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It Is Broken: Breaking the Inertia of the Exclusionary Rule

L. Timothy Perrin,*
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Carol A. Chase***

I. INTRODUCTION

Change is hard. Inertia begets inertia. The American exclusionary Rule¹ has been in place for thirty-eight years, meaning that two generations of lawyers have practiced in the wake of *Mapp v. Ohio*,² and that the vast majority of criminal law practitioners have never practiced under any other rule. Naturally, any proposal to alter a long standing, entrenched rule in the criminal justice system will evoke serious challenge. Despite the mounting evidence that the Rule fails in its essential function,³ and the fact that the Rule exacts tremendous costs,⁴ the exclusionary rule

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1. The American exclusionary rule will be referred to herein as either “the exclusionary rule” or “the Rule.”

2. 367 U.S. 643 (1961).

3. “The exclusionary rule is . . . a judicially created means of deterring illegal searches and seizures.” *Pennsylvania Bd. of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2019 (1998) (citations omitted). The Rule’s effectiveness as a deterrent of police misconduct has been questioned frequently over the last thirty years, based on the absence of empirical support for the rule’s value as a deterrent. See L. Timothy Perrin, H. Mitchell Caldwell, and Carol A. Chase, with Ronald W. Fagan, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 711-36 (1998) (describing an empirical study of the extent to which police are deterred by the exclusionary rule and concluding that the Rule does not effectively deter police misconduct); see also *Bivins v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) (observing that there

survives mostly, it seems, because of inertia and the perceived absence of any viable alternatives.⁵

The critics of the proposed civil administrative remedy have rightfully focused on perceived problems in the proposed remedy, while failing to offer any justification for retaining the existing exclusionary rule.⁶ Part of a thorough evaluation of any new approach should include a comparative analysis of the new proposal with the status quo. Reading the Totten,⁷ Fellmeth,⁸ and Levenson⁹ articles, one is hard-pressed to identify any passages extolling the virtues of the exclusionary rule. They do not claim that the Supreme Court got it precisely right in 1961.¹⁰ Nor do they claim that the current rule strikes the thoughtful, proportionate balance necessary to meet the competing goals of preserving individual liberties and protecting public safety. Perhaps the length of time we have lived with the Rule has numbed us to its defects, but its lack of support, even among those critical of our proposal, is very telling.

Even if the Rule is not fatally flawed, it has tremendous drawbacks. And, as the late Justice Blackmun noted fifteen years ago, “[i]f a single principle may be drawn from this Court’s exclusionary rule decisions, from *Weeks* through *Mapp* . . . it is that the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom.”¹¹ Our proposal was crafted with Justice Blackmun in mind. We firmly believe our proposal is a workable solution to a difficult issue, and we appreciate the opportunity to respond to the criticisms raised by our colleagues.

In Part II we respond to criticisms of our empirical study of law enforcement officials from Ventura County, California and elsewhere (the “Pepperdine Study”), which formed part of the basis for our proposed administrative remedy.¹² Part III addresses the criticisms of our proposed civil administrative remedy to partially

is no empirical evidence to demonstrate that the Rule deters police misconduct).

4. See Perrin et al., *supra* note 3, at 674-78 (summarizing the costs of the exclusionary rule, including lost prosecutions, reduced charges, erosion of rights under the Fourth Amendment, loss of police officer integrity, and the time, effort, and monetary costs required to process motions to suppress).

5. See *id.* at 672-73.

6. See *id.* at 743-54 (discussing the proposed administrative remedy to partially replace the exclusionary rule).

7. See Gregory D. Totten et al., *The Exclusionary Rule: Fix it, But Fix it Right*, 26 PEPP. L. REV. 887 (1999) (responding to the exclusionary rule critique of Perrin et al.).

8. See Robert C. Fellmeth, *The Optimum Remedy for Constitutional Breaches: Multi-accessed Civil Penalties in Equity*, 26 PEPP. L. REV. 923 (1999) (providing a solution to the exclusionary rule’s shortcomings).

9. See Laurie L. Levenson, *Administrative Replacements: How Much Can They Do?*, 26 PEPP. L. REV. 879 (1999) (critiquing Perrin et al.’s administrative remedy to the exclusionary rule).

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

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

12. See *infra* notes 17-65 and accompanying text.

replace the exclusionary rule (the "Pepperdine Proposal"),¹³ including criticisms that it will not be cost-effective; that it will not be efficient; that it will overdeter police officers; that it will increase the incentive for police perjury; and that it fails to right constitutional wrongs.¹⁴ In Part IV we address issues related to the implementation of our proposal, concluding that state and/or federal legislatures should be able to enact our proposal consistent with notions of federalism.¹⁵ We conclude in Part V with a demonstration of how our proposal will work when applied to the facts of five exclusionary rule cases and one police search that did not lead to a prosecution.¹⁶

II. RESPONSE TO CRITICISMS OF THE EMPIRICAL STUDY

It is axiomatic that important decisions should be based upon good information. The more insight a person has into a perplexing problem, the more likely it is that those involved will be able to identify an effective and satisfactory fix. In deciding whether the exclusionary rule should be retained, empirical data can provide important information about the relative costs and benefits of the Rule.¹⁷ Yet, as Professor Heise pointed out in his symposium piece, "whether the exclusionary rule deters illegal police conduct remains a vexingly complicated research question and one that thrusts researchers into murky areas inhabited by well-guarded human motivations within a complex social model."¹⁸ Thus, while recognizing the utility of empirical research, we also acknowledge its limitations in unearthing why law enforcement officials act the way they do.¹⁹

Despite the problems in some of our questions and despite the nebulous nature of the subject matter being tested, we believe the task was worth the considerable time and effort. And despite the particular criticisms of our study set forth in the commentaries, we believe some significant truths emerged, which should not be overlooked. To castigate the study for some particular and very limited concerns

13. The proposed civil administrative remedy is sometimes referred to herein as the "Pepperdine Proposal" solely for ease of reference and does not imply that the proposal has been endorsed by Pepperdine University.

14. See *infra* notes 66-190 and accompanying text.

15. See *infra* notes 191-236 and accompanying text.

16. See *infra* notes 237-359 and accompanying text.

17. See Perrin et al., *supra* note 3, at 678, 711-12.

18. Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 850 (1999); see also Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 716 (1970) (analyzing the effects of the exclusionary rule through case studies).

19. See Oaks, *supra* note 18, at 716 (noting that a reliable measurement of the exclusionary rule's deterrent effect is impossible); Perrin et al., *supra* note 3, at 711 ("The motivations of law enforcement officials defy direct observation, and that constitutes one of the most imposing barriers to the study of the rule.").

is to throw out the baby with the bath water.

First and foremost, our study confirms that police officers do not adequately understand the complicated law of search and seizure. Officers answered barely more than 50% of the search and seizure hypothetical questions correctly, and fewer than two-thirds of the hypothetical questions overall.²⁰ Even when the officers answered “correctly,” they often failed to understand the rationale or reason for the result.²¹ For the Rule to effectively deter police misconduct, those trusted with the execution of our criminal laws must understand the reason that evidence is suppressed. The second truth to emerge from the Pepperdine Study is that the lack of a systemized methodology to communicate the results of suppression hearings to the involved officers undermines the specific deterrent effect of exclusion.²² Absent communication about the results of the suppression hearing, officers are left uninformed as to whether their behavior conformed to the Fourth Amendment, and they miss a valuable opportunity to learn what they should do under similar circumstances in the future.

The third truth our study confirmed is that the exclusionary rule has contributed to a profound loss of police integrity.²³ The importance of this truth cannot be overstated, for the integrity of those trusted with the execution of our laws is at the heart of our system of justice. Thus, while there may be valid particular criticisms, a broader perspective containing these larger truths is critical.

Two of the contributors to this symposium have considered the problems engendered by attempting to use empirical evidence as a scholarly tool.²⁴ Professor Heise, while calling for an increase in the use of empirical research in legal scholarship, made a good case for the difficulty of undertaking this type of research. He emphasized the degree of caution that must be used in evaluating data based upon responses that require some assessment as to whether the responses are likely to be truthful.²⁵ He also noted that restricting our study to Ventura County limited the representativeness of the data drawn from the study, as does the response rate to our survey.²⁶ We concede the existence of these limitations to our study, which we have openly disclosed, and are grateful to Professor Heise for his insightful comments.

Totten and his co-authors also raised a number of concerns about our study. Totten urged that officers do not need to know the nuances of the law in order to correctly apply it,²⁷ and pointed to three problems in our study to support his argument: (1) our failure to place sufficient importance on officers getting the right

20. See Perrin et al., *supra* note 3, at 728-29 & tbl.6.

21. See *id.* at 729 nn.436-37 (discussing distribution of answers of respondents among possible answers).

22. See *id.* at 722-25.

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

24. See Heise, *supra* note 18, at 807; Totten et al., *supra* note 7, at 887.

25. See Heise, *supra* note 18, at 832.

26. See *id.* at 832-33.

27. See Totten et al., *supra* note 7, at 897.

result, even if they got it for the wrong reason; (2) the failure to differentiate between police officer errors of inclusion or exclusion; and (3) the validity of paper and pencil self-report testing.²⁸ Totten ignored the more substantial problems created by the exclusionary rule while focusing on these more obscure points.

First, Totten argued that it is not necessary for officers to understand Fourth Amendment law to correctly apply it, and he analogized it to the difficulty an average person would have understanding the difference between the degrees of murder.²⁹ This analogy misses the point. Most people would still recognize that the act of killing another is wrong. The results of our survey provide support for our conclusion that many times the officers cannot determine whether their conduct is "wrong," and therefore, are unable to conform their conduct to what the law requires.³⁰

Police officers must understand the rule of law. While an officer may conclude that evidence is admissible under the exclusionary rule because, for example, it would inevitably have been discovered,³¹ this may overlook the fact that a constitutional violation has occurred. In *Nix v. Williams*,³² the officers transporting Nix made the now-famous Christian burial speech to procure Nix's murder confession.³³ The Supreme Court held the confession to murder was obtained in violation of the defendant's rights,³⁴ but ultimately concluded that the condition of the victim's body was admissible based upon the inevitable discovery rule.³⁵ Had the officers more clearly understood the underlying constitutional principles, their conduct may have secured a lawful confession. While Totten would like us to believe that understanding the law underlying the exclusionary rule is not necessary as long as the correct result is reached, such reasoning fails to recognize that not knowing the law may result in constitutional violations even if the admissibility of evidence is preserved.

The responses to several of the hypothetical questions in our survey revealed that the responses from the officers were spread among the four available answers.³⁶ This supports the notion that officers are regularly unclear about what the law requires and that obedience of the law is a matter of fortuity, rather than conscious effort.

28. *See id.* at 894.

29. *See id.* at 897.

30. *See* Perrin et al., *supra* note 3, at 727-29.

31. *See, e.g., Nix v. Williams*, 467 U.S. 431, 444 (1984) (holding that the inevitable discovery rule overrides the exclusionary rule).

32. 467 U.S. 431 (1984).

33. *See id.* at 441; *Brewer v. Williams*, 430 U.S. 387, 392 (1977).

34. *See Brewer*, 430 U.S. at 405-06.

35. *See Nix*, 467 U.S. at 432.

36. *See* Perrin et al., *supra* note 3, at 728-29.

The second point raised by Totten is that the hypothetical questions failed to distinguish between errors of exclusion (where officers incorrectly decided against seizing evidence that would have been admissible) and errors of inclusion (where officers incorrectly decided to seize evidence where the law would not sanction the seizure).³⁷ Totten argued that errors of exclusion would suggest that the exclusionary rule is too strong a deterrent, and would result in officers not seizing evidence they should in fact seize, while errors of inclusion would support our conclusion that the Rule fails as a deterrent.³⁸ Consequently, for Totten, the error rate by officers is inconclusive in determining the extent of deterrence of the exclusionary rule if the questions do not differentiate between errors of inclusion and errors of exclusion.

To an extent, Totten is right. The Pepperdine Study could have provided more insightful results had more of our questions provided a better basis for differentiating between errors of inclusion and errors of exclusion. However, at least one of our hypothetical questions, C-8, does permit differentiation between errors of exclusion and errors of inclusion.³⁹ And the results of that question support our contention that the exclusionary rule inadequately deters Fourth Amendment violations. The correct answer to question C-8⁴⁰ was that the evidence is inadmissible. While 43.5% of the officers responded correctly to the question,⁴¹ another 23.6% answered that it was inadmissible, but for the wrong reason.⁴² 30.3% of the officers incorrectly answered that they could legally seize the narcotics.⁴³ Thus, 30.3% of the answers were errors of inclusion, again lending support to our conclusion that the exclusionary rule fails to significantly deter Fourth Amendment violations.

37. See Totten et al., *supra* note 7, at 894.

38. See *id.*

39. See Perrin et al., *supra* note 3, at 729 n.436.

40. Question C-8 provided as follows:

With probable cause that a drug transaction has just occurred, officers arrested a drug suspect just outside his house. At the time of the arrest they believed there was another person involved in the same drug enterprise. Prior to arrest, another person was seen coming and going from the house. Immediately after the arrest, officers entered the house and conducted a "protective sweep" for other persons who might pose a threat or dispose of evidence. During the "protective sweep" the officers seized narcotics from a bedroom closet. The seized narcotics are:

- (a) Admissible, because the officers had the right to look in the bedroom closet;
- (b) Admissible, because officers may search for fruits of the crime;
- (c) Inadmissible, because the officers had no search warrant;
- (d) Inadmissible, because the officers could perform a protective sweep but not seize narcotics.

Id. at 759.

41. See *id.*

42. See *id.*

43. See *id.*

Totten also argued that the officers responding to our questionnaire had higher error rates than they do in real life.⁴⁴ As support, he noted that the average number of suppression hearings the responding officers had been involved in was between fifteen and eighteen over an entire career.⁴⁵ This, he contended, is a relatively small number and is an indication that the vast majority of seizures are performed in accordance with the law.⁴⁶ First and foremost, Totten failed to recognize that suppression motions do not provide an accurate measurement of police misconduct. Some police errors result in the prosecution's dismissal of charges or a plea bargain and some victims are never prosecuted at all. Hence, a portion of police misconduct avoids suppression motions altogether. Remarkably, more than 20% of the officers who participated in our study claimed that they had never given testimony in a suppression hearing,⁴⁷ leading to the conclusion that a substantial number of officers had never made a mistake, or the officers had assignments in which they had no responsibility for searches or arrests, or any misconduct by the officers never resulted in a suppression hearing.

