

# How Accountability-Based Policing Can Reinforce— Or Replace—The Fourth Amendment Exclusionary Rule

David A. Harris\*

*In Hudson v. Michigan, a knock-and-announce case, Justice Scalia's majority opinion came close to jettisoning the Fourth Amendment exclusionary rule. The immense costs of the rule, Scalia said, outweigh whatever benefits might come from it. Moreover, police officers and police departments now generally follow the dictates of the Fourth Amendment, so the exclusionary rule has outlived the reasons for which the Supreme Court adopted it in the first place. This viewpoint did not become the law because Justice Kennedy, one member of the five-vote majority, withheld his support from this section of the opinion. Both the closeness of the vote on the rule's survival, and the Court's 2009 opinion in Herring v. United States, should motivate renewed discussion of what should replace it.*

*But even if the exclusionary rule remains in place, recently published empirical findings cast doubt on the Court's premise in Hudson that the bad old days of search and seizure violations lay behind us. On the contrary, viewing the data conservatively, roughly a third of all search and seizure activity violates the Fourth Amendment. Thus, the situation calls for a set of proposals that can serve as a substitute for the exclusionary rule if it disappears, but which can also work equally well to brace up the rule if it stays in place.*

*Fortunately, the law, criminology, and technology can combine to provide a viable set of answers for both possibilities. First, a system for tracking police search and seizure activity, based on successful work on early intervention systems now used to head off police misconduct, holds great promise for advancing the ability of supervising officers to ensure that those under their commands obey the law. Second, strengthening the ability of members of the public allegedly subjected to police misconduct to bring suit for redress in federal court would create real incentives for better police behavior. This would do much to address the*

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\* Professor of Law, University of Pittsburgh School of Law. My thanks to my colleagues at the School of Law's Spring Colloquium for the many helpful suggestions I received there. I also benefitted from the opportunity to present this work to the Criminal Justice Research Advisory Panel at the University of Pittsburgh's Center for Race and Social Problems. Special thanks to my colleagues Jules Lobel and Andrew Taslitz for their willingness to help me with this article, and to Donald Scott Williams and Drew Welsh for first-rate research assistance.

*issue of Fourth Amendment violations that uncover no evidence, making the exclusionary rule an inapplicable remedy. Third, new technologies can enable police departments to make video and audio recordings of nearly all police activity. Coupled with appropriate evidentiary presumptions, these devices can change police behavior, including search and seizure activity. The article will examine these three possibilities, explain their superiority to other substitutes for the exclusionary rule, and will also examine their drawbacks.*

## I. INTRODUCTION

In 2006, the United States Supreme Court decided *Hudson v. Michigan*.<sup>1</sup> *Hudson* concerned the “ancient”<sup>2</sup> knock-and-announce rule: the requirement that police pause and announce their authority before forcibly entering a dwelling.<sup>3</sup> The case came to the Court in an unusual posture. The State of Michigan conceded that police officers had violated the knock-and-announce rule when they burst through the defendant’s door.<sup>4</sup> But this did not end the discussion; “[t]he issue here,” the Court said, “is remedy.”<sup>5</sup> To put the argument in traditional search and seizure terms, the question was whether, notwithstanding the violation of the knock-and-announce requirement, the Fourth Amendment’s exclusionary rule should apply.

In an opinion that could surprise no long-term observer of the Supreme Court’s Fourth Amendment jurisprudence, the majority declared that this type of violation did not call for the use of the exclusionary rule. Using the exclusionary rule in such situations, the Court said, would not deter law enforcement violations of the knock-and-announce rule.<sup>6</sup> If the Court’s majority had stopped there, and confined its reasoning to the deterrence point, *Hudson* would have set out a new rule for a small set of cases, and would have fit cleanly into a line of Supreme Court precedent several decades old. In other words, *Hudson* would have settled a legal question—does the exclusionary rule apply to knock-and-announce violations?—but nothing more, and would likely not have provoked much

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<sup>1</sup> 547 U.S. 586 (2006).

<sup>2</sup> *Id.* at 589.

<sup>3</sup> *Id.* (explaining the knock-and-announce rule as the “common-law principle that law enforcement officers must announce their presence and provide residents an opportunity to open the door,” and stating that the Court found the rule to be part of the Fourth Amendment in *Wilson v. Arkansas*, 514 U.S. 927, 931–36 (1995)).

<sup>4</sup> *Hudson*, 547 U.S. at 590.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 594–95 (the Court had never applied the exclusionary rule except where its deterrence benefits outweighed its considerable social costs, *quoting* Penn. Bd. of Prob. v. Scott, 524 U.S. 357, 363 (1998)). Since the Court has long considered deterrence the only legitimate purpose for invoking the exclusionary rule, *United States v. Leon*, 468 U.S. 897, 906–07 (1984), the justices said that courts should not suppress evidence in such situations.

discussion. Instead, Justice Scalia's opinion ventured into another area, namely, the overall desirability and necessity of the exclusionary rule itself—not just in knock-and-announce cases, but in *any* case involving an arguably illegal search or seizure.<sup>7</sup>

In this section of the opinion, Scalia argued that a rule excluding probative evidence of guilt from consideration at trial because of the way police had gathered it carried a “massive” cost to society.<sup>8</sup> And while the cost the exclusionary rule entails may have been necessary at some point in history to deter police misconduct, Scalia said, that time had passed.<sup>9</sup> The bad old days had given way to an era of more enlightened policing, in which officers usually obeyed the Fourth Amendment. This followed, he said, from the fact that police have more education, get more training, inhabit a more professional environment, and serve in better police agencies now<sup>10</sup> than they did in 1961, when the Court declared in *Mapp v. Ohio* that the Constitution required the states to apply the exclusionary rule for violations of the Fourth Amendment.<sup>11</sup> In addition, people wronged by the police had remedial options now that did not exist in 1961: they could litigate civil rights claims, asserting not just individual but municipal liability for police misconduct,<sup>12</sup> and they could rely on attorneys eager to take these cases because of attorney fee reimbursement statutes.<sup>13</sup> In short, Scalia argued, the Fourth Amendment now works: Police generally follow the law, and when they do not, other robust remedies less costly to society than the exclusion of evidence now ensure that officers change their behavior and obey search and seizure rules. “We cannot assume,” Scalia said, “that exclusion [of evidence] in this context is necessary deterrence simply because we found it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for

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<sup>7</sup> *Hudson*, 547 U.S. at 597–99.

<sup>8</sup> At various points in *Hudson*, Justice Scalia called the cost of excluding evidence a “massive remedy,” *id.* at 595, “substantial social costs,” *id.* at 594–95, quoting *Leon*, 468 U.S. at 907, and a “costly toll” on courts and police, *Hudson*, 547 U.S. at 591, quoting *Scott*, 524 U.S. at 364–65. Regardless of which phrase he uses, Justice Scalia's opinion never wavers: the exclusionary rule imposes unacceptably high costs on society.

<sup>9</sup> “[W]e now have increasing evidence,” the Court said, “that police forces across the United States take the constitutional rights of citizens seriously.” *Hudson*, 547 U.S. at 599. In support, Scalia cited the work of the eminent criminologist Samuel Walker of the University of Nebraska, in which Walker noted the “wide-ranging reforms in the education, training, and supervision of police officers.” *Id.*, quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 51 (1993).

<sup>10</sup> *Hudson*, 547 U.S. at 598–99.

<sup>11</sup> 367 U.S. 643 (1961).

<sup>12</sup> *Hudson*, 547 U.S. at 597, citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (civil rights action available against federal government for Fourth Amendment violation); *Monnell v. Dep. of Soc. Servs.*, 436 U.S. 658 (1978) (allowing municipalities to be held liable for Fourth Amendment violations).

