduced as California Senate Bill 1122 by Senator Presley in 1991, S. 1122, x Leg., 1991-1992 Reg. Sess. (Cal. 1991), and reintroduced in 1993 as California Senate Bill 728 by Senator Presley, Cal. S. 728.

200. *See* Official California Legislative Information, Bill Information, 1993-1994 (visited Feb. 10, 1999) <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0701-0750/sb_728_vote_930518_000001_sen_comm>.

201. *See* Cal. S. 728 (amended June 2, 1993). California Senate Bill 728 was eventually enacted in September 1994 without any provisions regarding evidence and the exclusionary rule. *See* OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, BILL INFORMATION, 1993-1994, HISTORY (visited Feb. 10, 1999) <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0701-0750/sb_728_bill_history>.

202. *See* OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION, BILL INFORMATION, 1993-1994, VOTES (visited Feb. 10, 1999) <http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0701-0750/sb_728_vote_930518_000001_sen_comm>.

203. *See id.*

204. *See id.*

205. *See* John E. Fennelly, *Inevitable Discovery, The Exclusionary Rule, and Military Due Process*, 131 MIL. L. REV. 109, 129 (1991); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 43-44 & 44 n.210 (1994). *But see*, Perrin et al., *supra* note 3, at 711.

muddled with other factors.²⁰⁶ Where evidence is excluded at trial, unless there is a reported case, the outcome is also a mix of evidence and witness credibility; the impact of a set of facts excluded from the jury may be speculative. There are not a large percentage of cases amenable to the “Willie Horton” public outrage: a prisoner freed (for example, by conviction reversal for failure to exclude evidence) followed by subsequent visible crimes.²⁰⁷ Where a reversal occurs, the case usually may be retried by the prosecution.²⁰⁸ The defendant who may have already served several years in confinement, may be amenable to a plea bargain for additional time in custody or may be retried and convicted on allowable evidence.

The courts at trial and appellate levels have considerable expertise in deciding where constitutional lines are drawn and how the exclusionary rule is to be applied. Although making up a substantial caseload for crowded dockets, these courts can handle such cases with relative skill and comfort.

Perhaps most important, virtually every attorney active in the criminal field, for both prosecution and defense, has considerable experience in exclusionary rule litigation. States have established procedures for separate motions to be brought to contest the constitutionality of police investigations.²⁰⁹ There is a common view within the bar and the bench that the facial anomalies of the exclusionary rule have been somehow accommodated and that there are occasional arbitrary results, but that the police do care about convictions, which impacts their investigations. Additionally, the collateral harm of accommodation is moderated by other available evidence, plea bargaining, or judicial efficiency.²¹⁰

The criminal defense bar forms a particularly interesting case study of accommodation. Here, pre-existing expertise and investment combine with a widespread mind-set about the purpose of trials. Their focus is not on determining the truth, but on effectuating a contest with important societal benefits. The trial is a chance for the weak defendant to stand up to the powerful state. The defendant has few weapons in such a contest. Accordingly, difficulties for the state or advantages to the defendant are inherently equitable—they tend to mitigate the effect of the otherwise long odds facing the defendant. In other words, the game is fairer if the defendant has a better chance. Added to this mind-set is the notion that, in enforcing constitutional standards, defense counsel can do more than simply test the case of the state. In addition to presenting facts from the defendant’s point of view, defense counsel can affirmatively advance society’s agenda by correcting perceived constitutional wrongs themselves. Just as the prosecutor may hold

206. See Perrin et al., *supra* note 3, at 674-76.

207. See Maclin, *supra* note 205, at 44 n.210.

208. See *id.* (stating that the exclusionary rule “seldom hinders the prosecution of violent crimes”).

209. See CAL. PENAL CODE § 1538.5 (West 1982 & Supp. 1999).

210. See Perrin et al., *supra* note 3, at 688 (describing a study that found high approval ratings for the exclusionary rule despite belief in its problems (citing Michael Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C. L. REV. 138, 143 (1966))).

defendants accountable for violations of law, defense counsel attempts to hold the police accountable for constitutional violations. Hence, many cases have two prosecutors, each attempting to advance compliance with the law.

The 1993 proposed exclusionary rule option discussed above in California posed an interesting conundrum for these groups.²¹¹ The remedy proposed was clearly more effective in limiting police constitutional breaches than the exclusionary rule because the number of cases subject to sanction would increase substantially, and the remedy would be of much greater import to those determining public policy than is the exclusionary rule.²¹² But the American Civil Liberties Union, in addition to the defense bar, opposed the bill.²¹³ The statement of opposition was confusing and confused, but sufficed to sway Democrats on the Senate Judiciary Committee, with the exception of the bill's Democratic sponsor, from voting for the bill.²¹⁴

XIII. APPENDIX: MODEL BILL DRAFT LANGUAGE²¹⁵

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds that the exclusion of evidence or other fruits of unconstitutional acts by the state has become the primary means to ensure the enforcement of constitutional standards in criminal investigations. The Legislature finds that such sanction is limited to those cases where the exclusionary rule may be determinative, and that it is indirect, uncertain, and arbitrary in relation to its purpose of securing constitutional compliance.

(b) The Legislature declares that the function of criminal trials is to ascertain the truth so that the laws of the state may be accurately and fairly applied. Because of the exclusionary rule's application, substantial resources and attention in criminal cases focus on the nature of police procedure, separate and apart from the guilt of the defendant. In addition, the rule's bar to otherwise probative evidence sometimes compromises the truth seeking function of the criminal trial.

(c) The Legislature finds that such a remedy impacts the criminal justice

211. *See supra* Parts XI-XII.

212. *See supra* Parts XI-XII.