Second, Totten overstated the significance of our study's mean number of suppression hearings per officer (fifteen to eighteen). Totten estimated that each officer made about twenty-five arrests a year and "conservatively" extrapolated that number into "100 search and seizure decisions" for each officer each year.⁴⁸ Totten cited the Federal Bureau of Investigation Uniform Crime Reports of 1995 to support his arrest statistic⁴⁹ and concluded that officers must be getting it mostly right because they are involved in only a few suppression hearings out of thousands of such decisions over a career.⁵⁰ Of course, the crime statistics that Totten cited are national statistics, and Ventura County has decidedly less crime than the national average. As we pointed out in our study, Thousand Oaks and Simi Valley, two of the largest cities in Ventura County, are regularly listed as being among the safest cities in America.⁵¹ Thus, there are fewer arrests in Ventura County than elsewhere, and one might logically assume there are fewer search and seizure decisions for police.

44. See Totten et al., *supra* note 7, at 896.

45. See *id.*

46. See *id.*

47. See Perrin et al., *supra* note 3, at 723 tbl.3 (stating that 19.5% of Ventura County Police Officers, 23.9% of Ventura County Sheriff's Officers, and 27.8% of a third group of officers had responded that they had never testified in a suppression hearing).

48. See *id.* at 896.

49. See *id.* at 896 n.36.

50. See *id.* at 897.

51. See Perrin et al., *supra* note 3, at 713 nn.375-77.

Third, Totten's estimate that officers face 100 search and seizure decisions per officer per year is wildly speculative and is not drawn from any credible source. Too many variables have to be accounted for to make Totten's estimate reliable, thereby rendering the figure meaningless. Do we factor in high crime areas versus low crime areas?⁵² Suburban areas versus urban areas versus rural areas?⁵³ Do we distinguish between arrests of individuals versus searches of houses? Is writing a traffic ticket an arrest involving a search and seizure decision?

Fourth, Totten wrongly criticized our study for not collecting data about the number of times officers conducted searches or actually seized evidence or the number of times they chose not to collect evidence for fear of exclusion.⁵⁴ Such an endeavor would have been an exercise in futility. It would be impossible for officers to accurately recall the number of search and seizure situations they had encountered over a career, regardless of the length of their service as officers. Indeed, it was our belief in formulating the study that it would be difficult for officers to accurately estimate the number of suppression hearings in which they were involved,⁵⁵ an event much more memorable than a routine search by an officer. We certainly never intended for the number of suppression hearings estimated by the officers to serve as the basis for an argument about how often the officers get it right. Furthermore the information gathered by our study does not provide sufficiently precise information to support the conclusions reached by Totten.

Finally, Totten criticized "paper and pencil" tests, arguing that they are not a useful indicator of real world conduct.⁵⁶ While to some extent such criticism is valid, these tests remain the best available testing tool.⁵⁷ Additionally, our hypothetical questions were based upon decisions by the United States Supreme Court,⁵⁸ and, therefore, are "real world" examples.⁵⁹ We note the validity of the Totten criticism of "self-report" testing: Respondents may report their behavior to

52. *See id.* (noting that Ventura County is unusually safe).

53. *See id.* (indicating that Ventura County is largely a suburban county).

54. *See Totten et al., supra* note 7, at 896 (concluding that without information about the total number of search and seizure opportunities for officers it "is impossible to compute the rate at which officers confront difficult search situations and the proportion of times they were actually deterred from collecting evidence.").

55. The memory difficulties we anticipated may be illustrated by the large number of officers who responded to the questions about the number of suppression hearings in which they had testified by rounding off their answers and by the extremely large range of responses, from no suppression hearings to more than one hundred. The most popular answers to the number of suppression motions were zero, one, two, five, ten, and twenty, although some identified fifty, one hundred, or more than one hundred hearings. *See Perrin et al., supra* note 3, at 723 tbl.3.

56. *See Totten et al., supra* note 7, at 897-98.

57. *See Perrin et al., supra* note 3, at 711 (noting the importance of measuring the direct effects of the exclusionary rule on police officer behavior and the inability of other evaluative methods to ascertain this information because of their indirect nature).

58. *See Perrin et al., supra* note 3, at 714-15.

59. *See id.*

be what they believe the questioner would find to be the most appropriate response, rather than what actually occurred, and "tests do not always perfectly predict the behavior of the tested individual."⁶⁰ However, while paper and pencil tests are not perfect indicators of past or future conduct, they have long been regarded as an invaluable tool in human behavior research and usually provide a valuable first step in predicting human behavior.⁶¹ Moreover, in our study, any self-reporting bias would have caused the participants to minimize the extent of evidence suppression they had suffered and the extent of their awareness of police deception and not to exaggerate those facts. We noted in discussing our findings that the participating officers almost certainly understated the extent to which they were aware of deception by fellow officers.⁶² Similarly, any self-reporting bias likely played no significant role in the officers' responses to the hypothetical questions. If anything, one would expect the officers to expend additional time and effort on the questions, above and beyond the time available in the field, to make sure they answered them correctly.

Thus, while we readily recognize the limitations of our study, and the limits of all empirical studies based upon self-report questionnaires, we stand by the conclusions that we have drawn from our research.⁶³ Moreover, we draw strength from the other empirical studies that we cited in our Article.⁶⁴ As described in that Article, many of those studies came to conclusions similar to the ones that we reached.⁶⁵

III. RESPONSES TO CRITICISMS OF THE PEPPERDINE PROPOSAL

A. *Cost Comparison: The Exclusionary Rule vs. The Proposed Administrative Remedy*

The creation of a new administrative agency to deal with charges of police misconduct has risks and costs, which, at least superficially, may form a basis for an attack on the Pepperdine Proposal. However, any such attack is blunted by a comparative examination of the risks and costs inherent under both the exclusionary rule and our proposal. Therefore, just as the critiques have appropriately probed our administrative alternative for its costs, it is necessary to

60. See Totten et al., *supra* note 7, at 897-98.

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

62. See *id.* at 726-27.

63. See *id.* at 711-34.

64. See generally *id.* at Part III (discussing the findings of numerous previous studies).

65. See *id.*

probe the current approach for its costs. Only through such a comparative analysis can the relative costs and benefits of each be compared. We will compare the following: the costs in lost prosecutions,⁶⁶ the political costs,⁶⁷ the monetary and time costs,⁶⁸ the loss of individual rights,⁶⁹ and the cost to police integrity.⁷⁰

1. Cost in Lost Prosecutions

One of the clear costs of the current system is the cost in lost prosecutions. *United States v. Bayless*⁷¹ illustrates the failings of the Rule. The exclusionary rule does not take into account the nature of the crime, the nature and type of evidence subject to exclusion, or whether intentionally culpable conduct on the part of the officers is involved.⁷² Judge Baer's decision in *Bayless* left the public outraged to see yet another career criminal go free despite overwhelming evidence of his guilt.⁷³ The defendant's disproportionate windfall, as much as any other factor, brings the Rule into disrepute, and it is that lost prosecution which most concerns the public. The judicial system has tried its best to work around the confines of the Rule, but is often forced to reach legally farcical conclusions in order to preserve evidence critical for a conviction.⁷⁴

From the moment *Mapp v. Ohio*⁷⁵ was decided, judges have gone to great lengths to avoid evidence exclusion which results in lost prosecution. For example, in a 1963 study conducted by Stuart Nagel,⁷⁶ 47% of respondents reported that since *Mapp*, judges in states that had no prior exclusionary rule had broadened the definition of what constituted a permissible search so as to avoid evidence exclusion.⁷⁷

That "broadening" of "permissible searches" is no coincidence. The tortured interpretations of Fourth Amendment law in the wake of *Mapp* have created a body

66. See *infra* notes 71-83 and accompanying text.

67. See *infra* notes 84-88 and accompanying text.

68. See *infra* notes 89-108 and accompanying text.

69. See *infra* notes 109-21 and accompanying text.

70. See *infra* notes 122-40 and accompanying text.

71. 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996) (applying the exclusionary rule to suppress a large quantity of illegal drugs); see also Perrin et al., *supra* note 3, at 671 (analyzing the decision in *Bayless*).

72. See *Bayless*, 913 F. Supp. at 237-43.

73. See Perrin et al., *supra* note 3, at 671-72. In *Bayless*, police seized eighty pounds of cocaine and heroin from the trunk of the defendant's rental car after observing four men stuff two packed duffel bags into the trunk while the car was parked in a high-crime area during the early-morning hours. See *Bayless*, 913 F. Supp. at 234-37. Upon seeing the police, one of the men ran. *Id.* at 235. Despite the fact that the officers exhibited no intent to violate the defendant's rights, Judge Baer suppressed the evidence as violative of the Fourth Amendment. See *id.* at 234-35, 242.

74. See, e.g., *Florida v. Riley*, 488 U.S. 445 (1989); see *infra* notes 112-15.

75. 367 U.S. 643 (1961).

76. See generally, Stuart S. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283 (evaluating, through empirical evidence, the effects of the exclusionary rule).

77. See *id.* at 290.

of law that is remarkably complicated.⁷⁸ Thus, law enforcement must grapple with an increasingly complicated criminal procedure, with only limited success, precisely because of its increasing complexity. The result is an emergence of cases such as *Bayless*, which bring intense and focused public disdain for the entire criminal justice system.

This public disdain for lost prosecutions is not without merit. As a National Institute of Justice Study⁷⁹ indicated, of those defendants whose cases were rejected for prosecution because of possible Fourth Amendment violations, approximately half were re-arrested within the next forty-eight hours.⁸⁰ Furthermore, two-thirds of those who were released due to possible Fourth Amendment violations were repeat offenders.⁸¹ The cost of the exclusionary rule is clear: it allows dangerous repeat criminals to return to prey upon the community.

The sheer cost of lost prosecutions resulting from suppression of evidence under the exclusionary rule is tremendous, and is the greatest cost under the current system. However, another less visible cost of the Rule is "reduced prosecution." Prosecutors faced with the specter of evidence exclusion may lack the ability to fully prosecute cases, but may be able to file less serious charges with the remaining evidence. In this way, activity that should have resulted in the filing of a serious felony may result in a less serious felony or even a misdemeanor. Consequently, instead of receiving a lengthy prison sentence, a defendant may serve minimal jail time or avoid incarceration entirely. Unfortunately, no study undertaken thus far has probed this cost, which admittedly would be difficult to measure precisely.

It is in avoiding the cost of lost or reduced prosecutions that the Pepperdine Proposal offers its greatest benefit. When evidence is excluded, the guilty will generally escape conviction and punishment.⁸² Under the Pepperdine Proposal, which preserves the admissibility of evidence involving less than intentional police misconduct, society is safer and the public disdain for the criminal justice system will give way to a renewed confidence that our system works. Moreover, our proposed administrative remedy does not view the preservation of individual rights and public safety as diametrically opposed aims.⁸³ The competing dynamic that is

78. See *infra* notes 109-118 and accompanying text (discussing the Supreme Court decisions which have systematically limited the application of the exclusionary rule in order to preserve the ability of police to conduct searches).

79. See NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 2 (1982) [hereinafter NIJ STUDY].

80. See *id.* at 16.

81. See *id.* at 18.

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

83. See *id.*

at the heart of the operation of the Rule is eliminated. Our proposal protects individual rights while still punishing the guilty.

2. The Political Cost: The Loss of Public Confidence in the Criminal Justice System

Any proposal that suggests the creation of a new administrative agency to solve a problem is bound to draw an attack. Even without expending any real thought, the critic has a ready arsenal of generic bullets.⁸⁴ After all, everyone knows administrative agencies quickly become bloated, top-heavy, and cost inefficient. They create rules for their own sake, and generally serve to interpose yet another level of useless bureaucracy on an already overwrought citizenry. This almost intuitive attack is offered in a knee-jerk fashion to counter any approach that involves the creation of a new administrative remedy. One commentator opined that the creation of an administrative agency is wrong, in part, simply because of the public disdain for any new bureaucracy.⁸⁵ “According to a 1996 Gallup survey, seventy-one percent of respondents favored a proposition aimed at ‘reducing all government agencies.’”⁸⁶ Consequently, any such proposal carries with it political costs.⁸⁷

While these arguments may be appealing in a vacuum, they do not stand up under comparative analysis. If the cost of the unpopularity of a new government agency is balanced against the loss of public confidence in the criminal justice system because of lost and reduced prosecutions, the public’s dislike of a new agency may well give way. The specter of a guilty man escaping criminal conviction because critical evidence was excluded bears an enormous price tag; a price tag so high as to be the primary focus of the public’s disdain for the American

84. The wide spread adoption of sunset laws that are applied to administrative agencies reflects a legislative assumption that agencies must justify, on a regular basis, their existence, mission, and right to continue as an arm of government. Sunset laws either provide for a set termination date or provide for periodic review. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 473(e), 101.1(a) (Deering Supp. 1999). In California, there is a joint legislative sunset review committee. *See* CAL. BUS. & PROF. CODE § 473 (Deering Supp. 1999). State agencies, such as the State Board of Chiropractic Examiners and the State Board of Osteopathic Examiners, are required by law “to demonstrate a compelling public need for the continued existence of the board or regulatory program, and that its licensing function is the least restrictive regulation consistent with the public health, safety, and welfare.” *See* CAL. BUS. & PROF. CODE § 473.15(c) (Deering 1998); *see also* CAL. BUS. & PROF. CODE §§ 1000-1 to 1000-5, 3600-1 to 3600-5 (Deering 1998). Agencies that are within the Department of Consumer Affairs, such as those listed in section 100 of the California Business and Profession Codes, are “subject to a review every four years to evaluate and determine whether each board has demonstrated a public need for the continued existence of that board.” *See* CAL. BUS. & PROF. CODE § 101.1(a) (Deering 1998). This includes such agencies as the Medical Board of California, which licenses physicians. *See* CAL. BUS. & PROF. CODE § 101(b) (Deering 1998).

85. *See* Levenson, *supra* note 9, at 881.

86. *See id.* at 882 (citations omitted).

87. *See id.*

criminal justice system.⁸⁸ If the public were to pick their poison, it would not be the exclusionary rule. One cannot seriously suggest that an administrative remedy in place of the exclusionary rule will fail for reasons of political fallout.

3. Monetary and Temporal Cost Comparison of the Current System to the Proposed Administrative Remedy.

The most basic and obvious cost of both the exclusionary rule and the Pepperdine Proposal is the cost in time and money necessary to administer each. Admittedly, an administrative agency to oversee and evaluate claims will be expensive,⁸⁹ but so is the current system. Certainly any criticism based on the expense of our proposal is only valid if it outstrips the costs of the current system.⁹⁰ Unfortunately, no study to date has determined the monetary resources expended in bringing, handling, and disposing of suppression motions under the current system.⁹¹ Yet, we can identify some sources of cost under the exclusionary rule. The monetary cost to police departments could be measured in the additional man-hours expended in court appearances solely necessitated by suppression motions.⁹² Likewise, the burden on prosecutors is considerable. In the review of cases for possible filing, prosecutors must screen cases with an eye to potential evidence exclusion. This may cause cases to be rejected, lesser charges to be filed, or a case to be sent back to the originating police agency for further investigation.