<sup>13</sup> *Hudson*, 547 U.S. at 597, citing 42 U.S.C. § 1988(b) (2006) (statute making attorney's fees available in civil rights cases).

the sins and inadequacies of a legal regime that existed almost half a century ago.”<sup>14</sup>

Only one thing kept Justice Scalia’s view of the exclusionary rule from becoming law: Justice Kennedy, the majority’s fifth vote in *Hudson*, explicitly refused to join this part of the opinion. In a separate concurrence, Kennedy made his disagreement clear. “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>15</sup> The fact remains, however, that four of the justices stand ready to get rid of the exclusionary rule altogether. Perhaps more important, any long-term reckoning of the votes of the justices on the question of the continued vitality of the exclusionary rule seems, at best, unstable. The appointment of just one more justice who sees the exclusionary rule as Justice Scalia does in place of one who disagrees would obviously change the result in the next case, as would a change in any of the five votes of the justices who wish the exclusionary rule retained.<sup>16</sup>

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<sup>14</sup> *Hudson*, 547 U.S. at 597.

<sup>15</sup> *Id.* at 603 (Kennedy, J., concurring).

<sup>16</sup> President George W. Bush made two appointments to the Court; the second of these—Justice Samuel Alito, to replace Sandra Day O’Connor—surely resulted in a more reliably conservative Court than the one that preceded it. Indeed, the appointment of Alito likely changed the result in *Hudson* itself. See, e.g., Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1, available at <http://www.nytimes.com/2009/01/31/washington/31scotus.html> (noting O’Connor’s comments supporting application of the exclusionary rule at oral argument, then the order for re-argument after her retirement “signaling a 4-4 deadlock,” and then Justice Alito, her replacement, emerging as a member of Justice Scalia’s majority). While a new Justice appointed by President Obama would, as a general matter, likely side with the Court’s more liberal members, nominees to the Court in the modern era have sometimes taken stances on criminal justice issues inconsistent with the views of the presidents who nominated them. For confirmation, one need only think of Justice Brennan and Chief Justice Warren, nominated by Republican President Eisenhower, both of whom became leading liberal voices. The Senate’s confirmation of President Obama’s choice of Justice Sotomayor brings to the Court a jurist who may be liberal generally, but not on criminal justice matters. See, e.g., Jess Bravin & Nathan Koppel, *Nominee’s Criminal Rulings Tilt to Right of Souter*, WALL ST. J., June 5, 2009, at A3, available at <http://online.wsj.com/article/SB124415867263187033.html>. Moreover, Justice Kennedy himself may not remain a reliable supporter of the position—his own position—of maintaining the exclusionary rule. Despite his unequivocal language that the operation of the exclusionary rule “is not in doubt,” *Hudson*, 547 U.S. at 603, any observer of Justice Kennedy’s long-term record might have doubts because of Kennedy’s history of changing his views on core issues. Compare *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Justice Kennedy joining majority opinion holding that death penalty for juvenile offenders was not cruel and unusual punishment), with *Roper v. Simmons*, 543 U.S. 551 (2005) (Justice Kennedy’s majority opinion declaring that death penalty for juveniles is cruel and unusual punishment); compare *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Justice Kennedy joining majority opinion holding death penalty for mentally retarded defendants not unconstitutional), with *Atkins v. Virginia*, 536 U.S. 304 (2002) (Justice Kennedy joining majority opinion holding death penalty for mentally retarded defendants unconstitutional); compare *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Justice Kennedy dissenting from an application of the *Edwards* rule on interrogation after counsel requested), with *Minnick v. Mississippi*, 498 U.S. 146 (1990) (Justice Kennedy’s majority opinion expanding the *Edwards* rule, relying on majority opinion in *Roberson*, from which he dissented). There are many other examples. Thus, one must inevitably ask whether Justice Scalia’s expressed desire to get rid of

The Court took another step toward the elimination of the exclusionary rule in early 2009, in *Herring v. United States*<sup>17</sup> The case involved an arrest based on a warrant, which led directly to a search of the defendant and turned up methamphetamine and a weapon.<sup>18</sup> Minutes later, but not before the discovery of the contraband, the police learned that the warrant had been recalled months earlier.<sup>19</sup> The defendant's arrest, therefore, violated the Fourth Amendment, but the Court refused to apply the exclusionary rule.<sup>20</sup> Extending the rule of *Arizona v. Evans*,<sup>21</sup> the Court cited its statement in *Hudson* that excluding evidence "'has always been our last resort, not our first impulse.'" <sup>22</sup> The exclusionary rule should only apply, the Justices said, when police conduct is "sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."<sup>23</sup> While the majority opinion in *Herring* does not restate the many reasons given by Justice Scalia in *Hudson* that the exclusionary rule is no longer necessary, that conclusion implicitly undergirds *Herring's* repeated statements that only deliberate violations of the Fourth Amendment could justify exclusion; other types of violations simply could not pay the costs to the justice system that exclusion entails.<sup>24</sup> While it remains unclear at this early stage what *Herring* will mean for the vitality of the exclusionary rule, it seems likely to at least limit the rule's application; it could also, however, prove much more far-reaching.<sup>25</sup>

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the exclusionary rule might well come to fruition without any change to the Court's personnel at all. Thus, even as we attempt to come to grips with Justice Scalia's near upending of the exclusionary rule in *Hudson*, we need to see his failure to achieve his goal for what it actually was: a very near victory, in a battle he might soon fight again—and win.

<sup>17</sup> 129 S. Ct. 695 (2009).

<sup>18</sup> *Id.* at 698.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 704.

<sup>21</sup> 514 U.S. 1 (1995) (holding that an error in warrant records by court officials does not call for exclusion of evidence, but leaving open question of whether same result would obtain if error caused by police department).

<sup>22</sup> *Herring*, 129 S. Ct. at 700 (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

<sup>23</sup> *Herring*, 129 S. Ct. at 702.

<sup>24</sup> *E.g.*, *id.* at 701 ("The principal cost of applying the [exclusionary] rule is, of course, letting guilty and possibly dangerous defendants go free"); *id.* at 704 ("[W]hen police mistakes are the result of negligence such as that described here . . . any marginal deterrence does not 'pay its way.'").

<sup>25</sup> At this writing, just several weeks removed from the decision in *Herring*, it is impossible to know how far-reaching the opinion will turn out to be. Will it simply extend the rule of *Arizona v. Evans*, 514 U.S. 1, 14–15 (no exclusion of evidence when mistake leading to arrest made by judicial clerical staff), to mistakes made by police department office personnel, or will courts read it as ruling out the application of the exclusionary rule in all cases except those that stem from deliberate or reckless police conduct? Some already believe that courts will make the latter interpretation dominant, thus eliminating the exclusionary rule as a consideration in all but the most egregious cases. *E.g.*, Liptak, *supra* note 16 (quoting observers who believe that *Herring* all but ends the exclusionary rule).

In this article, I wish to challenge a fundamental assumption in Justice Scalia's argument in *Hudson*: that the exclusionary rule has outlived its usefulness because police officers—sufficiently kept in check by police department internal rules, by the possibility of litigation, and by departmental discipline, and influenced by a police culture that respects and values the Fourth Amendment's rules—now almost always do their jobs in accordance with those rules. I dispute these assumptions because new empirical work by two criminologists shows that Scalia's assumptions simply do not square with reality.

Just two years before the decision in *Hudson*, Jon B. Gould and Stephen D. Mastrofski published an investigation of police adherence to search and seizure standards in the field, that is, in the course of street-level police work.<sup>26</sup> In contrast to earlier work on the subject, Gould and Mastrofski's study used first-hand observation of police behavior—not behavior as reported to researchers after the fact or as recorded in court opinions—to see what police in situations presenting actual search and seizure issues really did. Contrary to what earlier researchers had concluded, Fourth Amendment violations, some quite egregious, showed up in *almost a third of all of the observed police investigations*.<sup>27</sup> Gould and Mastrofski's work does not appear anywhere in Justice Scalia's opinion.