213. *See supra* note 202 and accompanying text.

214. *See supra* note 204 and accompanying text. At the same time, every Republican present on the Committee voted for the measure. *See supra* note 203 and accompanying text. Although it would have substituted a stronger remedy for the exclusionary rule, and accordingly was not supported by any law enforcement association or interest, it provided a path to remove the exclusionary rule. In a political environment where the media's sound bite approach has infested legislative decision making, the mere invocation of that consequence secured their votes.

215. The model bill draft language presented in this Part is largely based on the language of California Senate Bill 728. *See supra* notes 189-195 and accompanying text.

system beyond the possible release of guilty defendants or the direct costs involved. Those effects include preliminary decisions not to prosecute or to accept lesser pleas to crimes committed based on the anticipated exclusion of evidence. In addition, they include the possible derogation of constitutional standards because of antipathy toward the collateral consequences of the exclusionary rule.

(d) The Legislature also acknowledges that the courts themselves are limited in their own authority to secure constitutional compliance, and that their primary available means has been the exclusion of evidence within their proceedings. The decision by courts to exclude has been justified by the failure of the Legislature to formulate an alternative and superior means for the enforcement of constitutional standards. The reliance on civil suits for damages is inadequate due to procedural barriers and the practical unlikelihood of a jury sanctioning police agencies in a way favoring a criminal defendant.

(e) The Legislature hereby creates a meaningful and enforceable remedy for violation of federal or state constitutional standards by agents of the state, more directed at the wrong, within the control of court adjudication and sanction, and precluding the need for the exclusion of relevant evidence as an ineffective sanction in its stead.

(f) The Legislature hereby expresses its intent to implement the more effective sanction of civil penalty assessment against the agency responsible for the management of persons violating constitutional rights of the citizenry. The intent of the Legislature is to vest in the courts a more direct, effective, and alternative remedy in lieu of the exclusionary rule. The Legislature expresses its hope that this remedy will be accepted by the courts.

(g) The Legislature expresses its intent to file amicus briefs as appropriate to urge appellate court acceptance of the remedies provided in this act, and the concomitant removal of the exclusionary rule as a means to enforce constitutional compliance by police agencies. The Legislature intends the substitution to apply only to breaches of the constitution, and it is not intended to apply to the court's generic authority to exclude evidence based on statutory or common law privileges, or because of the unreliability of evidence sought to be introduced.

SECTION 2. Title 16 (commencing with Section 1700) is added to Part 2 of the Penal Code, to read:

TITLE 16. EVIDENCE OBTAINED IMPROPERLY

1700. (a) A court shall admit all relevant nonprivileged evidence, and shall not exclude otherwise admissible evidence from a criminal proceeding because of the violation of constitutional standards in its acquisition.

(b) Any person may file a civil suit in superior court against any state or local public agency whose employees or agents have violated the constitutional rights of any citizen during the course of a criminal investigation. The cause of action shall be in equity. Where the court finds a violation of constitutional rights to have occurred, it may do either or both of the following:

(1) Issue an injunction commanding no further violations and award

restitution.

(2) Impose immediate civil penalties payable by the agency employing or directing the offender of up to one hundred thousand dollars (\$100,000) per violation.

(c) Where the violation is in violation of an effective injunction against that agency, a civil penalty of up to two hundred fifty thousand dollars (\$250,000) per violation may be imposed against the agency employing or directing the offender.

(d) The amount of civil penalty imposed by the court shall depend upon the court's consideration of all of the following factors:

(1) The flagrancy of the violation of constitutional rights.

(2) The degree of intrusion of the state or its agent.

(3) The lack of justification for the intrusion.

(4) Physical harm to persons or property damage occurring as a result of the unconstitutional intrusion.

(5) The opportunity for a warrant or other permissive process knowingly and inexcusably avoided by the offender.

(6) The prior record of intrusions by the agency employing or directing the offender.

(e) Attorneys' fees and costs shall be paid to a prevailing petitioner in an action under this section.

1701. (a) Where in the course of a criminal trial, a justice, municipal, or superior court has probable cause to believe a violation of the Constitution may have been committed by a law enforcement agency relevant to the criminal proceedings before the court, the court may schedule a hearing in the normal course, and command the presence of any witnesses as the court may demand. These proceedings shall be independent of the criminal trial and need not interrupt or delay pending criminal proceedings. The court may examine witnesses and conduct his or her own inquiry or may appoint a special prosecutor to conduct an appropriate investigation and prosecute the hearing. The agency whose behavior is the subject of the investigation and hearing shall be entitled to notice of the inquiry and to representation before the court.

(b) Where a special prosecutor is appointed, the court may order his or her compensation from the budget of the agency under inquiry. The special prosecutor shall receive reasonable fees and shall be vested with all of the powers of the Attorney General relevant to the assigned inquiry and hearing.

(c) As a result of such a hearing, the court may exercise those powers enumerated in Section 1700.

1702. (a) No civil penalties assessed under this title shall be paid by individuals.

(b) Civil penalties imposed by a court pursuant to this title shall be payable one-half to the crime victim's Restitution Fund as specified in Section 13960.1 of

the Government Code, and one-half to the General Fund of the state.

(c) No moneys paid by state or local public agencies assessed under this title shall be returned to, or supplement the budget of, the agency so assessed.

(d) Review of court decision under this title shall be by writ of ordinary mandamus, and shall be affirmed if supported by substantial evidence.

1703. This title shall remain in effect only until January 1, 2005, and shall have no force or effect on or after that date, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2004 deletes or extends that date, or unless the California Supreme Court and federal courts hold that this title is an acceptable substitute for the judicially created exclusionary rule and accepts this title as the remedy to be judicially applied in its stead.