The costs engendered in case rejection or the filing of lesser charges involve additional costs.⁹³ The immediate costs to police agencies associated with sending a case back for further work-up is obvious. The costs to prosecutors could also be measured in the salaried man-hours necessary to research and draft motions in

88. See *supra* notes 44-65 and accompanying text.

89. See generally Levenson, *supra* note 9, at 882 (discussing the costs of an administrative agency).

90. See Perrin et al., *supra* note 3, at 752-53 (discussing the costs of the exclusionary rule).

91. Only one study has even touched the surface of assessing such costs in the current exclusionary rule system. This was the General Accounting Office ("GAO") Study of 1979 which determined, among other things, that out of a total of 271 staff years assessed in the study, 3.6 of these staff years were used to process suppression motions. See COMPTROLLER GEN. OF THE U.S. ACCOUNTING OFFICE, REP. NO. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 1, 10 (1979) [hereinafter COMPTROLLER'S REPORT]. In addition, the GAO study estimated that 7.6 staff years available to judicial and law enforcement personnel were used to process such motions. *Id.* However, both findings failed to assign a monetary cost to these staff hours. *Id.*

92. This cost is nebulous, but based on the authors' experience it may be exacerbated by other factors. Frequently, officers called to testify are off duty, and consequently their court appearance is overtime. Additionally, suppression motions are often continued to another date, thereby requiring another appearance.

93. See *supra* notes 3-4 and accompanying text.

opposition to defense suppression motions, to subpoena and prepare witnesses for suppression hearings, and to represent the state during those hearings.

The judicial costs of the current system will, in part, be measured in total salaried hours that judges spend reviewing motions for suppression of evidence and presiding over suppression hearings.⁹⁴ So too, monetary costs can be measured in the salaried man-hours of appellate courtroom judges and personnel that must be expended to handle appeals arising from suppression motions.

That being noted, the Pepperdine Proposal would eliminate many of these costs. Except for the most egregious and intentional police misconduct, most Fourth Amendment rights claims will not be heard in the criminal courts.⁹⁵ And even in the administrative agency created to deal with police abuses there will be fewer claims because the incentive (evidence exclusion) to bring frivolous claims will have been eliminated.⁹⁶ The windfall of evidence exclusion which drives the high rate of suppression motions under the current system will no longer exist.⁹⁷ Moreover, the administrative remedy is such that, even though our proposal increases the number of potential claimants,⁹⁸ meritless claims will be quickly disposed of before they can substantially burden the agency's resources.⁹⁹ Thus, instead of dealing with search and seizure motions and appeals, prosecutors, law enforcement, and courts will be able to spend their limited resources on other budgetary concerns and or reduce their overall budget.

Of course, monetary savings will be inherent in any remedy in which law enforcement, prosecutors, and courts save time. And, unlike the paucity of data to illuminate the direct monetary costs, available studies of the exclusionary rule have considered the amount of time the current system consumes.¹⁰⁰

The GAO study in 1979 concluded that 3.6 out of 271 staff years were devoted to handling suppression motions, or 1.3% of the total.¹⁰¹ Further, the GAO study determined that 30.8% of all suppression motions never made it to the courtroom

94. See COMPTROLLER'S REPORT, *supra* note 91, at 10 (generally discussing the amount of man-hours expended by courts on suppression motions).

95. See Perrin et al., *supra* note 3, at 753 (noting that under the proposed administrative remedy, only evidence gathered due to the most egregious intentional police misconduct will be subject to suppression under the exclusionary rule; other misconduct claims will be handled through the administrative agency); see also William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 346 (1991) (study showing that of officers who responded to hypotheticals with answers that would violate the Fourth Amendment, 70% committed the violation unintentionally).

96. See Perrin et al., *supra* note 3, at 752.

97. See *id.*; see also Oaks, *supra* note 18, at 681-89 (discussing the increase in suppression motions after the exclusionary rule was imposed).

98. See generally 42 U.S.C. § 1983 (1994) (requiring that claimants have some actual damages in order to recover for civil rights violations); Perrin et al., *supra* note 3, at 749 (describing claimant's right to liquidated damages for each violation under the Pepperdine Proposal).

99. See Perrin et al., *supra* note 3, at 751-52.

100. See, e.g., COMPTROLLER'S REPORT, *supra* note 91, at 10.

101. See *id.*

because the parties plea bargained.¹⁰² The GAO study revealed that defense attorneys used suppression motions, with little or no chance for success, as a tool to improve their client's footing or simply to delay the proceeding.¹⁰³

The use of the suppression motion as a strategic tool by defense attorneys results in a time cost to police departments as well. In the Pepperdine Study, almost 60% of the participating police officers responded that they had never had evidence excluded despite their appearance at an average of fifteen to eighteen suppression hearings.¹⁰⁴ This data confirms that suppression motions are usually futile, but nonetheless are employed frequently enough to warrant a substantial number of appearances by officers at suppression motion hearings.¹⁰⁵

As noted, regardless of whether the suppression motion has merit, its processing still consumes valuable man-hours under the current system.¹⁰⁶ Under the proposed administrative remedy, the time spent handling such motions is, for the most part, transferred to an administrative agency, thus freeing up law enforcement, prosecutorial, and judicial time. The number of suppression motions that will be heard in the courts because of intentional police misconduct will be only a small fraction of that currently heard.¹⁰⁷ Thus, it is reasonable to conclude that the fifteen to eighteen suppression motions the average Ventura County peace officer attends under the current system will dramatically decrease under the proposed administrative remedy. That time saved can be redistributed to other societal or law enforcement needs.

Prosecuting attorneys will also save considerable time because the proposed administrative remedy will eliminate the incentive for defense attorneys to file frivolous suppression motions. Only the most egregious and intentional police misconduct will result in suppression.¹⁰⁸ Without having to draft motions in response to suppression motions, plea bargain due to possible evidentiary improprieties, or attend suppression hearings, prosecutors should experience a dramatic time savings. These time savings, which, of course, translate into monetary savings, are important because the time freed up for these agencies will provide relief for an overburdened judicial system, one that even now struggles to find ways to reduce its tremendous workload.

102. *See id.*

103. *See* H. Mitchell Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 MARQ. L. REV. 45, 50-51 (1994).

104. *See* Perrin et al., *supra* note 3, at 722.

105. *See id.*

106. *See* COMPTROLLER'S REPORT, *supra* note 91, app. II at 10.

107. *See* Perrin et al., *supra* note 3, at 753-54.

108. *See id.*

4. Cost to Individual Rights

It is ironic that the rule put in place to protect individual liberties has instead had a decidedly chilling effect on individual liberty. The rule that was to “dictate” law enforcement compliance with the Fourth Amendment has led to the development of a body of law that has compromised individual liberties under the Fourth Amendment. Judges faced with the prospect of evidence exclusion, and the specter of a gutted prosecution, have contorted the law of criminal procedure in a result-determinative attempt to keep otherwise excludable evidence from being excluded. This contortion of the law impacts society on a far greater level than lost prosecutions in any particular case. The exclusionary rule has led to the compromise of the Fourth Amendment protections for all Americans.

For example, in order to protect drug convictions, the Supreme Court has held that a person has no expectation of privacy in his financial¹⁰⁹ and telephone records¹¹⁰ because he or she has released information contained in those records to a third party, namely, the companies which provide those services. These holdings fly in the face of both *Katz v. United States*¹¹¹ and the reasonable assumption that a person who banks or makes phone calls does not expect the companies through whom he contracts these services to make information about his records public.

In *Florida v. Riley*,¹¹² the Supreme Court held that an individual who had erected a greenhouse in his fenced backyard did not have a reasonable expectation of privacy when a police helicopter hovered directly over the greenhouse and used high-powered binoculars to observe through vent slats the marijuana plants growing within.¹¹³ In order to uphold the conviction of the marijuana grower, the Court advanced the legally farcical notion that a person would not expect privacy in such a place,¹¹⁴ even though it is likely that if a private person had used high powered binoculars and a helicopter to observe activities within that greenhouse, he or she would have faced liability for invasion of privacy or worse.¹¹⁵ These result-determinative decisions illustrate the lengths to which courts will go to

109. See *United States v. Miller*, 425 U.S. 435, 440-41 (1976).

110. See *Smith v. Maryland*, 442 U.S. 735, 741-46 (1979).

111. 389 U.S. 347, 352-53 (1967) (holding that the Fourth Amendment is violated when a warrantless search is conducted in a place where 1) a reasonable person would have an expectation of privacy and 2) the person asserting the right actually manifests an expectation of privacy).

112. 488 U.S. 445 (1989).

113. See *id.* at 450-51.

114. See *id.*; see, e.g., *Minnesota v. Carter*, 119 S. Ct. 469 (1998) (decision of the Supreme Court from its current term exemplifying the arbitrary lines the Court draws in deciding who may assert a Fourth Amendment violation; the Court decided that a mere guest in a home does not have standing to object to the search of that home, but if the guest stays overnight, the person does have standing).

115. See *Riley*, 488 U.S. at 450.

preserve the admissibility of evidence.¹¹⁶ These decisions reduce the right of privacy individuals have in places and things. The specter of the exclusionary rule hovers over almost every judicial decision involving criminal procedure. And because of its draconian "one rule fits all" remedy,¹¹⁷ judges are not free to fairly, dispassionately, and consistently apply the body of Fourth Amendment law. Compromises to accommodate the needs of particular situations lead to "bad" law.¹¹⁸

Furthermore, under the current system, police searches in violation of the Fourth Amendment that do not result in an arrest¹¹⁹ do not offer any true remedy to the person whose rights were violated.¹²⁰ The police misconduct, therefore, remains undeterred. Under the Pepperdine Proposal, an opportunity to address these grievances will be available regardless of whether the violation led to an

116. See *Carter*, 119 S. Ct. at 474 (holding that a temporary guest does not have standing to challenge a search of a home, but overnight guest does); *California v. Hodari*, 499 U.S. 621, 629 (1991) (refusing to suppress crack cocaine that was thrown to the ground by the defendant as he was being chased by a police officer). The Court in *Hodari* held that the defendant was not seized for purposes of the Fourth Amendment when a police officer began chasing him, even though the officer had no reasonable suspicion of criminal activity. *Id.*; see also *California v. Greenwood*, 486 U.S. 35 (1988) (holding that a person has no expectation of privacy in trash left on their curb for garbage-man pickup); *United States v. Dunn*, 480 U.S. 294 (1987) (holding that a person had no expectation of privacy in a barn on person's own property surrounded by two fences when officers had to come onto the property, climb two fences, and peer over an opening with a flashlight in order to see inside the barn); *California v. Ciraolo*, 476 U.S. 207, 215 (1985) (holding that defendant did not have a reasonable expectation of privacy to his backyard, which contained marijuana, even though it was part of the curtilage of his home and defendant had built a six foot outer fence and ten foot inner fence around it; warrant was not required for the police to fly over the defendant's yard at 1,000 feet to look around it); *INS v. Delgado*, 466 U.S. 210, 218-20 (1984) (holding that illegal aliens were not seized for the purposes of the Fourth Amendment when INS agents, armed and in uniform, positioned themselves at all the exits of the building where the aliens were working and additional INS agents, also armed and in uniform, walked around the building questioning the aliens about their citizenship). In *Delgado*, the Court determined that despite the fact that armed INS agents were standing at all of the exits a reasonable person would feel that they were free to leave. *Id.*

117. See Perrin et al., *supra* note 3, at 676-77.

118. See *supra* notes 109-116 and accompanying text.

119. For example, the police may search a residence in violation of the Fourth Amendment in hopes of discovering admissible evidence, then having found none, decide not to charge the individual. The police may also illegally search one individual's residence for the purpose of securing evidence against another individual who does not have standing to challenge the search. The police may, through their own negligence, illegally search the wrong house. In none of these examples does the exclusionary rule offer redress for the individual who had his rights violated.

120. Currently, an individual can file a civil rights action under 42 U.S.C. § 1983, but often the amount of damages an individual could recover is too small to justify the cost of filing a claim. See *Carey v. Phipus*, 435 U.S. 247, 266-67 (1978) (holding that plaintiffs must prove actual injury to recover damages under § 1983); Perrin et al., *supra* note 3, at 739-40.

arrest.¹²¹ This aspect of our proposal may be easily overlooked in light of the vast implications involved in partially eliminating the exclusionary rule. However, it should be noted that our proposal is a significant step forward in the preservation of individual liberties.

5. Cost to Police Integrity

“It is an open secret long shared by prosecutors, defense lawyers, and judges, that perjury is widespread among law enforcement officers. . . . [T]he exclusionary rule might not have been such a good idea. . . . [I]t sets up a great incentive for people to lie. . . . [With the exclusionary rule] [y]ou may just get more incentive for police to tell a lie to avoid letting somebody they think is guilty, or they know is guilty, go free.”¹²²

—Judge Alex Kozinski

Police perjury, perhaps more than any other consequence, cuts to the very heart of our system of justice.¹²³ A police officer, by virtue of her position, is uniquely able to pervert the administration of justice.¹²⁴ It is a small step from lying to preserve the admissibility of evidence to lying to convict an innocent defendant.¹²⁵ The Skolnick study of 1966 provided empirical data of such police practices,¹²⁶ and our study, some three decades later, provided chilling confirmation that, indeed, police occasionally lie in order to prevent exclusion of evidence.¹²⁷ This factor, as much as any other, presents a clear and present danger to individual rights. The

121. See Perrin et al., *supra* note 3, at 751.

122. Stuart Taylor, Jr., *For the Record*, THE AMERICAN LAWYER, Oct. 1995, at 71-72 (quoting Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit).

123. More than seventy years ago, Justice Brandeis voiced his deep concern about police misconduct: “To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

124. See Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1352 (1996) (“A police officer’s word is a pillar of our criminal justice system. On the word of a police officer alone a grand jury may indict, a trial jury may convict, and a judge pass sentence.”) (quoting COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, THE CITY OF NEW YORK, COMMISSION REPORT (Milton Mollen, Chair) (1994)) [hereinafter MOLLEN REPORT].

125. See, e.g., Pam Belluck, *Officials Face Trial in Alleged Plot to Frame Man for Murder*, N.Y. TIMES, March 9, 1999, at A19 (reporting that seven prosecutors and sheriff’s deputies were being tried for perjury and obstruction of justice arising out of claims the deputies fabricated evidence to convict an innocent man, causing the defendant to spend ten years on death row).