With these new data in mind, the proper conclusion seems not to be that we can do without the Fourth Amendment's exclusionary rule, but rather that the exclusionary rule needs significant bracing up if we want our police officers to follow Fourth Amendment rules. I propose that this come in the form of measures that follow the path of police accountability: new methods of increasing police compliance with rules that have met with significant success in the last fifteen years.

Commentators do not exaggerate when they say that these new ways of insuring police accountability can create a "new world"<sup>28</sup> of policing in the United States—policing that fights crime and also respects the Constitution, the rule of law, and the people police serve. Police departments all over the U.S. have begun to use these police accountability tools in the field, and have obtained positive results. We can adapt these methods to serve the specific goal of ensuring greater compliance with Fourth Amendment rules, not perfectly, to be sure, but better than what apparently goes on now.

The slim margin upon which the exclusionary rule now stands in *Hudson*, however, and the decision in *Herring*, obligate me to take the discussion further. Suppose that, in the near future, Justice Scalia and his allies on the Court succeed in eliminating the Fourth Amendment exclusionary rule. What then? What, if anything, should replace the rule? Positing, as I do, that following Fourth Amendment rules in the gathering of evidence remains a good thing—that

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<sup>26</sup> Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004).

<sup>27</sup> *Id.* at 316.

<sup>28</sup> SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* (2005).

returning to the days when state and local police rarely, if ever, honored the Fourth Amendment's prohibition of unreasonable searches and seizures<sup>29</sup> would not represent progress—I will argue that in the wake of a repeal of the exclusionary rule, legislatures should enact laws to require the use of those same newly-developed police accountability mechanisms, supplemented by other measures, because they would represent the best hope for having law-abiding police departments. In other words, these methods would serve as the best available substitute for a defunct exclusionary rule, should that time arrive. Moreover, they represent the only way of going forward in an exclusionary-rule-free world if we wish to see continuing improvement in law enforcement institutions, and law-abiding behavior by our officers. Even Justice Scalia concedes that the exclusionary rule should get substantial credit for improving (indeed, transforming probably is not too strong a word) police work and police departments between 1961 and today. Therefore, we ought to look for ways to continue to see this kind of progress after the discontinuance of the use of the rule. Accountability-based policing can do that.

This article proceeds with Section II, in which I will explain why litigation does not, in fact, deter police misconduct now. In Section III, I will explain how the work of Gould and Mastrofski shows that Justice Scalia's majority opinion errs when it describes a world in which we no longer need the exclusionary rule. Section IV explains why the best way to give the exclusionary rule the wherewithal it needs to ensure that police do follow the law includes mechanisms of police accountability adapted for Fourth Amendment compliance. Section V will argue that, should Justice Scalia succeed in killing the exclusionary rule, police accountability methods give us the best hope of maintaining, and nurturing, police work that values, and responds to, the Fourth Amendment. Section VI discusses ways to make the elements of the system proposed here reality.

## II. HAVE POST-*MAPP* LITIGATION APPROACHES DETERRED FOURTH AMENDMENT VIOLATIONS?

Justice Scalia's stand in *Hudson* in favor of abandoning the exclusionary rule rests primarily upon the absence of deterrence, and on the availability of civil litigation by private parties as a way to address police noncompliance with the Fourth Amendment. Using litigation against knock-and-announce violations as an example, Scalia says that “[i]t is clear, at least, that the lower courts are allowing

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<sup>29</sup> For readers interested in what these “bad old days” were like, I strongly recommend Chapter Two of REMO FRANCESCHINI & PETER KNOBLER, *A MATTER OF HONOR: ONE COP'S LIFELONG PURSUIT OF JOHN GOTTI AND THE MOB* (1993), in which the author, a New York City detective with decades of experience, explains how police officers responded to Fourth Amendment rules in the course of their work: they disregarded them, paying them no attention whatsoever, because the Fourth Amendment's prohibitions on unreasonable searches and seizures did not matter. No state court, and certainly no police department, ever did anything to enforce them, so violating them carried no consequences.

colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity.”<sup>30</sup> He backs this not with any evidence, but with the statement that “[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”<sup>31</sup>

Justice Breyer’s dissent strongly disputes these assertions. He accuses Scalia of “argu[ing] without evidence,” and “search[ing] in desperation for an argument.”<sup>32</sup> In one memorable passage, Breyer labels Scalia’s supposition that civil litigation effectively deters Fourth Amendment violations “a support-free assumption.”<sup>33</sup> We need not decide here who has the better of this argument. Note, however, that the utility of lawsuits as a way to deter police misconduct depends on a further assumption that, when faced with substantial damages, police agencies will take action to change their behavior. The evidence on this point—as opposed to the assumptions—suggests that any deterrent effect of damages remains weak. The facts show that when confronted with sizeable damages from police misconduct—damages in the tens and even hundreds of millions of dollars—the vast majority of police departments do not make efforts to handle similar situations differently in the future. For example, between 1994 and 2000, New York City faced damages in police misconduct cases amounting to \$180 million dollars.<sup>34</sup> This stunning figure dwarfs the entire budgets of all but the largest police departments; for example, it is roughly two and one-half times the 2004 budget of the Pittsburgh Police Bureau.<sup>35</sup> And yet there is no evidence that the assessment of this shocking amount of damages changed anything at the NYPD. During the 1990s, the city of Detroit paid out \$124 million dollars in lawsuits stemming from police misconduct.<sup>36</sup> Yet no one in the police department or the city government took any action to change or reform the department.<sup>37</sup> Meaningful change began only in 2003, when the federal government forced the city to agree to a settlement requiring numerous reforms regarding the handling of persons in custody, use of force by police, and the supervision of police officers.<sup>38</sup> Thus, the idea that those in charge of a police department will respond at some point to the fiscal pain of escalating damages for police misconduct by imposing meaningful reforms has no basis in fact. Studies of imposing damages on police departments as a reform strategy show little evidence of any direct changes in police departments, despite the presence of some small victories forcing “local

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<sup>30</sup> *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 611 (Breyer, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> DAVID A. HARRIS, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* 120 (2005).

<sup>35</sup> *Id.*

<sup>36</sup> WALKER, *supra* note 28, at 26.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



departments to adopt a new or revised policy on a particular aspect of police operations.”<sup>39</sup> Rather, police departments have remained largely indifferent to the waxing or waning of damages. They regard civil cases and the damages that may result as “not our problem”<sup>40</sup> or just part of the inevitable “cost of doing business.”<sup>41</sup>

All of this may seem illogical, indeed, a challenge to the common economic assumption that actors make rational economic choices. Under closer examination, however, the actions of the police officials in charge are not as unreasonable as they first seem. In the typical municipal government in the United States, the agency that does the damage does not pay for the damage. As Samuel Walker says, “one agency of government (the police) perpetrates the harm, another agency defends it in court (the law department), and a third agency writes the check (the treasurer).”<sup>42</sup> Thus, for the police department the costs of police misconduct are completely externalized. Perhaps the mayor and the city council should care, but the fact that the police department and its officials do not care should come as no surprise. The only mystery is why anyone would assume, as four Justices did in *Hudson* that tort suits would serve as a workable deterrent to police misconduct. They do not now, and they have not in the past.

### III. THE REAL PROBLEM: NOT TOO MUCH EXCLUSION, BUT TOO LITTLE COMPLIANCE

#### A. Seeing a True Picture of Fourth Amendment Compliance

Beyond the points set out in Section II, there is another, more fundamental, reason to question Justice Scalia’s reasons for wanting to get rid of the Fourth Amendment’s exclusionary rule. Recall that Scalia argued in *Hudson* that policing—police departments, individual officers, and the whole law enforcement profession in general—has vastly improved since *Mapp v. Ohio* imposed the exclusionary rule on the states in 1961. He cited “the increasing professionalism of police forces, including a new emphasis on internal police discipline,” and concluded that “police forces across the United States take the constitutional rights of citizens seriously.”<sup>43</sup> Justice Scalia cites the work of criminologist Samuel Walker that there has been “wide-ranging reforms in the education, training, and supervision of police officers.”<sup>44</sup> To be sure, no one would deny that police work

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<sup>39</sup> *Id.* at 32.