126. See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 211-229 (1975).

127. See Perrin et al., *supra* note 3, at 725-27.

question is not whether police officers lie, but to what extent. Judges,¹²⁸ prosecutors,¹²⁹ commentators,¹³⁰ and police officers¹³¹ agree that police perjury is fostered by the exclusionary rule.

Far from preventing police misconduct, the exclusionary rule provides an incentive for the police officer to falsify reports or testimony to cover up any mistakes made during the course of the search. The officer knows that no personal liability will result from covering up his violation of the criminal's rights. He is, in effect, taking a gamble, and a very attractive one at that, for at best, if he

128. See Taylor, *supra* note 122, at 71-72 (quoting Judge Alex Kozinski of the Ninth Circuit Court of Appeals: "[The exclusionary rule] sets up a great incentive for people to lie"); see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 98 (1992) (asserting that a majority of judges and public defenders responding to survey believed that perjury was a main factor limiting the deterrent effect of the exclusionary rule).

129. See, e.g., H. RICHARD UVILLAR, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE* 116 (1988) (describing, from the viewpoint of a former prosecutor, the practice of police perjury in suppression hearings as "prevalent"); Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 (characterizing police perjury as "commonplace" from the vantage of a one-time prosecutor); see also MOLLEN REPORT, *supra* note 124, at 41-42. The Mollen Commission, which was impaneled to study police corruption in New York City, reported that "several former and current prosecutors acknowledged—'off the record'—that perjury and falsifications are serious problems in law enforcement." See *id.*

130. Two commentators in particular, Alan Dershowitz and Christopher Slobogin, have written at length about the pervasive problem of police perjury. See ALAN M. DERSHOWITZ, *REASONABLE DOUBTS* 49-64 (1996) (claiming that police perjury is common); ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi-xxii (1983) ("Almost all police lie about whether they violated the Constitution in order to convict guilty defendants."); Alan M. Dershowitz, *The Consequences of Perjury and Related Crimes*, 1998 WL 18089897 (reprint of testimony given before the United States House of Representatives Judiciary Committee on December 1, 1998) ("All objective reports point to a pervasive problem of police lying, and tolerance of the lying by prosecutors and judges, all in the name of convicting the factually guilty whose rights may have been violated and whose convictions might be endangered by the exclusionary rule."); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 ORE. L. REV. 775, 775-76 (1997) (claiming that some police lie "routinely and pervasively," including under oath to convict the guilty or frame the innocent); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1041-48 (1996) (describing the extensive problem of police perjury); see also Cloud, *supra* note 124, at 1355-56 (reporting on studies showing that "police officers commit perjury most often to avoid suppression of evidence"); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L. J. 1311, 1315 (1994) ("Police perjury occurs most frequently when officers are testifying about searches and seizures and witness interrogations.").

131. See MOLLEN REPORT, *supra* note 124, at 29-30, 36, 41-42 (reporting that police officers told the Commission that the practice of police lying in connection with gun and narcotics arrests was so common that it was given its own label: "testilying"). The Mollen Report also quoted officers as claiming that lying was necessary to "get a suspected criminal off the streets" and that lying to help convict a guilty person was justified. *Id.*; see also Jerome H. Skolnick, *Terry and Community Policing*, 72 ST. JOHN'S L. REV. 1265, 1266 (1998) (quoting the Police Commissioner of New York City as saying: "I . . . agree that there's a lot more police lying than most police are willing to concede").

commits an exclusionary rule violation and lies to cover it up, most likely his transgression will go unpunished, and the criminal will still be convicted. However, if the lie does not work, then the next possibility is that the evidence will be excluded, and the criminal will walk. But even under the worst-case scenario, in which the police officer himself is sued, he will likely suffer little or no civil liability. And in the event that the officer is found liable for substantial damages, the city or county will probably pay the damages for him.¹³² The officer may face administrative sanctions or, in an extremely rare instance, a perjury trial,¹³³ but the likelihood of either succeeding is slim, because most perjury trials turn on a decision of credibility between an officer and an accused criminal.

No matter how low the incidence of police lying, a remedy which encourages police perjury to cover up mistakes is at odds with the goals of the exclusionary rule: deterrence of police misconduct and preservation of judicial integrity. Under the Pepperdine Proposal, an officer could be *personally* liable for civil penalties for violating a suspect's rights.¹³⁴ This provides an incentive to be particularly careful in protecting individual's rights, thus diminishing situations in which an officer would have an incentive to lie.

Levenson pointed out in her article that the threat of personal liability could increase, not decrease, the officer's incentive to lie about violations of individual rights.¹³⁵ We disagree for one fundamental reason. Under our proposal's good faith exception,¹³⁶ the officer who commits an honest, but accidental, mistake and violates an individual's rights faces no personal liability.¹³⁷ Indeed our proposal expands the current good faith exception beyond *Leon*¹³⁸ and it therefore provides more protection for police officers.

Moreover, the criticisms about an increased risk of perjury miss an important point. Even if a police officer's incentive to commit perjury may not be reduced by our proposal, what is likely to be greatly diminished is the extent to which judges, prosecutors, and others will have an incentive to "wink" at the perjury. Under the current system, judges are discouraged from critically examining police testimony because a finding that the officer is lying will result in the exclusion of probative evidence concerning criminal activity. Uncritical acceptance of police officer testimony preserves the admissibility of evidence and is unlikely to be disturbed on appeal because appellate judges give deference to a lower court's

132. See *Board of the County Comm'rs v. Brown*, 117 S. Ct. 1382, 1388 (1997) (Breyer, J., dissenting) (citing to state statutes that provide for indemnification of government employees).

133. See Younger, *supra* note 129, at 596 ("[T]he policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.").

134. See Perrin et al., *supra* note 3, at 744.

135. See Levenson, *supra* note 9, at 881.

136. See Perrin et al., *supra* note 3, at 746.

137. See *id.*

138. 468 U.S. 897, 922-24 (1984) (adopting good faith doctrine for searches conducted by police in reliance on search warrant later ruled invalid).

assessment of witness credibility.¹³⁹ We do not suggest that all, or even most, judges uncritically accept perjured testimony, and the extent to which this occurs is understandably difficult to determine. But studies other than our own have acknowledged that courts tolerate some amount of police officer perjury to avoid suppressing evidence.¹⁴⁰ At a minimum, our proposal should drastically reduce any incentive judges may have to uncritically accept police officer testimony. This will lead to better enforcement of Fourth Amendment rights. Furthermore, as judges and prosecutors become more willing to recognize and punish police officer perjury, we may actually see a reduction in the number of officers who are willing to risk a perjury conviction in order to avoid a finding that they acted in violation of the Fourth Amendment.

B. *The Efficiency of the Pepperdine Proposal Versus Other Options*

Professors Fellmeth and Levenson attack the proposed administrative remedy as being inherently inefficient.¹⁴¹ Citing the GAO study, and characterizing the inefficiency of the current system as modest, Levenson postulated that our proposed administrative remedy would be much more cumbersome than the current system.¹⁴² Her analysis fails to recognize, however, that any possible inefficiencies will not impact the criminal justice system. Given that the bulk of suppression concerns would be funneled into the administrative agency, the criminal courts

139. See *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir. 1987) (reasoning that the exclusionary rule was intended to "deter unconstitutional conduct, not perjury. In the absence of a constitutional violation, there is no basis upon which to exclude relevant evidence.").

140. See Orfield, *supra* note 128, at 98; see also Comment, *Effect of Mapp v. Ohio on Police Search and Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95-96 (1968) (finding that after *Mapp*, police testimony of finding drugs out in the open nearly tripled); *supra* note 128 and accompanying text (discussing judge's acceptance of police perjury).

141. See Fellmeth, *supra* note 8, at 955; Levenson, *supra* note 9, at 880. Fellmeth also argues that an administrative agency outside the control of the judiciary is doomed to fail. See Fellmeth, *supra* note 8, at 954. With an unsubstantiated dismissal of the checks built into the proposed administrative remedy and ignoring the ultimate oversight function that judges have on the outcome of claims, Fellmeth attempts to portray a system in which corruption will run rampant absent complete judicial oversight. See *id.* Fellmeth brings a broad constitutional argument to a narrow topic. While checks and balances function to keep the federal government from spinning into the void, Fellmeth's criticism fails to recognize the longstanding practice of allowing the Executive branch a great deal of latitude in oversight of its own agencies. See *id.* The Justice Department has the most vigorous oversight role in the hundreds of Executive Branch agencies, yet oversight can always be taken to the judiciary in extreme cases. The proposed administrative remedy expressly provides for appellate review of its decisions. See Perrin et al., *supra* note 3, at 746. State Attorneys General also will have the authority to investigate and sanction any improprieties that might arise, at least to the extent that they oversee administrative agencies.

142. See Levenson, *supra* note 9, at 881-82.

would be largely freed of their responsibilities as they relate to the oversight of police misconduct.¹⁴³ Thus, the inefficiency of the current system would be effectively removed from the courts and placed into a separate sphere; the judicial system now unburdened could operate at a more efficient pace.

Fellmeth opined that because claims of egregious and intentional police misconduct will continue to be handled within the current system, the Pepperdine Proposal failed to gain ground; the courts will still be forced to deal with suppression motions.¹⁴⁴ However, under the Pepperdine Proposal claims of egregious and intentional police misconduct will be the only basis for exclusion.¹⁴⁵ Legitimate claims based on intentional police misconduct account for only a small percentage of suppression motions, and given the clear demarcation, illegitimate claims will be quickly weeded out.¹⁴⁶ Thus, any suggestion that every defendant will simply plead such conduct in order to make his claim in the criminal courts is meritless.

Arguments based on inefficiency concerns, especially Fellmeth's, underscore a key point about the role of our proposal. While efficiency is certainly one of the goals of this proposed remedy, another, and far more important goal, is the restoration of integrity to the judicial system.¹⁴⁷ Efficiency is important in any discussion of legal reform, but it would be reckless to propose efficiency at the cost of integrity. It is premature to criticize the efficiency of an agency which is not yet in existence. Moreover, efficiency is tangential to our proposal. Make no mistake, this proposal is about restoring integrity and proportionality in a system that has given way on both grounds.

C. *The Deterrent Effect of the Pepperdine Proposal*

Totten argued that the proposed administrative remedy carries with it the risk of over-deterrence of police officers.¹⁴⁸ He evoked the image of the hamstrung officer, afraid to execute his duties for fear of facing a civil penalty.¹⁴⁹ This is a legitimate concern. However, the good faith provision in our proposal largely insulates reasonable and well-intentioned officers from civil penalties.¹⁵⁰ Officers who have acted reasonably by both obtaining proper training and by making a good faith attempt to comport their conduct to the law will not be held liable under the

143. See Heffernan & Lovely, *supra* note 95, at 346 (reporting that about 70% of police errors in their study were unwitting ones).

144. See Fellmeth, *supra* note 8, at 953.

145. See Perrin et al., *supra* note 3, at 743.

146. See Cloud, *supra* note 130, at 1313.

147. See Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 835, 838 (1999) (arguing that the primary purpose of the exclusionary rule was not to deter police misconduct, but to implement constitutional judicial review in the Fourth Amendment context).

148. See Totten et al., *supra* note 7, at 903

149. See *id.* at 907.

150. See Perrin et al., *supra* note 3, at 746.

new proposed administrative remedy.¹⁵¹ Thus, officers who act in good faith will not have their hands tied under our proposal.¹⁵² Conversely, those officers who intentionally violate the rules will pay, as they should.

Our proposal shifts more of the responsibility for preserving individual rights directly onto individual officers, and thus provides more incentive for officers to be wary of violating those rights.¹⁵³ The indirect sanctions under the current exclusionary rule are so disconnected from officer responsibility that they are ineffectual as a deterrent.¹⁵⁴ In contrast, the proposed administrative remedy directly sanctions the officer with civil liability for his misconduct,¹⁵⁵ yet it also protects those officers whom society needs the most: those who are well-educated and well-intentioned. Proper training and proper motive will always be a viable defense under the proposed remedy,¹⁵⁶ and therefore, the threat that our proposal will chill officer performance is alleviated. The only officers our proposal will "over deter" are the officers who need greater deterrence: those who act unreasonably.

The proposed administrative remedy encourages police agencies to provide better training to their officers by extending civil liability to police agencies that fail to provide adequate training to their officers.¹⁵⁷ Thus, besides providing a remedy for those whose rights are violated by the police, the Pepperdine Proposal also has the much-desired effect of putting better-trained, more reasonable police officers on the streets.

D. The Nexus Between the Remedy and the Constitutional Wrong

Fellmeth argued that the remedy in the Pepperdine Proposal is too far removed from the wrong being committed on the individual and on society.¹⁵⁸ This criticism fails to recognize the primary purpose of the exclusionary rule, to deter police misconduct, and is puzzling in light of the extent to which the current rule fails to achieve its goals. The current system attempts to accomplish deterrence by excluding evidence at trial. Yet, to be effective, the officer's error and the reason for exclusion of the evidence must be communicated to the offending officer. Upon learning of the error and the resulting exclusion, the officer must be

151. *See id.* at 747.

152. *See id.*

153. Under our proposal, officers who violate a defendant's Fourth Amendment rights without good faith are subject to a liquidated damage award for each violation. *See id.* at 749.

154. *See id.* at 750.

155. *See id.*

156. *See id.* at 747.

157. *See id.* at 748.

158. *See Fellmeth, supra* note 8, at 956-57.

sufficiently chagrined at his error and the evidence exclusion to be motivated to take the steps necessary to do a better job next time around.¹⁵⁹ All too often one or more of these steps does not occur.¹⁶⁰ It would be nearly impossible to craft a system with a less direct sanctioning of unconstitutional conduct. The tremendous disconnection between the violation and the “remedy” is a primary reason the Rule is in need of reform.

Conversely, our proposal furthers the goal of deterrence by directly sanctioning the offending officer. In addition, by allowing an aggrieved individual a monetary remedy for violations of his Fourth Amendment rights, the Pepperdine Proposal provides a realistic remedy for redressing violations and an incentive to file claims. Without this incentive, direct sanctions would have little effect because few would file claims merely to compensate society.¹⁶¹

Nevertheless, Fellmeth decries compensation to the individual victim who has had his rights violated, and insists instead that society should be compensated.¹⁶² Recognizing that the violation of individual Fourth Amendment rights cannot be undone, a monetary remedy is a time-tested method of compensating for the violation. While violations of basic rights injure society as a whole, to propose a system which offers no redress to the individual who most acutely suffers the injury is contrary to any notion of justice. The dignity of the individual deserves true protection, even if that individual has committed a crime. Fellmeth’s argument fails to recognize that when the dignity of an individual is restored, even if it takes monetary compensation to do so, society benefits.

E. Intentional Violations and the Preservation of Judicial Integrity

Our proposal to limit the application of the exclusionary rule to intentional misconduct has been criticized as going both too far and not far enough and as being inefficient and imprecise. Professor Levenson suggests that judges will have a difficult time distinguishing between intentional and unintentional misconduct, thus adding another level of decision-making to the process.¹⁶³ However, our proposal radically simplifies the suppression hearing. Under exclusionary rule jurisprudence, courts focus initially on the existence of a violation. The critical question is whether the police officer conducted an unlawful search or seizure, wrongfully obtained a confession, or improperly denied a person his or her right to counsel. A court rarely finds it necessary to inquire about the officer’s state of

159. If officers feel chagrined, it is unlikely due to embarrassment over having evidence suppressed. Studies show that police officers are rarely criticized for having evidence that they seized suppressed. See SKOLNICK, *supra* note 126, at 223. In fact, officers who have their evidence suppressed often receive sympathy from peers and supervisors rather than criticism. See *id.*

160. See Perrin et al., *supra* note 3, at 722-23.

161. See *id.* at 751.

162. See Fellmeth, *supra* note 8, at 956-57.

163. See Levenson, *supra* note 9, at 884.

mind at the time of the wrongful conduct.¹⁶⁴ The Pepperdine Proposal, on the other hand, starts with the question of the officer's intent. It asks: Did the officer intentionally or knowingly conduct the wrongful search?¹⁶⁵ Only an affirmative answer to that question will justify application of the exclusionary rule.

The Pepperdine Proposal will ease a judge's burden of having to decide whether an officer acted in good faith or whether a particular action violated a defendant's rights. Instead, the court's only task will be to decide, based upon all of the circumstances, whether the officer's misconduct was intentional. Certainly, the court's decision will be no more burdensome than thousands of other decisions we ask judges to make. The fact that the decision may occasionally be difficult is no reason to avoid it, particularly if the distinction to be made is ultimately worth the effort. Here, we believe it is. Intentional misconduct by police, unlike mere negligent or even grossly negligent actions, poisons a criminal proceeding and imperils the public's trust and confidence in our justice system.¹⁶⁶ Such misconduct must not lead to any benefit to the state or any tacit approval by the court.

Ironically, our proposal's focus on the intent of law enforcement officers would actually extend application of the exclusionary rule to a new area. Since the Supreme Court decision in *Harris v. New York*¹⁶⁷ it has been accepted that information obtained from a defendant in violation of *Miranda* could be used to impeach the defendant, if he or she testified at trial inconsistently with the prior statement.¹⁶⁸ The Court in *Harris* stressed that police activity resulting in *Miranda* violations was not appropriate, but that the search for the truth was more important than excluding evidence to deter police.¹⁶⁹

After the Court's decision in *Harris*, some police departments adopted policies that encouraged police officers to question suspects outside of *Miranda*, by

164. See *Whren v. United States*, 517 U.S. 806, 813-14 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis . . . [T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.").

165. See Perrin et al., *supra* note 3, at 753-54.

166. See *Illinois v. Gates*, 462 U.S. 213, 258 (1983) (White, J., concurring) (citations omitted); *People v. Peevy*, 953 P.2d 1212, 1228-32 (Cal. 1998) (Mosk, J., concurring), *cert. denied*, 119 S. Ct. 595 (1998).

167. 401 U.S. 222 (1971).

168. See *id.* at 224.

169. See *id.*; see also *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) ("[T]he 'search for truth' outweighs the 'speculative possibility'" that excluding statements for impeachment purposes would deter future police misconduct in violating *Miranda*).

ignoring or disregarding invocations of *Miranda* rights.¹⁷⁰ These policies arise out of a belief that *Miranda* is merely a prophylactic and non-constitutional rule.¹⁷¹ The policies encourage officers to obtain any information possible, even if it violates *Miranda*, in order to enhance their investigative work and limit the ability of defendants to offer trial testimony at variance with their statement.¹⁷² In *People v. Peevy*,¹⁷³ the Supreme Court of California ruled that a statement obtained from a suspect can be used to impeach, even though the officers intentionally violated *Miranda* in getting the statement.¹⁷⁴

Our proposal, by focusing on the intent of the officers, would thwart this analysis. Judicial integrity suffers immeasurably when courts in the criminal justice system, including the courts of last resort, give their approval to police activity that intentionally and as a matter of policy ignores well-accepted and clearly stated rules. Justice Byron White, in his concurrence in *Illinois v. Gates*,¹⁷⁵ recognized the connection between preservation of judicial integrity and the exclusion of evidence seized through intentional misconduct as follows:

I do not dismiss the idea that the integrity of the courts may be compromised when illegally seized evidence is admitted, but I am convinced that the force of the argument depends entirely on the type of search or seizure involved. At one extreme, there are lawless invasions of personal privacy that shock the conscience, and the admission of evidence so obtained must be suppressed . . . Also deserving of exclusionary treatment are searches and seizures perpetrated in intentional and flagrant disregard of Fourth Amendment principles. But the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred in assessing the facts . . . or relied in good

170. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 133-38 (1998). Weisselberg describes at some length the extent to which police departments question suspects with little or no regard for *Miranda*. One particularly disturbing example is a training bulletin published by the California District Attorneys Association which encouraged officers to "continue questioning a suspect who has invoked his or her [*Miranda*] rights." See *id.* at 133.

The bulletin stated:

Despite having been on the books for twenty-nine years, *Miranda* is still widely misunderstood by cops and lawyers, and misconstrued by trial and appellate courts, who keep treating it as a constitutional imperative, the deliberate violation of which would be improper, unlawful, unconstitutional and poisonous to call [sic] resulting evidence. In fact, however, the warning and waiver components of *Miranda* were simply a court-created "series of recommended 'procedural safeguards' that were not themselves protected by the Constitution."

Id. (quoting Devallis Rutledge, QUESTIONING "OUTSIDE MIRANDA," DID YOU KNOW . . . (California Dist. Attorney's Ass'n, Sacramento, Cal.), June 1995 at 4).

171. See *Michigan v. Tucker*, 417 U.S. 433, 445-46 (1974) (referring to *Miranda* requirements as "prophylactic standards"); see also Weisselberg, *supra* note 170, at 133-35 (quoting police training material referring to *Miranda* as not constitutionally required).

172. See Videotape: Questioning "Outside *Miranda*" (Greg Gulen Productions 1990).

173. 953 P.2d 1212 (Cal. 1998), *cert. denied*, 119 S. Ct. 595 (1998).

174. See *id.* at 1219 ("[T]he *Harris* rule applies even if the individual police officer violates *Miranda* and *Edwards* by purposefully failing to honor a suspect's invocation of his or her right to counsel.").

175. 462 U.S. 213 (1983).

faith upon a warrant In these circumstances, the integrity of the courts is not implicated.¹⁷⁶

Similarly, in the *Peevy* case, Justice Mosk concurred in the court's judgment but wrote separately to caution courts about the importance of rejecting evidence obtained by police who intentionally violate *Miranda* or other protective safeguards.¹⁷⁷ He noted that the very existence of a law enforcement agency policy to obtain statements from suspects in violation of *Miranda* would prove that *Miranda* had failed to deter police misconduct and would necessarily require the exclusion of such evidence.¹⁷⁸ To admit such evidence, he concluded, "would exact a great cost from *Miranda*, and ultimately from the Fifth Amendment privilege against self-incrimination itself."¹⁷⁹

James McNally and James Bey claimed that officers of the Los Angeles and Santa Monica Police Departments continued questioning them after the two suspects invoked their *Miranda* rights. Allegedly, the officers told McNally and Bey that nothing they said could be used against them.¹⁸⁰ Of course, this statement was false under *Harris* and its progeny. Ultimately, both McNally and Bey were convicted.¹⁸¹ They subsequently sued the LAPD and SMPD and asserted claims under section 1983, claiming that the officers' interrogations violated their Fifth, Sixth, and Fourteenth Amendment rights.¹⁸² The trial court denied the defendants' Motions to Dismiss¹⁸³ and Motions for Summary Judgment and the case is currently on appeal to the Ninth Circuit.¹⁸⁴

Discovery in that case revealed that the police departments trained their officers to ignore invocations of *Miranda* and to continue questioning suspects.¹⁸⁵ Our proposal would require courts to examine the officer's intent and would require exclusion of this evidence, even for impeachment purposes, if the *Miranda* violations were knowing and intentional.

176. See *id.* at 259 n.14 (White, J., concurring) (citations omitted).

177. See *Peevy*, 953 P.2d at 1228 (Mosk, J., concurring).

178. See *id.* at 1231-32.

179. *Id.* at 1232.

180. See *California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327, 329-30 (C.D. Cal. 1996).

181. See *id.* at 330.

182. See *id.*

183. See *id.* at 338.

184. See Jenna Ward, *Do Police Have the Right Not to Live By "Miranda"*, RECORDER, Sept. 17, 1998, at 1 (reporting that the federal district judge denied the defendants' Motions for Summary Judgment in August of 1997 and that the court's ruling is currently on appeal to the Ninth Circuit).

185. See Weisselberg, *supra* note 170, at 133 (observing that the *Butts* "litigation uncovered training materials for law enforcement officials, teaching officers that it is permissible to question suspects who have invoked the right to counsel or the right to remain silent.").

One might argue that such an extension of *Miranda* would actually impugn judicial integrity. It would create the likelihood of criminal defendants offering perjured testimony at trial, secure in the knowledge that the prosecution could do nothing about it.¹⁸⁶ Yet, when police manipulate this loophole to justify disregarding a suspect's *Miranda* rights, the integrity of the entire criminal justice system suffers.¹⁸⁷ *Miranda* provides no protection for suspects if the police feel free to ignore its invocation to gain an advantage. We believe that preserving the system's integrity requires excluding evidence under such circumstances, even if that means risking an increase in perjured testimony by defendants. Our hope is that such an approach will cause police to exhibit greater respect for the rights of suspects, and thus, restore greater confidence in our system of justice. Thus, contrary to Levenson's criticisms,¹⁸⁸ our use of the intentional and knowing standard actually extends the exclusionary rule to new areas and properly focuses the attention of courts to the egregiousness of police conduct while preserving judicial integrity.

Unlike Levenson, Professor Fellmeth criticizes the intentional and knowing standard because it does not go far enough.¹⁸⁹ Our concern about Fellmeth's radical approach is two-fold: first, he fails to provide any means for preserving judicial integrity in the absence of some use of the exclusionary rule; and second, his proposed replacement remedy¹⁹⁰ is facially inadequate to protect the rights of injured suspects or to compensate for their injury. The retention of the exclusionary rule for instances of intentional police misconduct in combination with the proposal civil administrative remedy effectively addresses both of these concerns.

IV. THE IMPLEMENTATION OF THE PROPOSAL: THE STATES AS LABORATORIES

We believe that the civil administrative remedy is a logical, rational, and sensible solution to a perplexing problem. But this question remains: is it a usable solution that could be implemented by state and federal legislatures? Professor Harold Krent attempts to answer that question in his imminently practical article,¹⁹¹ which fills a gap left by our initial offering. Krent concludes that the proposal could be implemented consistent with Supreme Court authority, and that any

186. See *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (noting high importance of truthful testimony in trials and need for safeguards to ensure truthfulness of witnesses); *Harris v. New York*, 401 U.S. 222, 224 (1971) (allowing prosecutors to impeach a defendant for credibility purposes by using the defendant's prior conflicting statements).

187. See generally Weisselberg, *supra* note 170, at 109.

188. See Levenson, *supra* note 9, at 879.

189. See Fellmeth, *supra* note 8, at 953.

190. See *id.* at 960-61.

191. See Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 885 (1999).

resulting “lack of uniformity should be accepted as the price we pay for our system of federalism.”¹⁹²

We agree with Professor Krent and offer a few additional thoughts about the implementation of our proposal. Initially, we note that the Supreme Court has the final word on matters of constitutional law or interpretation.¹⁹³ The Court has made it clear, however, that the exclusionary rule is simply a “judicially created means of deterring illegal searches and seizures” and other police misconduct.¹⁹⁴ The exclusionary rule is not a personal constitutional right.¹⁹⁵ Although the Court’s opinion in *Mapp* left some doubt about the basis for the exclusionary rule,¹⁹⁶ subsequent decisions have been remarkably unambiguous. The Court, in *Calandra*,¹⁹⁷ *Stone*,¹⁹⁸ and *Scott*,¹⁹⁹ characterized the exclusionary rule as a judicially created remedy, not a personal constitutional right. Moreover, individual justices have on occasion demonstrated their beliefs about the nature of the exclusionary rule by soliciting or suggesting other means of enforcing Fourth

192. *See id.* at 875.

193. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-175 (1803).

194. *Pennsylvania Bd. of Probation & Parole v. Scott*, 118 S. Ct. 2014, 2019 (1998) (noting that the exclusionary rule is a “judicially created means of deterring illegal searches and seizures”) (citations omitted); *Stone v. Powell*, 428 U.S. 465, 486 (1976) (indicating that the exclusionary rule is not a personal constitutional right); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

195. *See Stone*, 428 U.S. at 486; *Calandra*, 414 U.S. at 348. Professor Morgan Cloud, in his symposium contribution, argues that we have made an important mistake in assuming that “the primary, and perhaps sole, justification for the exclusionary rule is deterring police misconduct.” *See Cloud*, *supra* note 147, at 835. His criticism demonstrates that “one man’s assumptions are another man’s facts.” We agree that judicial integrity was an important part of the Court’s rationale in adopting the exclusionary rule. *See Perrin et al.*, *supra* note 3, at 672-73, 753. Yet, it is equally clear, and unfortunate, that the Court has ignored the judicial integrity rationale and emphasized the deterrence rationale as the primary, if not sole, justification for the Rule. *Scott*, *Stone*, and *Calandra* all point to that undeniable fact. *See Scott*, 118 S. Ct. at 2019; *Stone*, 428 U.S. at 486; *Calandra*, 414 U.S. at 348. Professor Cloud criticizes these decisions, but he cannot magically wish them away. Moreover, our proposal seeks to recognize the important role of judicial integrity in instances of intentional police misconduct. *See Perrin et al.*, *supra* note 3, at 753.