<sup>40</sup> *Id.* (citation omitted).

<sup>41</sup> *Id.* at 33 (citation omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006).

<sup>44</sup> *Id.* at 599, quoting WALKER, *supra* note 9, at 51. While the quote is accurate, it is at best taken out of context. Any fair reading of the pages on which Professor Walker’s words appear show that he made the statement to argue *in favor of retaining, not eliminating*, the exclusionary rule. This

in the U.S. has improved: police officers have more training, better grounding in the law, and a more sophisticated outlook on their role than they did, as a group, in 1961. But it is another thing entirely to assume that we can now do without the exclusionary rule because police now follow the Fourth Amendment. In fact, we have new evidence on this question, and the news is not good.

Just two years before the Court's decision in *Hudson*, Jon B. Gould and Stephen D. Mastrofski published the results of their observational studies of police behavior, which focused on compliance with search and seizure rules.<sup>45</sup> Their data came from observation of police work in the field, not court opinions or analysis of police reports. Using either of the two latter methods, the researchers thought, would vastly undercount search and seizure activities, good or bad, because they would only consider police actions that resulted in arrests and/or cases tried and then appealed, or actions documented in official, and therefore perhaps biased, reports.<sup>46</sup> Most of the prior research on the question of compliance with search and seizure rules examined the result of suppression motions heard in courts, and most suggested that police officers did, in fact, follow the law when making arrests or conducting searches. Most courts, these researchers observed, did not suppress evidence very often; the highest rate of suppression overall in any study was about two percent.<sup>47</sup> But relying on the results of suppression motions limited these studies to searches in which police found evidence—only part of the universe of searches done by police. By using field observation, Gould and Mastrofski sought to obtain data on police practices that never resulted in any seizure of evidence,

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misuse of his work in a Supreme Court opinion so disturbed Professor Walker that he took to the pages of the *Los Angeles Times* to set the record straight:

Scalia's opinion suggests that the results I highlighted have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police. I have never said or even suggested such a thing. To the contrary, I have argued that [the improvements in police officers and their departments] reinforce the Supreme Court's continuing importance in defining constitutional protections for individual rights and requiring the appropriate remedies for violations, including the exclusion of evidence.

Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5.

<sup>45</sup> Gould & Mastrofski, *supra* note 26.

<sup>46</sup> *Id.* at 316.

<sup>47</sup> *Id.* at 319 (“With a few exceptions . . . the majority of past research suggests that police officers conform to the law when searching suspects and making arrests . . . . Examining the results of suppression motions across multiple jurisdictions, researchers in several studies have found that only a minimal number of cases are lost because of illegal police stops or searches”), citing Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Comptroller General of the U.S., *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979); Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611 (1983); Peter Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585 (1983); Craig D. Uchida and Timothy S. Bynum, *Search Warrants, Motions to Suppress and “Lost Cases”*: *The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034 (1991).

arrest, or reported case, as well as those searches or seizures that did uncover evidence. While the fact that officers knew they were under observation might cause some of them to “be on their best behavior,” the researchers accepted this, reasoning that, along with reading questionable factual and legal inferences in favor of the police, this would skew any doubts in the direction of benefiting the police.<sup>48</sup> In other words, any patterns they might uncover showing compliance problems would likely be a conservative underestimate of the problem, and thus more defensible.<sup>49</sup>

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<sup>48</sup> Gould & Mastrofski, *supra* note 26, at 320, 329.

<sup>49</sup> Given the centrality of Gould and Mastrofski’s work to my thesis, a word about the methodology used seems essential, especially since their results seem to contradict a good deal of the prior research in the field. First, in contrast to other methods based on the examination of appellate court opinions or reports of officers themselves, Gould and Mastrofski used direct observation of police in the field. Though they concede there could be “reactivity effects”—officers adjusting their behavior because of the presence of the observer—they contend that it is nevertheless the most reliable source for data on police practices. *Id.* at 320. Data were obtained by training “a small team of faculty and student field researchers” who performed observations of individual police officers. *Id.* at 325. The study took place over a three-month period, during which the field observers “accompanied the selected officers throughout their regular work shifts, taking brief notes on their activities and encounters with the public . . . in a manner that would not distract the officer or citizens.” *Id.* After most observed encounters, researchers informally debriefed the officers to understand and record their perceptions and motives regarding the events. To minimize any reactivity effect, researchers guaranteed individual officers anonymity; they even allowed the officers to examine their field notes and ask them questions, though few did. *Id.* The sample of officers was selected to “closely parallel[] the demographics of the entire patrol force.” *Id.* The officers came from the police force of “Middleberg,” which the authors describe as “a medium-sized American city in the middle of illicit drug shipment routes.” *Id.* at 324. The police department was “one of the more professional agencies in the state” and was “a few years into the implementation of community policing,” an initiative to which the agency had strongly committed itself. Gould and Mastrofski describe the department as “bubbling with efforts to reach out to the community” to help police in their anti-crime efforts. *Id.*

The researchers measured officers’ search and seizure activity first by examining the narrative descriptions of police activity turned in by the field researchers, and then asking whether a search or seizure had taken place; searches were defined as “an intrusion by a police officer into a citizen’s person or real or personal property when the officer was seeking evidence.” *Id.* at 326. If the answer was yes, they then assessed whether or not the officers had acted constitutionally by comparing their recorded observations to a set of Fourth Amendment cases consisting of governing decisions by the U.S. Supreme Court, federal appellate and district courts, and state court that applied in Middleberg. *Id.* at 327–28. A team of three performed the assessment of constitutionality. If two members of the team (a faculty member and a trained student assistant) could not agree on the constitutionality of the search, they brought in the third, who was a practicing attorney. On a small number of cases, additional work was performed in the form of legal research to reach a consensus on the legality of the officer’s actions. The researchers also took care “to read both factual and legal inferences in favor of the police officers” with regard to constitutionality. They did this because they “wish[ed] to minimize the risk of overstating the police misuse of authority, so this study may actually *underestimate* the number of constitutional violations because we gave officers the benefit of the doubt” when making a judgment regarding whether police had acted unconstitutionally. *Id.* at 329. Finally, as an additional check, Gould and Mastrofski used a panel of three experts familiar with the search and seizure law of the U.S. and the state in which Middleberg sits, and had them independently examine the ten cases their teams of three had considered the closest calls

Gould and Mastrofski's result may prove dispiriting for those who, like Justice Scalia, believe that our police forces have moved beyond the "bad old days" of not complying with Fourth Amendment rules and therefore have no need for an exclusionary rule. The researchers found that, on average, police officers searched suspects 0.8 times per shift.<sup>50</sup> Of all of those suspects searched, thirty percent—almost one-third—experienced unconstitutional searches.<sup>51</sup> Given the size of the jurisdiction the researchers studied, this amounted to between six and seven unconstitutional searches per one hundred residents each and every year. Of the thirty percent of searches that violated the Fourth Amendment, the suspects in almost all of them were released; that is, no arrest occurred because no evidence was found. In the words of Gould and Mastrofski, "only 3% of the unconstitutionally searched defendants would have had good cause to file a suppression motion,"<sup>52</sup> because, for the other ninety-seven percent, with no evidence of crime recovered, no criminal case resulted in which the illegally searched suspect could file a motion.

Thus, Gould and Mastrofski's work tells us at least two important things. First, non-compliance with Fourth Amendment standards reaches at least thirty percent according to conservative measurements, not the low single-digit levels found in prior studies. And, second, the exclusionary rule as it currently operates would reach almost none of these violations. As if this were not disturbing enough, Gould and Mastrofski add something more: Those most likely to commit these illegal searches were "model" officers in terms of their commitment to serving the community as they understood the idea. "They were 'Dudley Do-Rights' who did wrong, but in the war-against-drugs context, their unconstitutional searches were viewed as normal and necessary, virtually unchallenged by the police hierarchy, the courts, or the public."<sup>53</sup>

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constitutionally. (The experts were a state appellate judge, a former federal prosecutor, and an attorney who had been both a former federal prosecutor and a criminal defense attorney.) In nine out of ten cases, the experts agreed with the decision of the research team on the constitutionality of the search; in the one case of disagreement, the experts believed a search that the research team found constitutional to be unconstitutional. *Id.* at 330.