196. *See Mapp v. Ohio*, 367 U.S. 643, 649 (1961). In *Mapp*, the Court made conflicting statements about the basis for the Rule. At one point it said: “the plain and unequivocal language of *Weeks*--and its later paraphrase in *Wolf*--to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.” *Id.* But elsewhere in the opinion it downplayed the Rule’s constitutional basis calling it a “judicially implied deterrent safeguard.” Professor Krent notes in his article that in *Mapp* “the Court’s plurality opinion equivocated as to the nature of the exclusionary rule.” Krent, *supra* note 191, at 860.

197. 414 U.S. at 348.

198. 428 U.S. at 486.

199. 118 S. Ct. at 2019.

Amendment rights.²⁰⁰ The distinction between right and remedy is critically important. As Krent points out, “when the Court formulates constitutional law in a common-law capacity, other actors may play a more direct role in constitutional lawmaking.”²⁰¹

In our context, those other actors would be state or federal legislatures. Our proposal, which includes the creation of a new administrative agency, would require a legislative enactment. But would the Supreme Court give its imprimatur to our proposal, allowing Congress or individual states to replace the exclusionary rule in instances of unintentional violations with a civil administrative remedy?

The answer to that question turns on the Rule’s remedial purpose, which is to deter illegal searches and seizures.²⁰² Presumably, any alternative remedy must provide comparable deterrence to comport with the Constitution. The Court has refused to apply the exclusionary rule when application of the rule would fail to deter police misconduct.²⁰³ At the same time, the Court has rejected application of the rule to a variety of nontrial contexts, including grand juries,²⁰⁴ habeas corpus,²⁰⁵ civil tax,²⁰⁶ civil deportation,²⁰⁷ and parole revocation hearings.²⁰⁸ Violations of rights of persons not charged with a crime cannot be deterred by a rule which applies only in a criminal proceeding. The Pepperdine Proposal, on the other hand, will apply to all police misconduct and impose direct consequences on the police officer who violates an individual’s rights.²⁰⁹ Therefore, the administrative remedy, in combination with retention of the exclusionary rule for intentional misconduct by police, will deter police misconduct more effectively than does the exclusionary

200. See *United States v. Leon*, 486 U.S. 897, 928 (1984) (Blackmun, J., concurring); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting). Justice Blackmun’s words in *Leon* have provided a kind of clarion call for the authors, prodding them to search for an effective alternative to the exclusionary rule. We have quoted Blackmun’s words in prior exclusionary rule articles. See Caldwell & Chase, *supra* note 103, at 45 (looking for alternatives to the exclusionary rule); L. Timothy Perrin, et al., *An Invitation to Dialogue: Exploring the Pepperdine Proposal to Move Beyond the Exclusionary Rule*, 26 PEPP. L. REV. 789, 789 n.1 (1999). In *Bivens*, Chief Justice Burger’s dissent urged congressional action to replace the exclusionary rule. He stated: “I conclude . . . that an entirely different remedy is necessary but it is one that in my view is as much beyond judicial power as the step the Court takes today. Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated.” *Bivens*, 403 U.S. at 422.

201. Krent, *supra* note 191, at 858.

202. See *supra* notes 3-4 and accompanying text.

203. See *Arizona v. Evans*, 514 U.S. 1, 16 (1995) (extending good faith exception to clerical errors by court employees); *Massachusetts v. Shepard*, 468 U.S. 981, 988-91 (1984) (applying the good faith doctrine to judicial error in issuing a warrant); *Leon*, 468 U.S. at 922-24 (adopting a good faith exception to the exclusionary rule when police rely on a warrant later ruled invalid.)

204. See *United States v. Calandra*, 414 U.S. 338, 354 (1974).

205. See *Stone v. Powell*, 428 U.S. 465, 494 (1976).

206. See *United States v. Janis*, 428 U.S. 433, 454 (1976).

207. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984).

208. See *Pennsylvania Bd. of Probation & Parole v. Scott*, 118 S. Ct. 2014, 2022 (1998).

209. Perrin et al., *supra* note 3, at 750-51.

rule.

Our proposal adds protection for police by extending the current good faith doctrine to all conduct by police officers.²¹⁰ However, the proposal simultaneously broadens potential civil liability for all unreasonable misconduct engaged in by police officers, including liquidated damages for each violation and easy access for each complainant.²¹¹ The strident opposition of Totten and his co-authors to the proposal and their concern that the proposal would over deter police²¹² demonstrate the proposal's strong deterrent effect. Moreover, the fact that fewer than five percent of the law enforcement officers who responded to our study agreed that the exclusionary rule should be replaced with a monetary recovery for victims suggests that the proposal will produce a consequence more likely to deter police.²¹³

Krent's conclusion that the Supreme Court would defer to state or federal legislatures enacting our proposal gains support from a recent Fourth Circuit decision concerning *Miranda* rights. In *United States v. Dickerson*²¹⁴ the appellate court held that the admissibility of confessions is controlled by an often ignored federal statute²¹⁵ rather than the Supreme Court's holding in *Miranda*.²¹⁶ Congress passed the statute in 1968,²¹⁷ only two years after *Miranda*.²¹⁸ The statute purports to make voluntariness the sole test for admitting confessions in federal court.²¹⁹ The Fourth Circuit rested its opinion on the principle that Congress can override judicially created rules of evidence and procedure that are not constitutionally required and concluded that *Miranda* is not a constitutionally mandated rule.²²⁰ Thus, the statute was a legitimate exercise of congressional authority.²²¹

In the same way *Miranda* was created by the Supreme Court as a means of enforcing Fifth Amendment rights, so is the exclusionary rule a court created rule of enforcement. In the same way Congress chose to override the Court's creation

210. See *id.* at 746-47.

211. See *id.* at 750-51.

212. See Totten et al., *supra* note 7, at 894.

213. See Perrin et al., *supra* note 3, at 732, 744 tbl.7.

214. 166 F.3d 667 (4th Cir. 1999).

215. See 18 U.S.C. § 3501(a) (1994). The statute provides, in pertinent part, as follows: "[A] confession . . . shall be admissible in evidence if it is voluntarily given." *Id.*

216. See *Dickerson*, 166 F.3d at 671.

217. See 18 U.S.C. § 3501(a).

218. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

219. See 18 U.S.C. § 3501(a).

220. See *Dickerson*, 166 F.3d at 690-91. The Fourth Circuit noted that the Supreme Court has not referred to the *Miranda* warnings as a constitutional right, but has invited Congress and the states to develop their own safeguards. See *id.* at 691. The court concluded that the plain language of the statute reflected its intention to overrule *Miranda* and restore voluntariness as the sole test for the admission of confessions. See *id.* at 686-87.

221. See *id.* at 692.

in *Miranda*, it could also choose to modify or completely override the exclusionary rule. Even if the Supreme Court ultimately decides that the statute's voluntariness test does not adequately replace the important protective function served by *Miranda*,²²² our proposal, with its more direct and comprehensive deterrence of police misconduct than the exclusionary rule, actually strengthens the protective function of the Rule.

Within the framework of the Constitution, Congress could enact our proposal to partially replace the exclusionary rule with a civil administrative remedy. Congressional legislation would be the most effective means of implementing the proposal and ensuring that the goals intended by the exclusionary rule, deterrence and judicial integrity, are uniformly met. Indeed, only an act of Congress would provide the possibility of national uniformity in redressing police misconduct under the Fourth, Fifth, or Sixth Amendment. Through appropriate legislation Congress could put into place the agency to administer the civil administrative remedy, and could either mandate state participation in the new scheme using its power to protect individual rights under section five of the Fourteenth Amendment,²²³ or encourage such participation using its spending powers under Article I, Section 8 of the Constitution.²²⁴ Congress already uses those powers to regulate a broad array of activities that are non-federal. Congress has relied on its enforcement powers under the Fourteenth Amendment to enact legislation such as the Civil Rights Act of 1964²²⁵ and subsequent anti-discrimination laws that prohibit discrimination on the basis of race, ethnicity, gender, age, and disability (among others).²²⁶ Furthermore, Congress has relied on its spending powers to encourage states to enact into law a variety of provisions, including legislation raising the legal drinking age to twenty-one.²²⁷

222. The Fourth Circuit's decision may be susceptible to challenge on procedural grounds. Despite the fact that neither the prosecution nor the defense raised the statute in the lower court proceedings, the Fourth Circuit considered the statute anyway. The court did so on the suggestion of an amicus, a law professor, Paul Cassell. *See id.*

223. *See* U.S. CONST. amend. XIV, § 5. Under the incorporation doctrine, the Fourth, Fifth, and Sixth Amendments apply to the states through the provisions of the Fourteenth Amendment. *See* JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION* 43-44 (1997) (discussing the Supreme Court's incorporation of the protections contained in the Fourth, Fifth, and Sixth Amendments, beginning with *Mapp v. Ohio*). Thus, the rights protected by the exclusionary rule apply to the states with equal force and Section 5 of the Fourteenth Amendment empowers Congress to enforce those rights. Section 5 provides as follows: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5.

224. *See* U.S. CONST. art. I, § 8, cl. 1. The Spending Clause provides that Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." *See id.*

225. *See* 42 U.S.C.A. § § 2000A-2000h-6 (1994 & Supp. 1998).

226. *See, e.g.*, 29 U.S.C. § § 621-634 (1994) (Age Discrimination in Employment Act); 42 U.S.C. § § 12101-1247 (Americans With Disabilities Act).

227. *See* 23 U.S.C. § 158 (1990); *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987). In *Dole*, the Supreme Court identified four restrictions on Congress' broad spending powers: (1) the expenditure must be "intended to serve general public purposes"; (2) any conditions on the receipt of funds by the

Even if Congress does not legislate the proposal into existence, individual states could implement the proposal. The resulting lack of uniformity should not pose any constitutional impediment to states that choose to enact the proposal. At least nine states have not adopted the good faith doctrine formulated in *Leon*.²²⁸ Another state has created a good faith exception for arrests²²⁹ and the knock and notice requirement,²³⁰ and other states do not apply the exclusionary rule to evidence obtained by police as a result of arrests made with probable cause but in violation of state law.²³¹

Beyond Fourth Amendment issues, matters of great importance are regularly left to the states to decide for themselves, provided they do so within the framework of the Constitution. The diversity of state law governing issues such as abortion,²³² physician-assisted suicide,²³³ and the use of marijuana for medical

states must be unambiguous; (3) any condition placed on receipt of federal funds must be related to the federal interest in particular national projects or programs; and (4) other constitutional provisions must not bar the conditional grant of funds. *See id.* at 207-08. The Court held that it was a constitutional exercise of Congressional spending powers to require that states raise the legal drinking age to 21 before they could receive a certain percentage of federal highway funds otherwise allocable to the states. *Id.* at 205. The Court stated: "Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement of state action found in [the pertinent statute] is a valid use of the spending power." *Id.* at 212. Other examples of Congress using its spending powers to "encourage" states to enact legislation deemed to be in the national interest abound. *See, e.g.,* 23 U.S.C. § 159(a) (Supp. 1998) (requiring Secretary of Transportation to withhold highway funds from states unless they enacted and enforced laws requiring the suspension or revocation of the driver's license of each individual convicted of a drug offense); *id.* § 161 (requiring withholding of state funds in absence of legislation "that considers an individual under the age of 21 who has a blood alcohol concentration of 0.02 percent or greater while operating a motor vehicle in the State to be driving while intoxicated").

228. *See State v. Marsala*, 579 A.2d 58, 59 (Conn. 1990); *Gary v. State*, 422 S.E.2d 426, 428 (Ga. 1992); *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992); *Commonwealth v. Upton*, 476 N.E.2d 548, 556 (Mass. 1985); *State v. Canelo*, 653 A.2d 1097, 1102 (N.H. 1995); *State v. Novembrino*, 519 A.2d 820, 822-23 (N.J. 1987); *People v. Bigelow*, 488 N.E.2d 451, 455 (N.Y. 1985); *State v. Carter*, 370 S.E.2d 553, 554 (N.C. 1988); *Commonwealth v. Edmunds*, 586 A.2d 887, 888 (Pa. 1991).

229. *See Harvey v. State*, 469 S.E.2d 176, 178-79 (Ga. 1996).

230. *See Neal v. State*, 325 S.E.2d 457, 459 (Ga. Ct. App. 1984).

231. *See People v. Burdo*, 223 N.W.2d 358, 360 (Mich. Ct. App. 1974) ("[Because] probable cause did exist, defendant's arrest was not constitutionally invalid, but rather merely statutorily illegal; therefore the per se exclusionary rule is not applicable."); *State v. Eubanks*, 196 S.E. 2d 706, 709 (1973) (exclusionary rule does not apply to arrest that was statutorily illegal, but constitutionally valid).

232. *See Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (holding that "[o]nly where state regulation imposes an undue burden on a woman's ability to make [the abortion] decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause"). The undue burden test adopted in *Casey* has resulted in the enactment of a variety of abortion regulations by states, including, among others, waiting periods, parental consent, and informed consent requirements. *See id.* at 881-87, 899-900 (upholding constitutionality of Pennsylvania's informed consent, waiting period provisions, and parental consent requirements); *see also* MINN. STAT. ANN. § 145.412 (West 1998)

purposes²³⁴ reflects the power of states in a federalist society to retain all authority not explicitly divested by the federal government.²³⁵ The Supreme Court has repeatedly described the relationship between the federal government and the states as one in which “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²³⁶

States are free to propose laws and create rights or remedies provided they do not conflict with the federal Constitution. The exclusionary rule is not constitutionally mandated, thus clearing the way for implementation of our proposed civil administrative remedy. Any resulting lack of uniformity should be welcomed, not feared, as we move toward a stronger, more effective criminal

(providing that abortions may be performed before viability with consent of patient and after viability if necessary to preserve the life or health of the patient); VA. CODE ANN. §§ 18.2-72-18.2-74 (Michie 1996) (providing for lawful abortions during the first two trimesters of pregnancy, but prohibiting abortion during the third trimester unless “continuation of the pregnancy is likely to result in the death of the woman” or substantial physical or emotional injury); VA. CODE ANN. §§ 18.2-74.2 (Michie Supp. 1998) (prohibiting “partial birth abortion that is not necessary to save the life of a mother”); VA. CODE ANN. §§ 18.2-76 (Michie Supp. 1998) (requiring informed consent before all abortions).

233. See, e.g., N.Y. PENAL LAW § 120.30 (McKinney 1997) (providing that physician-assisted suicide is a felony crime); Death With Dignity Act, OR. REV. STAT. § 127.810-897 (1997) (providing that terminally ill adults residing in Oregon may obtain a lethal prescription from an Oregon physician); WASH. REV. CODE ANN. § 9A.36.060 (West 1988) (providing that physician-assisted suicide is a felony crime). The New York and Washington statutes were recently upheld by the Supreme Court. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997) (upholding Washington statute that prohibited physician assisted suicide); *Vacco v. Quill*, 521 U.S. 793 (1997); Robert M. Hardaway et al., *The Right to Die and the Ninth Amendment: Compassion and Dying After Glucksberg and Vacco*, 7 GEO. MASON L. REV. 313 (1999) (discussing the right to die under a Ninth Amendment analysis).