<sup>50</sup> *Id.* at 330.

<sup>51</sup> *Id.* at 331.

<sup>52</sup> *Id.* at 332.

<sup>53</sup> *Id.* at 345. Perhaps Gould and Mastrofski's findings should not come as a shock. Just a few years ago, George Kelling, one of the architects and proponents of the "broken windows" theory of policing in which police make high numbers of arrests to address minor crimes, noted that police were "pushing the Fourth Amendment" to the breaking point, past any fair reading of its limits. GEORGE L. KELLING, NAT'L INST. OF JUSTICE, "BROKEN WINDOWS" AND POLICE DISCRETION (1999). And at least two contemporary examples could have prepared us for the findings of Gould and Mastrofski. In the early 1990s, scandal struck the New York Police Department; allegations surfaced that a group of officers in one precinct had engaged in a long-standing pattern of brutality, abuse, theft, and drug dealing. An official commission, headed by former Judge Milton Mollen, investigated the allegations and wrote a report. Milton Mollen et al., CITY OF N.Y., COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMM'N REPORT (1994). The main allegations concerned outright criminality by

## B. *Why Fourth Amendment Compliance Matters*

### 1. The Effect on Police Legitimacy

When we ask why police should comply with Fourth Amendment rules, the answer may seem easy: because these rules are the law—constitutional commands, no less. And, the Constitution binds the police just as it does other citizens. In fact, since police exist to enforce the law, they must not be above it. If police disobey the law, the law will seem to apply only to those who do not have power. When that happens, law emerges as little more than force cloaked in legal authority, and the police, the literal embodiment of state power, teach people by their illegal actions that the law means nothing.<sup>54</sup>

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officers—gangsterism with uniform and badge, and in those terms were terrible enough. But the Mollen Commission found that another form of corruption was, if less serious, actually far more common and for that reason alone quite insidious. NYPD officers, it seems, routinely lied in court in search and seizure cases: officers willfully and frequently told judges untruths in order to create legal justification for their actions. *Id.* at 36. In fact, according to the Mollen Commission's report, this practice became so common and so accepted within the NYPD that it had attained its own label: officers called it "testilying." *Id.* In light of these findings, it would have made sense to expect that officers who so widely, willingly, and cavalierly lied to courts about their Fourth Amendment actions were not consistently complying with those constitutional rules; *their lack of compliance was the reason that they told their lies.*

The second example also comes from New York. In the late 1990s, years of intensive stop and frisk activity in the name of active "broken windows"-style policing culminated in the unfortunate death of Amadou Diallo, an African immigrant, in a hail of police gunfire in the vestibule of his apartment building. In the immediate aftermath of Diallo's death, the New York Attorney General ordered that the NYPD turn over to his office all of the Department's stop and frisk reports (forms that every officer performing a stop and frisk was required to complete) for the prior fifteen months. The Attorney General then commissioned a study of these reports, led by two very well respected researchers at Columbia University. The study, released at the end of 1999, contained a wealth of information on how one of the world's largest police departments conducted the routine business of stopping and frisking persons about whom officers had suspicion. CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICE: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL (1999). Based on the reports of police themselves, the researchers concluded that up to one-seventh—fourteen percent—of all of the documented stops and frisks did not meet constitutional standards. And these data may well have underestimated the level of unconstitutional search and seizure conduct. Many times, the section of the form used for describing the legal justification for the stop was simply left blank—no reasons for suspicion were given. Given all of this, especially in a police department in which "testilying" to bolster search and seizure cases had become routine, this non-compliance with stop and frisk rules seems to support the contention of Gould and Mastrofski that lack of compliance with the Fourth Amendment should be a matter of grave and immediate concern.

<sup>54</sup> See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To

This assessment is true, but it does not go far enough in explaining the importance of police compliance with the law. Beyond a requirement that everyone must follow the law lies a concept perhaps at least as important and certainly more subtle: the legitimacy of police authority. Police in our society and other developed countries carry the responsibility for responding to and addressing crime and disorder. Police officers act when a victim or witness reports crime, with the aims of rendering appropriate assistance to those injured or inconvenienced, apprehending the guilty parties, and sometimes preventing crime before it happens. The success that police do or do not have in coping with crime depends heavily on obtaining the cooperation of people in the communities the police serve.<sup>55</sup> Society creates the law and institutions like the police to address problems of crime and social disorder. But in the end, the ability of the police to perform their core function of addressing crime has everything to do with the relationship between the police and the people. The work of the police can become harder, and perhaps even undoable, if the communities in which they work do not cooperate with them. To put it simply, when it comes to fighting crime, the police cannot do it alone. They need the help of the community; they need members of the community to be their partners in the fight against crime.

The tie between crime fighting and Fourth Amendment compliance could not be more important. To have the support of the community in the fight against crime, the community must view the police as law-abiding and therefore legitimate. If the police have legitimacy in the eyes of the public, citizens will comply to a greater degree with the law, and will do more to assist police in maintaining public safety and order.<sup>56</sup> In the most basic sense, the legitimacy of the police rests upon the public's feelings about whether police act in ways citizens consider just: do police act fairly in their decision making? If citizens believe the police follow the law and act with evenhandedness, they will regard the police department as legitimate, and offer greater support for police efforts as a result.

## 2. Maintaining Police Legitimacy

In a revealing new piece of research, Jeffrey Fagan of Columbia University and Tom Tyler of New York University set out to find answers to two basic questions.<sup>57</sup> First, they wondered whether members of the public who viewed

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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.”).

<sup>55</sup> See, e.g., Robert J. Sampson, et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

<sup>56</sup> TYLER, *supra* note 55, at 170–78 (arguing that a psychology of legitimacy explains why people tend to obey authorities and institutions in which they feel trust).

<sup>57</sup> Jeffrey Fagan & Tom Tyler, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

police as legitimate would exhibit higher degrees of cooperation with the police.<sup>58</sup> Second, they wanted to know if viewing the police as legitimate followed from citizens' personal experiences with police, and whether it was the perception of police fairness or a favorable or non-favorable outcome in these encounters that influenced citizens' views of legitimacy.<sup>59</sup> As to the first hypothesis, the researchers found that legitimacy—that is, a perception by the public that the police acted legitimately—shaped public cooperation with the police. “[P]eople are more willing to cooperate with the police when they view the police as legitimate social authorities. If people view the police as more legitimate, they are more likely to report crimes in their neighborhood.”<sup>60</sup> When members of the public obey the law more and work with police to fight crime, crime and disorder decrease, and therefore give police a greater chance to succeed. As for the second question, Fagan and Tyler’s findings support the idea that the public’s perceptions of the fairness of police practices, as experienced by citizens in their personal encounters with police, shape judgments of police legitimacy.<sup>61</sup> Fagan and Tyler’s findings “point to the justice of police policies and practices as key factors shaping police legitimacy. . . . [P]eople evaluate the legitimacy of the police largely in terms of their judgments about the fairness by which the police exercise their authority.”<sup>62</sup> And, the perceived fairness of the procedures with which police acted toward citizens affected legitimacy more than whether the citizen had experienced a positive or negative outcome.<sup>63</sup> In other words, following the law, fair decision-making, and fair treatment of the public lead to a perception that police are legitimate and therefore deserving of support and help. Further, when a perception of police legitimacy exists, people can more easily accept even negative police outcomes.<sup>64</sup> All of this is consistent with additional work by Tyler and others.<sup>65</sup>

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<sup>58</sup> *Id.* at 237.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 263.