234. See, e.g., CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 1999) (providing that the state cannot impose civil or criminal penalties on a patient with an illness for which marijuana provides relief if such patient is found in possession of or growing marijuana for personal use); PA. STAT. ANN. tit. 35, § 780-104 (West 1993 & Supp. 1998) (making no allowance for the medical use of marijuana); TEX. HEALTH & SAFETY CODE ANN. §§ 481.111(c), 481.201-205 (West 1992) (creating a research program through the Texas Board of Health to allow the controlled use of marijuana for medicinal purposes).

235. See THE FEDERALIST No. 32, at 203 (Alexander Hamilton) (Issac Kramnick, ed. 1987) (commenting that “the rule that all authorities, of which the states are not explicitly divested in favor of the Union, remain with them in full vigor is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of [the Constitution]”).

236. See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Brandeis described the role of states as “one of the happy incidents of the federal system.” See *id.* In the time since *Liebman*, the Court has regularly invoked Brandeis’ words. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (quoting Brandeis’ dissent in *Liebman*); *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (quoting Brandeis’ dissent in *Liebman* in exclusionary rule case and concluding: “this Court should select a jurisdictional presumption that encourages States to explore different means to secure respect for individual rights in modern times”); *United States v. Virginia*, 518 U.S. 515, 600 (1996) (Scalia, J., dissenting) (quoting Brandeis’ dissent in *Liebman* and noting the Court’s failure to allow Virginia to reintroduce the novel disposition of single sex education); *United States v. Lopez*, 514 U.S. 549, 581 (noting that when there is “considerable disagreement” about how to accomplish a goal, “the theory and utility of our federalism is revealed for the states may perform their role as laboratories for experimentation to devise various solutions”).

justice system.

V. APPLICATION OF THE PEPPERDINE PROPOSAL

Our proposal to move beyond reliance on the exclusionary rule as the primary remedy for police misconduct has raised a number of valid and practical concerns on the part of academics and practitioners alike. Will the proposal work? Is it too costly? Does it shift the balance too far for or against effective law enforcement? And, perhaps most importantly, what would the proposal look like in actual cases? This section will attempt to move our proposal beyond the theoretical law review world and into the practical world of police and law enforcement.

We utilize the facts from five exclusionary rule cases and one police search that did not lead to a prosecution to demonstrate the critical differences between our proposal and current practice. To provide a comprehensive overview of our proposal the selected cases involve varying degrees of police misconduct, from the officer acting in good faith to the officer intentionally violating the rights of suspects. We hope to demonstrate that our civil administrative remedy will effectively deter police misconduct,²³⁷ provide an incentive for victims to hold police accountable for Fourth Amendment violations,²³⁸ increase judicial efficiency,²³⁹ make the remedy for a constitutional violation proportionate to the misconduct,²⁴⁰ and eliminate the high societal cost associated with the exclusionary rule.²⁴¹

A. *Intentional Violations: Mapp v. Ohio*

On May 23, 1957,²⁴² three Cleveland police officers went to the home of Dollree Mapp on the mistaken belief that a suspect in a recent bombing and paraphernalia related to the bombing were inside her house.²⁴³ Mapp would not let them in without a warrant.²⁴⁴ Three hours later, unaware that they were about to make history, seven officers returned to Mapp's house and knocked the door down to get inside.²⁴⁵ Mapp's attorney arrived just after the officers, but was not allowed

237. See Perrin et al., *supra* note 3, at 750-51.

238. See *id.* at 751.

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

240. See *id.* at 752.

241. See *id.* at 752-53.

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

243. See *id.* at 644.

244. See *id.*

245. See *id.*

to see his client.²⁴⁶ Mapp demanded to see a search warrant.²⁴⁷ When an officer held up a piece of paper he falsely claimed was a warrant, Mapp grabbed it and a struggle ensued.²⁴⁸ Mapp was handcuffed and dragged up a flight of stairs to her bedroom.²⁴⁹ Police then searched her dresser, a chest of drawers, her closet, her daughter's bedroom, the kitchen, and her basement.²⁵⁰ During that search, officers found books and pictures that led to Mapp's conviction for the violation of an Ohio obscenity statute.²⁵¹ The Supreme Court reversed Mapp's conviction and applied the exclusionary rule to the states, resulting in the dismissal of charges.²⁵²

Applying the Pepperdine Proposal to these facts, Mapp would again file a motion to suppress the books and photographs.²⁵³ She would then have the burden of proof to make a prima facie case that her rights were knowingly and intentionally violated.²⁵⁴ Only after Mapp had made such a showing would the state be required to respond to the motion.²⁵⁵

Assuming she made the required showing, an evidentiary hearing would follow in which the burden would shift to the state to show that the officers did not knowingly and intentionally violate Mapp's rights.²⁵⁶ The presiding judge would not need to determine at this point whether the officers acted in good faith.²⁵⁷ If the officers violated her rights knowingly and intentionally, the evidence must be suppressed.²⁵⁸ However, if the court finds that the officers did not violate Mapp's rights knowingly and intentionally, the evidence would be admissible.²⁵⁹

In *Mapp* the officers held up a fake warrant, arrested Mapp when she tried to grab it, and searched her entire house without a warrant. The egregious nature of the police misconduct demonstrates a knowing and intentional violation of Mapp's Fourth Amendment rights, and the trial court should apply the exclusionary rule to suppress any evidence seized from Mapp's house.²⁶⁰ Thus, in the criminal proceeding, the end result produced by the civil administrative remedy would be no different for Mapp than under the current exclusionary rule application.

However, under current practice, the exclusionary rule is Mapp's primary

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.* at 644-45.

250. *See id.* at 645.

251. *See id.* at 644-45. The statute, § 2905.34 of the Ohio Revised Code, made it a felony to possess obscene, lewd, or lascivious books or pictures. *See id.* at 643.

252. *See id.* at 660.

253. *See Perrin et al., supra* note 3, at 744-46.

254. *See id.*

255. *See id.*

256. *See id.* at 744-47.

257. *See id.*

258. *See id.* at 746-47.

259. *See id.*

260. *See id.*

remedy and existing civil remedies are relatively ineffectual.²⁶¹ Under our proposal, the judge in the criminal proceeding would advise Mapp of the available civil administrative remedy, including damages for any violations of her rights by the police.²⁶² Mapp would begin the process by filing a written verified complaint with the agency responsible for enforcing this remedy.²⁶³ She would file her claim against the officers who engaged in the wrongful conduct and against the Cleveland Police Department if its customs or policies played a part in the police misconduct. The statute of limitations on such a claim would be one year from the violation.²⁶⁴ However, the statute would be tolled during an ongoing criminal proceeding, to allow resolution of the matter even if the motion to suppress was denied and the case proceeded to trial.²⁶⁵

Because the trial judge held that a knowing and intentional constitutional violation had occurred, the only issue in the administrative proceeding would be damages.²⁶⁶ Any ruling made by a criminal trial judge regarding whether a knowing and intentional violation had occurred, subject to reconsideration or appeal, would be binding on the administrative court.²⁶⁷ Mapp would be entitled to recover both compensatory and punitive damages.²⁶⁸ Punitive damages, limited by a cap,²⁶⁹ would be recoverable in the administrative proceeding only for knowing and intentional violations, thus providing the strongest possible deterrent of egregious police misconduct.²⁷⁰

Finally, the administrative law judge would be authorized to enter cease and desist orders against the individual officers or the Cleveland Police Department after a determination that they engaged in a policy or pattern of illegal conduct.²⁷¹ The judge would also have the authority to enforce these orders through contempt power and to sanction anyone who violated the order.²⁷² Thus, under our proposal, with respect to knowing and intentional violations by police, victims such as Mapp would receive the benefits of the exclusionary rule in addition to receiving compensatory and punitive damages.

261. *See id.* at 737-40 (describing significant limitations of existing civil remedies).

262. *See id.* at 754.

263. *See id.* at 745.

264. *See id.* at 747-48.

265. *See id.*

266. *See id.* at 747, 754.

267. *See id.*

268. *See id.* at 748-49.

269. *See id.* at 749.

270. *See id.* at 748-749.

271. *See id.*

272. *See id.* at 749-50.

B. Unintentional Violations: United States v. Reilly

Kevin Reilly owned a 10.71 acre farm in New York, which he used to grow marijuana.²⁷³ Two New York police officers discovered Reilly's illegal activities and entered his property in 1991 without a warrant.²⁷⁴ They stumbled across approximately twenty marijuana plants growing in a wooded area located about 125 feet from a cottage.²⁷⁵ The officers then left the property, obtained a search warrant, and returned to Reilly's property to seize the marijuana plants and marijuana paraphernalia.²⁷⁶

Although a warrant was issued, the officers failed to inform the magistrate of their previous warrantless search of the property one year earlier. The officers further failed to inform the judge that they had actually entered the property to find the marijuana, and omitted many characteristics of the property, providing only a bare bones description of the property.²⁷⁷ In subsequent federal court proceedings,²⁷⁸ the district judge²⁷⁹ and Second Circuit rejected the officers' good faith claims.²⁸⁰ The Second Circuit noted that "[t]he good faith exception to the exclusionary rule does not protect searches by officers who fail to provide all potentially adverse information to the issuing judge."²⁸¹ In seeking the warrant, the officers omitted information that was clearly material to the legality of the search, particularly relating to the issue of curtilage. The Second Circuit found that the marijuana plants were within the property's curtilage,²⁸² which the trial judge

273. *United States v. Reilly*, 76 F.3d 1271, 1273 (2d Cir. 1996).

274. *See id.* at 1273.

275. *See id.* The farm consisted of a main residence and a cottage about 375 feet away. *See id.* Reilly planted a lawn throughout the property and hundreds of trees. *See id.* He also put in a pond and gazebo by the cottage. *See id.* The property was fenced in on three sides and had a hedgerow and trees along one border. *See id.* The Second Circuit described the property as "well-maintained and pastoral." *See id.* at 1273-74.

276. *See id.* at 1274. The officers found fifteen plants in the cottage and about 115 growing in the wooded area. *See id.* In Reilly's residence they seized one plant, some harvested marijuana, and implements for weighing and bagging. *See id.*

277. *See id.* at 1280. The search warrant was issued on the basis of the affidavit of one of the officers. *See id.* The officer stated in the affidavit that he "walked along Reilly's property until [he] found an area where marijuana plants were grown" but failed to describe the area in any detail. *See id.*

278. Reilly was first prosecuted in state court, wherein he pled guilty to criminal possession of marijuana and unlicensed growing of marijuana. *See id.* at 1274. He challenged the search on appeal, however, and the Appellate Division of the New York Supreme Court found that the search of Reilly's property was illegal under New York's open fields doctrine. *See id.* He was then indicted in federal court and charged with manufacture of marijuana. *See id.*

279. *See United States v. Reilly*, 875 F. Supp. 108, 121 (N.D.N.Y. 1994), *aff'd*, 76 F.3d 1271, 1283 (2d Cir. 1996) (holding that the search was an illegal invasion of Reilly's curtilage).

280. *See Reilly*, 76 F.3d at 1283.

281. *Id.* at 1280.

282. *See id.* at 1281. The Second Circuit concluded: "[T]hough the boundaries of curtilage are naturally and necessarily imprecise, the officers undertook a search that caused them to invade what they could not fail to have known was potentially Reilly's curtilage. They then failed to provide Judge

would have known before issuing the warrant if he had been given sufficient information about the property by the officers.²⁸³ Moreover, the issuance of the warrant was premised on information obtained from the illegal prior search made earlier the same day.²⁸⁴

Under our proposal, the issue for the trial judge would not be whether the officers acted in good faith, but whether the officers' misconduct was knowing and intentional.²⁸⁵ The prosecution would argue that the officers did in fact obtain a search warrant, rather than seizing the marijuana at the time of their initial discovery. The prosecution would further argue that the officers were reasonably under the mistaken belief that the marijuana plants were not within the curtilage of the property in that they were more than 200 feet from the residence.²⁸⁶ The Second Circuit recognized in its opinion the difficulty officers face in determining the parameters of curtilage.²⁸⁷ Thus, their conduct may have been negligent or grossly negligent, but it did not rise to the level of knowing and intentional. The defendant would simply reiterate the successful arguments made to the Second Circuit—that the description of the defendant's farm was calculated to mislead²⁸⁸ and that the officers' prior search of the farm was illegal.²⁸⁹

We believe that the facts in *Reilly* exemplify police misconduct that falls short of the knowing and intentional standard, but also falls outside of the good faith exemption. Thus, under our proposal the court would admit the evidence at trial, contrary to the actual result in the *Reilly* case. However, *Reilly* would have access to the civil administrative remedy to recover damages for the unreasonable police misconduct of wrongfully searching his property.²⁹⁰ It is this situation, involving police misconduct that falls between the good faith and intentional extremes,²⁹¹ in

Barrett with an account of what they did." *Id.*

283. *See id.* at 1280. The Second Circuit noted that without a more detailed description of the land "the issuing judge could not possibly make a valid assessment of the legality of the warrant that he was asked to issue." *Id.*

284. *See id.* "[T]he officers never gave Judge Barrett a full account of what they did. And without such an account, Judge Barrett could not possibly decide whether their conduct was sufficiently illegal and in bad faith as to preclude a valid warrant." *Id.*

285. *See Perrin et al., supra* note 3, at 743.

286. The Second Circuit noted the imprecise nature of the curtilage analysis and recognized that "[t]he distance between the marijuana plants and the main residence . . . is admittedly large." *Reilly*, 76 F.3d at 1277.

287. *See id.*

288. *See id.* at 1280.

289. *See id.*

290. *See Perrin et al., supra* note 3, at 744-53 (discussing the civil administrative remedy process).

291. For another example of this level of misconduct see *United States v. De Leon-Reyna*, 898 F.2d 486 (5th Cir. 1990). In that case, a Border Patrol Agent stopped a welding truck based on erroneous information about the truck's license plate registration. *See id.* at 487. The officer obtained the

which our proposal has the most significant impact on current practice. Rather than obtaining a windfall from the exclusionary rule and having his charges dismissed because of police errors, Reilly would be prosecuted, and likely convicted, for illegally growing marijuana.²⁹² At the same time, he would have relatively easy access to the administrative remedy, including counsel provided by the agency itself, and the right to recover damages for the constitutional wrong he suffered.²⁹³ At a minimum, Reilly would be entitled to liquidated damages for each wrong committed by the police, regardless of his actual economic or non-economic damages.