<sup>61</sup> Unlike other studies on legitimacy, Fagan and Tyler used a longitudinal research design in which people were interviewed both before and after they had personal experiences with police. *Id.* at 243. They did two waves of surveys by telephone, using a random sample of residential telephone numbers from New York City. The first set of interviews took place in 2002, and the second in 2004. The second wave focused on respondents from the first wave who, in the intervening time, had had a personal encounter with the police. The same questions were asked each time. This enabled Fagan and Tyler to probe deeply into the individual respondent’s feelings concerning the legitimacy of the police both before and after the experience, to delve into whether the police action was perceived as procedurally fair and just, and whether the respondent experienced a favorable or unfavorable outcome at the end of the encounter. *Id.* at 244–46.

<sup>62</sup> *Id.* at 264.

<sup>63</sup> *Id.* at 262 (“[C]onsistent with a procedure-based approach, legitimacy increases, even in the face of the delivery of negative outcomes. Those people who received a negative outcome via a just procedure increased their views about the legitimacy of the police and the law following a personal experience with a legal authority.”).

<sup>64</sup> *Id.* at 255–56.

The implications of this work on police legitimacy have important implications for the debate about compliance with Fourth Amendment standards. Police/citizen encounters involving searches and seizures are just the kind of personal experiences that, according to Fagan and Tyler, shape public views of police legitimacy and, with it, the prevalence of law-abiding behavior by the public and its willingness to help police. Everyone wants public safety and less crime; the vitality of our cities and towns depends on it.

For many years, advocates of the primacy of crime control as the goal of every aspect of the criminal justice system have expressed the idea that police compliance with the Fourth Amendment, enforced through the exclusionary rule, has hurt efforts to control crime. Police, confined and “handcuffed” by search and seizure rules, cannot catch all the criminals they might without such rules; further, when judges suppress evidence under the exclusionary rule because police failed to follow the constitutional rules, this hurts public safety because a guilty criminal goes free.<sup>66</sup> It turns out, however, that this view ignores an important part of the picture. By ensuring police compliance with the rules that guide law enforcement’s use of search and seizure tactics, we increase the public’s perception that police act legitimately; legitimacy flows from the public’s belief that police policies and practices adhere to the law. This, it turns out, engenders more law-abiding behavior, and greater citizen assistance for the police in helping to stem crime and public disorder. Put another way, a direct relationship exists between police fairness and compliance with the law and lower crime and more public order. Thus, increasing police compliance with Fourth Amendment standards matters very much if one cares about crime control. Ensuring that the police follow the law on searches and seizures is not only an abstract good, or a legal, philosophical, and moral requirement for a just society (if those things are not enough by themselves): it also enhances public safety.

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<sup>65</sup> See, e.g., DAVID BEETHAM, *THE LEGITIMATION OF POWER* 117, 118 (1991) (stating that the “contemporary state . . . requires legitimation . . . to maintain its political system intact in the face of serious policy failure or challenge . . .”); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (discussing studies showing that views of the system depend on the justice of procedures as well as the fairness of the outcomes); TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997) (explaining that procedural fairness, not just fairness of outcomes, makes a difference to individual dignity and commitment to law); TYLER, *supra* note 55, at 23–30 (discussing past research suggesting that legitimacy exists when society internalizes standard-based reasons for voluntarily obeying the directives of authorities); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375 (2006) (explaining ways in which legitimacy facilitates the exercise of the power of the state, because people see authorities and institutions as proper).

<sup>66</sup> *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“The exclusionary rule generates ‘substantial social costs’ . . . which sometimes include setting the guilty free and the dangerous at large.”).



IV. STRENGTHENING THE EXCLUSIONARY RULE OR CREATING A SUBSTITUTE:  
ACCOUNTABILITY-BASED POLICING MECHANISMS AS THE NEW TEMPLATE

With all of this in mind, we must have a stronger approach to Fourth Amendment compliance, whether the exclusionary rule stays in place or not. Assuming the Supreme Court does not abrogate the rule, we should anticipate that police conduct will certainly be no better than what Gould and Mastrofski revealed; if the rule goes, compliance will likely fall. This would constitute a loss: a loss to citizens, who would see their constitutional rights trod upon rather than honored, and a loss to society as a whole, as the disrespect shown to the law by police misconduct delegitimizes our legal and law enforcement system. Either way, something more must be done.

Luckily, the tools now exist to ensure better police compliance. Samuel Walker, the criminologist quoted by Justice Scalia in *Hudson*, tells us that where police misconduct occurs, this happens not because of “a few bad apples.” Rather, it results from failed organizations, i.e., failed police departments. As Walker explains:

The rotten apple theory . . . is simplistic and ineffective. Most important, it does not address the underlying organizational and management causes of [police misconduct] . . . . Firing a cop or a police chief has a certain cheap appeal, and chiefs can be rather easily dismissed. Far more difficult is the task of changing the culture of a police department, in the sense of developing informal norms of professional conduct and a habit of reporting and investigating misconduct.<sup>67</sup>

Barbara Armacost agrees with Walker. The problem, she says, is not a few rotten apples, but “rotten barrels.”<sup>68</sup> Therefore, if the problems come from dysfunctional organizations, change will originate from organizational solutions. The development of successful tools and systems to ensure police accountability over the last two decades has all centered on this approach: building structures both within and outside police agencies, in order to ensure compliance with the norms of at least acceptable (if not better) police conduct, with the aim of bringing police officers and their departments up to the standards of the best practices available.

A strategy suited to improving Fourth Amendment compliance would use three components in combination. First, we should use early intervention systems: data-driven accountability structures designed to detect, track, and highlight various aspects of police officer conduct. These systems, already in use in a number of police departments, would serve as an ideal method for tracking and

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<sup>67</sup> WALKER, *supra* note 28, at 14.

<sup>68</sup> Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 457–59 (2004).

managing police conduct related to searches and seizures. We would couple this with two other necessary changes: a technological innovation that creates the ability to generate an audio and video record of virtually all police actions, and substantial adjustments to the law that would restore litigation as a serious tool for redressing violations of the Fourth Amendment.

#### A. Early Intervention Systems

Early intervention systems help police departments track the behavior of their officers, something difficult to do in the absence of a data-driven, systematic effort. The idea originated at least as long ago as 1981, in the seminal report on police by the U.S. Civil Rights Commission, *Who Is Guarding the Guardians?*<sup>69</sup> In discussing the issue of police violence and other misconduct, the Commission recommended that “[a] system should be devised in each department to assist officials in early identification of violence-prone officers.”<sup>70</sup> This suggestion prompted development of procedures to bring data on various aspects of police behavior—at first, focusing on police use of force—into a comprehensive package for police supervisors, and by 1989 the International Association of Chiefs of Police (IACP) fully endorsed early intervention systems as a tool for avoiding misconduct and ensuring better police performance overall.

These systems had many potential applications beyond tracking officer use of force, IACP said: early intervention systems are “a proactive management tool useful for identifying a wide range of problems [and] not just a system to focus on problem officers.”<sup>71</sup> The federal government considers early intervention systems an industry best practice.<sup>72</sup> The Commission on Accreditation for Law Enforcement Agencies (CALEA), the national police accrediting organization, adopted a standard in 2001 requiring all large law enforcement agencies to have an early intervention system in place.<sup>73</sup>

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<sup>69</sup> U.S. COMM’N ON CIVIL RIGHTS, WHO IS GUARDING THE GUARDIANS? A REPORT ON POLICE PRACTICES (1981).

<sup>70</sup> *Id.* at 159.

<sup>71</sup> INT’L ASS’N OF CHIEFS OF POLICE, BUILDING INTEGRITY AND REDUCING DRUG CORRUPTION IN POLICE DEPARTMENTS 80 (1989).

<sup>72</sup> SAMUEL WALKER, EARLY INTERVENTION SYSTEMS FOR LAW ENFORCEMENT AGENCIES: A PLANNING AND MANAGEMENT GUIDE (2003), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e07032003.pdf>; U.S. DEP’T OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY (2001), available at <http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>.

<sup>73</sup> CALEA’s Standard 35.1.15 states: “A comprehensive Personnel Early Warning System is an essential component of good discipline in a well-managed law enforcement agency. The early identification of potential problem employees and a menu of remedial actions can increase agency accountability and offer employees a better opportunity to meet the agency’s values and mission statement.” COMM’N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, STANDARD 35.1.15 cmt. (4th ed. 2001).

In order to see how early intervention systems can improve Fourth Amendment compliance, we need to know a little bit about how these systems typically work.<sup>74</sup> The basic idea is that the police department creates a data system that collects, sorts, and tracks data regarding certain police behaviors. For any particular type of police conduct in which the police department might have an interest—traffic tickets given, arrests made, citizen complaints, missed court appearances, hours of overtime or outside employment worked or sick days taken, or damage to squad cars in accidents—the department requires that information recording this action be put into the system. For each type of conduct, the system contains thresholds, set by department leaders. For example, the system might specify that more than one accident involving an officer's squad car during any six-month period, or two or more citizen complaints per quarter, constitutes a threshold. These thresholds thus serve as trip-wires, and the conduct of any officer that exceeds a threshold would trigger an alert to the officer's sergeant.

On the ground level, sergeants oversee the early intervention system; as police department "middle managers," sergeants perform the first-level supervision of rank-and-file police officers, and use the early intervention system to help them do this. Every time a sergeant begins a duty shift, he or she is required to sign in to the police department's early intervention system. If an officer has exceeded one of the thresholds for any category of conduct measured, the system automatically presents this information to the supervisor. The supervisor must then follow up by investigating the data that indicate that an officer has breached a threshold. Investigation will include gathering necessary information and reports and talking directly to the officer identified by the system.

The sergeant performs this basic investigation in an effort to find out whether a pattern exists in the officer's behavior that might indicate, (1) the presence of misconduct, (2) the possibility that the officer involved might need some extra training, or (3) the possibility of some personal problem, such as substance abuse or a messy divorce, that has begun to have an impact on job performance. Most times, the investigation reveals that a sound explanation exists for the over-the-threshold conduct. For example, an alert from the system indicating that an officer has performed more than the usual number of stops-and-frisks in the past three months might be explained by the fact that the officer now works as a member of the drug detection team in a high-crime area. Whatever the supervisor finds, he or she must make a report to the next-higher person in the chain of command. When the supervisor finds an innocent explanation for the officer's conduct, the report need only state that the supervisor took no action, and why. If the supervisor did take (or recommend) action—close observation for a period of time, retraining, or

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<sup>74</sup> This general description of the workings of an early warning system is reflected in the operation of the Personnel Assessment and Review System (PARS), used by the Pittsburgh Police Bureau and described in my earlier work. HARRIS, *supra* note 34, at 81–84, 90–94. See also WALKER, *supra* note 28, at 100–34; GEOFFREY P. ALPERT ET AL., EARLY WARNING SYSTEMS: RESPONDING TO THE PROBLEM POLICE OFFICER (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/188565.pdf>.

even discipline—he or she must report that as well. Based on these reports, passed up the chain to district commanders, information and knowledge about individual officers and police conduct in the department as a whole makes its way from the bottom of the department to the top.

In some departments, such as the Pittsburgh Police Bureau,<sup>75</sup> chiefs hold periodic meetings (in Pittsburgh, this occurs once a calendar quarter) to review all early intervention data from each district command in the department, in order to make sure that each district commander, and all departmental supervisors under his or her command, have followed through. In this fashion, police behavior and misconduct become an issue in the forefront of the department's focus. Individual officers are held accountable for their actions by their sergeants, who in turn are held accountable for the supervision they provide, and especially for their use of the early intervention system, and so on up the line. At each level, the accountability message receives reinforcement in the form of real consequences. For a patrol officer whose conduct comes into question through the system, this will mean completing retraining, or a period under more intense than usual supervisory scrutiny, or even some form of discipline. For a supervisory or command officer, failure to follow early warning system rules—for example, a failure to adequately investigate a situation when an officer hits a threshold—could ultimately lead to a loss of that command responsibility. In this way, the system improves policing as individually troubled officers receive extra attention; problem officers are addressed and perhaps weeded out;<sup>76</sup> and the rest know that should their conduct not come up to standard, they will suffer the same fate. Thus, compliance with rules and standards set by the organization increases.

Police leaders and their professional organizations generally like early intervention systems for a simple reason: they can work, if they are constructed, maintained, and used correctly. They help law enforcement agencies spot problem police behavior before it wounds the agencies, through complaints, damaged public relations, wrecked equipment, lawsuits, or even deaths or injuries to citizens and officers. A National Institute of Justice study in 2001, examining the use of early intervention systems of three police departments in large cities and surveying hundreds of other agencies, found that having a working early intervention system in place improves critical aspects of performance. “In spite of considerable differences among the [early intervention systems in the three departments

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<sup>75</sup> See HARRIS, *supra* note 34.

<sup>76</sup> According to Samuel Walker, there has been less resistance to the use of early intervention systems from rank and file officers because they help to spot, improve, or perhaps get rid of the few misbehaving officers who cause the lion's share of the problems in any police department. Walker quotes a police supervisor as saying that the worst thing for officer morale is when no action is taken against problem officers, and the successful use of an early intervention system shows everyone that the organization can deal with these perennial problem cases. “A contributing factor to officer cynicism is the perception that bad officers are not punished and good performance not rewarded,” Walker says. “In this respect, a properly functioning [early intervention] system may contribute significantly to the morale of the better officers.” WALKER, *supra* note 28, at 128.

studied], each program appeared to reduce problem behaviors significantly,” including reducing the use of force and the level of citizen complaints.<sup>77</sup> And the systems had positive effects not just on line officers, but on their supervisors. “Early warning systems encourage changes in the behavior of supervisors, as well as of the identified officers.”<sup>78</sup> A study of the Pittsburgh Police Bureau’s early intervention system by the Vera Institute of Justice lauded the implementation of the system and its effect on the agency, calling it the successful “centerpiece of the Police Bureau’s reforms.”<sup>79</sup> The study also found no evidence that police officers had disengaged from law enforcement duties in response to the use of the system, as some had predicted.<sup>80</sup>

### 1. Building Search and Seizure Data Into Early Intervention Systems

Early intervention systems can work the same way in the context of searches and seizures. Since these systems can track any type of police behavior reducible to a data entry, they can do the same for police behavior related to Fourth Amendment activity. This will require adding the right categories of data to give police supervisors the information they need, and ensuring that the same rules apply to this information as to all other categories. It will also mean guaranteeing that these data matter—that when the data show that an officer has crossed a threshold regarding search and seizure behavior, action will follow, just as with other categories of behavior the system tracks.

#### i. Required Data

The use of an early intervention system to address search-and-seizure issues begins with an unbreakable requirement: every time a search or seizure activity takes place—for example, a brief detention on the street, a vehicle pulled over to investigate a traffic infraction and perhaps cite a driver, a search of a person’s purse or backpack—the officer involved must record certain specified data elements. The method of compiling and inputting the data hardly matters: using paper forms from which data are later extracted; hand-held computers that allow quick electronic recording from pull-down lists, and later synchronization with a

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<sup>77</sup> ALPERT ET AL., *supra* note 74, at 2–3. In August of 2009, a comprehensive study of sixteen years of experience under the early intervention system of the Los Angeles County Sheriff’s Department, the first such system in the U.S., showed that it reduced police misconduct by identifying problem behavior that successfully predicted other problems in the future. POLICE ASSESSMENT RES CTR., 27TH SEMIANNUAL REPORT (2009), [http://www.parc.info/client\\_files/LASD/27th%20Semiannual%20Report.pdf](http://www.parc.info/client_files/LASD/27th%20Semiannual%20Report.pdf).

<sup>78</sup> ALPERT ET AL., *supra* note 74, at 2, 4–5.