C. *Violations Made in Good Faith: United States v. Leon*

In August of 1981, a confidential informant of unproven reliability told Burbank Police officers that two persons he knew as Armando and Patsy were selling cocaine and methaqualone from their home.²⁹⁴ The informant apparently witnessed Patsy sell methaqualone five months earlier and saw her in possession of a large amount of cash.²⁹⁵ The informant also indicated that Armando and Patsy kept only small amounts of the drugs at their home and stored larger quantities elsewhere.²⁹⁶ On the basis of this information, officers began an investigation of the residence identified by the informant and two others as well.²⁹⁷

During the investigation, officers learned of Albert Leon's involvement²⁹⁸ and of his prior arrest on drug charges.²⁹⁹ Another informant stated that Leon was heavily involved in drug importation.³⁰⁰ Officers observed numerous instances of what they believed to be drug transactions at the residence identified by the first informant and at two other residences, one of which was Leon's residence.³⁰¹ On the basis of these and other observations,³⁰² an "experienced and well-trained

erroneous information because he failed to use code words in communicating the license plate number, contrary to agency policy, resulting in the dispatcher misunderstanding the license plate of the truck. *See id.* at 488. After the wrongful stop, the agent discovered twelve hundred pounds of cocaine in the truck. *See id.* The Fifth Circuit found that the agent "was negligent for failing to follow proper radio procedures," and thus, there was no proper basis for the initial stop. *See id.* Under our proposal, the drugs would be admissible at trial because the agent's misconduct was unintentional. *See Perrin et al., supra* note 3, at 743.

292. Reilly initially pled guilty to the state court charges. *See Reilly*, 76 F.3d at 1274.

293. *See Perrin et al., supra* note 3, at 745, 749.

294. *United States v. Leon*, 568 U.S. 897, 901 (1984).

295. *See id.*

296. *See id.*

297. *See id.*

298. *See id.* at 901-02.

299. *See id.*

300. *See id.* at 901.

301. *See id.* at 901-02.

302. *See id.* Officers also observed two other men whom officers believed were involved board separate flights to Miami. *See id.* When the men returned together, a consensual search of their luggage revealed a small amount of marijuana. *See id.*

narcotics investigator" prepared an application for a warrant to search the three residences and automobiles belonging to all of the suspects.³⁰³ This application was reviewed by several Deputy District Attorneys.³⁰⁴ A search warrant was issued and its execution led to the discovery of large quantities of drugs and the subsequent arrest of the three subjects.³⁰⁵

The defendants filed motions to suppress the drugs and the District Court granted them in part.³⁰⁶ The judge granted the motion because he found that there was not sufficient probable cause to justify the issuance of the warrant.³⁰⁷ The District Court denied the government's Motion for Reconsideration and the Court of Appeals for the Ninth Circuit affirmed the ruling,³⁰⁸ rejecting the government's request to create a good faith exception to the exclusionary rule when evidence is seized in a reasonable, good faith reliance on a search warrant.³⁰⁹

The Supreme Court reversed,³¹⁰ it held that when evidence is seized in violation of the Fourth Amendment by officers acting reasonably and in good faith reliance on a warrant, its admissibility is not barred by the exclusionary rule.³¹¹

Under the Pepperdine Proposal, the procedural maneuvering in the criminal case would be streamlined. Leon and his colleagues would presumably not even file a motion to suppress, because of their inability to show that the officers knowingly and intentionally violated the Fourth Amendment.³¹² Although there was insufficient probable cause to justify the issuance of the warrant, the trial court made an express finding in *Leon* that the officer who applied for the warrant acted in good faith.³¹³ In the unlikely event the defendants filed a motion to suppress, the good faith finding by the criminal judge would be unnecessary. Instead, the judge who heard the motion to suppress would need to determine only whether a knowing and intentional violation of Leon and his associates' rights had occurred.³¹⁴ Of course, the judge would not find a knowing and intentional violation of constitutional rights, and thus, the evidence seized would be admissible in the

303. *See id.* at 902.

304. *See id.*

305. *See id.*

306. *See id.* at 903. Some of the drugs seized were admissible because none of the defendants had standing to challenge all of the searches. *See id.*

307. *See id.* at 903 n.2, 904.

308. *See id.* at 904 (citations omitted).

309. *See id.*

310. *See id.* at 905.

311. *See id.* at 922.

312. *See id.* at 922-23.

313. *See id.* at 904.

314. *See Perrin et al., supra* note 3, at 754.

criminal prosecution.³¹⁵

However, because the defendants suffered a Fourth Amendment violation, they would be entitled, under our proposal, to pursue compensatory damages in the administrative proceeding after the conclusion of their criminal trial. As discussed in section C above, to determine whether they are entitled to compensatory damages, the administrative judge would decide whether the officers acted in good faith.³¹⁶ The officers would present testimony of their reliance on informants, the extensive investigation, the surveillance of the defendants' homes and cars, and the fact that they had several Deputy District Attorneys review their application for a warrant.³¹⁷ This testimony would demonstrate that the officers acted in good faith.³¹⁸ Thus, the officers would not be civilly liable for their constitutional violations.³¹⁹

Consequently, although there was a Fourth Amendment violation, the evidence seized would be admissible in a criminal prosecution and the officers who committed that violation, because they acted in good faith, would not be civilly liable.³²⁰ This outcome is consistent with the Court's observation that when a constitutional violation occurs where the officer is acting in good faith, "the deterrence rationale loses much of its force."³²¹

D. Intentional or Reckless Violations on Innocent People: The Ordeal of Robert L. Wilkins

On May 8, 1992, Robert L. Wilkins, an African-American Deputy Public Defender, was riding in a car with his family on their way home from a funeral.³²² His car was stopped for speeding by a Maryland Police Officer who claimed that the car was traveling sixty miles-per-hour in a forty miles-per-hour zone.³²³ After issuing Wilkins' cousin a speeding ticket, the officer asked for permission to search the car.³²⁴ Wilkins reminded the officer that searching a car without probable cause is unconstitutional.³²⁵ The officer, apparently not as knowledgeable as Wilkins in

315. *See id.*

316. *See supra* Part V.C.

317. *See Leon*, 468 U.S. at 901-02.

318. *See id.* at 904. Pursuant to the government's request, the District Court in *Leon* made an express finding that the officer who applied for the warrant acted in good faith. *See id.*

319. *See Perrin et al.*, *supra* note 3, at 746-47.

320. *See id.*

321. *United States v. Peltier*, 422 U.S. 531, 539 (1975) (quoting *Michigan v. Tucker*, 417 U.S. 433, 447 (1974)).

322. *See Jennifer A. Larabee*, Note, "*DWB (Driving While Black)*" and Equal Protection: The Realities of an Unconstitutional Police Practice, 6 J.L. & POL'Y 291, 291 (1997) (arguing for a new equal protection test for analyzing consideration of race by police in detaining motorists for traffic violations).

323. *See id.*

324. *See id.* at 291-92.

325. *See id.* at 292.

Fourth Amendment jurisprudence, disregarded Wilkins and continued to press for consent to search the car.³²⁶ When the family refused to allow him to search the car, the officer ordered the occupants out of the car and made them stand in the rain for half-an-hour while he summoned police dogs to complete a search.³²⁷ The dogs did not find any contraband.³²⁸

Wilkins and his family filed a lawsuit against the Maryland State Police Department and eventually received a \$50,000 settlement.³²⁹ Wilkins was guilty of nothing more than "Driving While Black"³³⁰ and the police who make such pretextual stops are rarely held accountable for their conduct. Victims in Wilkins' position do not benefit from the exclusionary rule as a remedy for Fourth Amendment violations because nothing was found, there was nothing to exclude, and thus, nothing to prosecute.³³¹ Ironically, the only group that receives any benefit from the rule are criminals who gain the advantage of having some or all of the evidence of their crimes excluded in prosecutions against them. The civil administrative remedy eliminates that anomaly, giving innocent victims more effective and accessible relief.

Under our proposal, Wilkins could initiate the administrative process by filing a written complaint with the enforcement arm of the responsible administrative agency.³³² The filing would begin a preliminary review of the complaint to determine if the facts alleged constitute a violation.³³³ If the preliminary investigation determined that the complaint was without merit, the administrative process would end.³³⁴

However, under the alleged facts, it is apparent that a violation occurred. Wilkins would be represented in the administrative process by an agency lawyer, thus eliminating the substantial costs he presumably incurred in bringing his section 1983 claim. A hearing would follow in which Wilkins would have to establish by a preponderance of the evidence that a constitutional violation had occurred.³³⁵ Wilkins would satisfy this burden by presenting circumstantial evidence that the

326. *See id.* The officer went so far as to advise Wilkins and his family that it was the "regular practice of the Maryland State Police to search motor vehicles." *See id.*

327. *See id.* at 292.

328. *See id.*

329. *See id.*

330. *See generally* David A. Harris, Whren v. United States: *Pretextual Traffic Stops and 'Driving While Black'*, 21 MAR CHAMPION 41 (1997) (discussing pretextual searches which are racially motivated).

331. *See Perrin et al., supra* note 3, at 674-75.

332. *See id.* at 745.

333. *See id.*

334. *See id.*

335. *See id.* at 747.

stated reason for stopping him was a mere pretext. The burden would then shift to the officer to establish that she acted in good faith.³³⁶ The officer, under this set of facts, would not likely be able to make such a showing as there was no legitimate basis on which to justify searching Wilkins' car. Consequently, the hearing would move to the damages phase.

Wilkins would be entitled to punitive damages, subject to a cap, if the administrative judge determined that the officer knowingly and intentionally violated Wilkins' rights.³³⁷ If the judge did not find a knowing and intentional violation, Wilkins would be entitled to receive liquidated damages for the violation at a preset amount, regardless of any actual economic or non-economic harm.³³⁸ Thus, under the Peppertine Proposal, the victim of a constitutional violation who has not committed a crime would still be able to obtain relief.

E. Other Applications Beyond the Courtroom

Our proposal would also benefit those who suffer constitutional violations in situations where courts, despite the acknowledgment of a constitutional violation, have elected not to apply the exclusionary rule. For example, in *Pennsylvania Board of Probation & Parole v. Scott*,³³⁹ the Court held that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.³⁴⁰ In *Scott*, the defendant, after being convicted of third-degree murder, was placed on parole.³⁴¹ One of the conditions of his parole was that he was to refrain from owning or possessing firearms or any other weapons.³⁴² After Scott was arrested for various parole violations, officers illegally searched his home and found five firearms, a compound bow, and three arrows.³⁴³ At the parole hearing, Scott was recommitted on the basis of the weapons found during the illegal search and sentenced to serve thirty-six months in prison.³⁴⁴ The Court acknowledged the illegality of the search that produced the weapons, but declined to apply the exclusionary rule to parole hearings.³⁴⁵

The rationale behind the Court's decision was based on the notion "that the State's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution."³⁴⁶ Rather, the Court observed that the exclusionary

336. *See id.*

337. *See id.* at 748-49.

338. *See id.* at 749.

339. 118 S. Ct. 2014 (1998).

340. *See id.* at 2017-18.

341. *See id.* at 2018.

342. *See id.*

343. *See id.*

344. *See id.*

345. *See id.* at 2023.

346. *See id.* at 2019 (citations omitted).

rule is a judicially created remedy to deter illegal searches and seizures.³⁴⁷ Our proposal embraces this rationale by providing a remedy to victims of constitutional violations even in cases where the exclusionary rule does not apply.³⁴⁸

Perhaps this is the greatest advantage of the civil administrative remedy. It applies to everyone, including criminals who suffer the most egregious police misconduct and innocent victims of a police officer's ignorance of constitutional law. By replacing a remedy that benefits only the guilty and is inapplicable to those who have not committed a crime, the Pepperdine Proposal protects the constitutional rights of everyone in a manner palatable to society.

F. *Coming Full Circle: The Civil Administrative Remedy and Judge Baer*

In *United States v. Bayless*,³⁴⁹ Judge Baer first granted a defendant's Motion to Suppress eighty pounds of cocaine and heroin and then reversed himself and admitted the drugs on a Motion for Reconsideration by the government.³⁵⁰ In his first opinion, Judge Baer decried the reliance of the arresting police officers on stereotypes of the defendant and the community in which she was arrested.³⁵¹ Baer even quoted President John F. Kennedy: "The great enemy of truth is very often not the lie--deliberate, contrived, and dishonest--but the myth--persistent, pervasive, and realistic."³⁵² In granting Bayless's Motion to Suppress the drugs found in the trunk of defendant's car, the judge bluntly stated: "I find [Bayless's] statement to be credible and reject the testimony proffered by [the arresting officer]."³⁵³

After the tremendous public outcry at the suppression of the drugs and a rehearing,³⁵⁴ Baer changed his mind and his decision,³⁵⁵ Judge Baer apologized to the police officers³⁵⁶ and praised the United States Attorney's Office for their commendable preparation of witnesses that he had previously characterized as liars.³⁵⁷ Judge Baer's sudden about-face demonstrates the myth of the exclusionary rule: that the rule is applied fairly and is an effective remedy for Fourth

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

348. *See Perrin et al., supra* note 3, at 750.

349. 913 F. Supp. 232 (S.D.N.Y. 1996), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

350. *See Bayless*, 921 F. Supp. at 212.

351. *See id.* at 240.

352. *See id.* at 234 (quoting President John F. Kennedy, Commencement Speech, Yale University 1962).

353. *See id.*

354. *See Perrin et al., supra* note 3, at 671-72 nn.2-3.

355. *See Bayless*, 921 F. Supp. at 212.

356. *See id.* at 217.

357. *See id.* at 215 n.5.

Amendment violations.

Under our proposal, Baer would not have to decide between suppressing the eighty pounds of drugs, thus causing the dismissal of the case and the angry public reprisals, or validating a seizure that occurred under questionable circumstances. Instead, Baer would have to decide only whether the police search and seizure, if improper, was a knowing and intentional violation of Bayless's rights. This point would be difficult to prove, and Baer could legitimately deny the suppression motion while still preserving the defendant's right to pursue the civil administrative remedy. By giving judges an alternative besides setting the guilty free, the civil administrative remedy both redresses constitutional violations and maintains the public's faith in the criminal justice system.

Justice Blackmun, in his concurring opinion in *Leon*,³⁵⁸ pronounced that "the scope of the exclusionary rule is subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom."³⁵⁹ We agree. It is our hope that the Pepperdine Proposal, or any discussion it might generate, can contribute to that change.

358. 468 U.S. 897 (1984) (Blackmun, J., concurring).

359. *See id.* at 928 (Blackmun, J., concurring).