<sup>79</sup> ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE 25 (2002), *available at* <http://www.vera.org/download?file=239/Pittsburgh%2Bconsent%2Bdecree.pdf>.

<sup>80</sup> *Id.* at 48.

central computer system; or inputting the data directly into mobile wireless laptop computers mounted in squad cars.<sup>81</sup> The point is not *how to record* the data, but that *it must be recorded*.

Some will object that all officers will not comply with this rule one hundred percent of the time. Also, and perhaps more importantly, requiring this sort of record keeping constitutes an additional burden that officers will have to shoulder, when that time would be much better spent fighting crime. As to the first objection, no one awake to the realities of street-level policing, and of bureaucracies generally, would ever expect one hundred percent compliance with *any* rule, but we can ensure a relatively high degree of compliance by doing two things. First, officers must understand that data recording is mandatory, not optional, and that the department's leadership has committed itself to the effort. Officers will learn this when, (1) the leadership of the department says so, in no uncertain terms, and (2) when the leadership acts accordingly, if necessary, by punishing officers who refuse to comply.

The second objection, that this type of record keeping will waste time better spent fighting criminals, collides with two important facts. First, policing everywhere, on every level, has become increasingly data driven. For example, rather than simply assume that police commanders do everything they can to respond to crime in their bailiwicks, police departments around the country have followed New York City's example and constructed Compstat systems, with which departmental leadership holds commanders responsible for actual, measured—not anecdotal or impressionistic—outcomes.<sup>82</sup> Second, the waste-of-time argument has proven largely overblown when made in other contexts. Critics of data collection to track possible racial profiling by police made the same argument. Experience on the street proved them wrong: collection and transmission of the

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<sup>81</sup> All of these methods have been used in different contexts by many police departments in the collection of data about traffic stops as part of efforts to address racial profiling. *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 181–82 (2002).

<sup>82</sup> A large body of research exists concerning the construction, use and implementation of Compstat systems. *E.g.*, JOHN M. SHANE, COMPSTAT IMPLEMENTATION, FBI LAW ENFORCEMENT BULLETIN (2004), *available at* [http://www.fbi.gov/publications/leb/2004/june2004/june04leb.htm#page\\_14](http://www.fbi.gov/publications/leb/2004/june2004/june04leb.htm#page_14); DAVID WEISBURD ET AL., COMPSTAT AND ORGANIZATIONAL CHANGE: A NATIONAL ASSESSMENT (2003), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/222322.pdf>; JAMES J. WILLIS ET AL., COMPSTAT IN PRACTICE: AN IN-DEPTH ANALYSIS OF THREE CITIES (1999), *available at* <http://www.policefoundation.org/pdf/compstatinpractice.pdf>. The Compstat system was the brainchild of Commissioner William Bratton of the New York Police Department and his deputy, Jack Maple. For a narrative history and description of the development and use of Compstat, see WILLIAM BRATTON & PETER KNOBLER, THE TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); JACK MAPLE & CHRIS MITCHELL, THE CRIME FIGHTER: HOW YOU CAN MAKE YOUR COMMUNITY CRIME-FREE (2000). For just one example of how the Compstat model has spread to law enforcement environments vastly different than New York, see HARRIS, *supra* note 34, at 101–03 (data-driven performance system called Abstrat, modeled on Compstat, used in Overland Park, Kansas).

required data on a system using only police radios took roughly thirty seconds to a minute.<sup>83</sup>

With data collection established as a bedrock rule, what specific data should officers collect? The following list constitutes a basic starting point for the types of information needed to construct an effort to bolster Fourth Amendment compliance using an early intervention system:

- 1) the date, time, and location of the search or seizure;
- 2) whether the officer performed the search and seizure action as part of any special assignment, e.g., during the course of an anti-DWI operation, or as part of a drug interdiction team;
- 3) the nature of the encounter, e.g., a brief detention or an arrest;
- 4) the legal basis for the Fourth Amendment action taken by the officer, e.g., what facts and observations made the officer suspicious enough to detain the person, including both factual and legal justification;
- 5) identifying information on the civilian involved, including name, address, contact information, and physical description, including perceived racial or ethnic group;
- 6) whether any search was performed, e.g., opening of containers such as a purse or backpack, examination of contents of pockets, or search of vehicle, and, if so, what type—*Terry* pat down, search incident to arrest, consent search, etc.;
- 7) whether any contraband was recovered, and if so, of what nature and quantity, especially in drug cases;
- 8) whether any further action was taken, such as an arrest, the issuance of a summons, or the like.

Collecting these data would constitute a sufficient basis for measurement of a police officer's Fourth Amendment actions, and would form the necessary foundation for putting search and seizure activities into an early warning system.

ii. Required Investigation, Review, and "Reporting Up" by Supervisors at Each Level, and Required Feedback and Follow-Up Action

All good early intervention systems require supervisors who receive reports on officers exceeding system parameters to investigate the facts underlying the report, to review the matter with the officer(s) involved, and to "report up" to their own supervisors on the situation (including any recommendation that they make regarding the officer). As part of this process, the officer, him- or herself, receives feedback from the supervisor and must receive information on and results of the investigation, including what recommendations the supervisor will make.

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<sup>83</sup> HARRIS, *supra* note 81, at 182.

Of course, all of this must also happen with the early intervention system's tracking of search and seizure behaviors. That is, supervisors must follow the same system of assessment and follow-up with search and seizure behaviors as they do with other police conduct the system tracks; nothing less will do. Putting search and seizure into some kind of separate category that does not require investigation, review, feedback and reaction would render the search and seizure part of the system largely meaningless.

### iii. Effects on Internal Discipline, Rewards, and Disincentives

In order for the collection, analysis, and use of a data on search and seizure activity to make a difference, the results of the process must matter to the individuals under supervision. And that means, in the simplest terms, that patterns of undesirable officer behavior revealed by the system must have consequences to the officer on the street. Unless it does, an early intervention system will not change behavior.

This is easy to say, but harder to make happen. So perhaps it is best to describe in broad terms what we should expect. First, saying that findings revealed by the system should result in consequences *does not mean* that every time the early warning system finds that an officer's search-and-seizure behavior has exceeded the prescribed parameters, the officer must suffer the imposition of some disciplinary sanction. What must happen first is investigation, review, and analysis by the officer's supervisor. This may very well uncover a complete and satisfactory explanation for the trend or pattern noted by the system that called the behavior to the supervisor's attention in the first place. When this happens, the result should be not sanctions, but "no action necessary."<sup>84</sup> But officers and supervisors alike should know that reported patterns that do disclose evidence of misconduct must carry consequences. If the need for counseling or retraining or intense supervision or some kind of treatment becomes apparent, these things will take place. Perhaps more important, officers should understand that trends or patterns showing incorrect search or seizure behavior will affect the major incentives or disincentives for any employee: receiving (or not receiving) pay raises, promotions, desirable assignments, more control over one's work or workload, or increased responsibility or prestige. These are the ways in which workers of any kind measure their success; to affect worker behavior, employers' actions must have an impact upon these things. Making clear to a would-be supervisor that she will never make sergeant or lieutenant unless she begins to respect search and seizure law and procedure will get that person's attention in a

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<sup>84</sup> This is what I often observed in Pittsburgh in the context of that department's Personnel Assessment and Review System: supervisors reporting to their own commanders that a particular officer may have been flagged by the system, but that investigation revealed a perfectly good explanation—for example, a higher-than-normal number of stops and frisks might be explained by the officer's inclusion in a plain clothes street crime suppression unit, which used stops and frisks as a frequent tool. HARRIS, *supra* note 34, at 81–83.



way that simple admonishments will not. Telling a sergeant that he will not receive a raise or the extra resources needed for a new task unless he toes the line in terms of getting his officers to do their jobs within Fourth Amendment boundaries will cause the sergeant to prioritize the correct handling of searches and seizures. In short, if we want to change the way that police officers respond to the rules of search and seizure, we have to make it matter to them. Collecting and analyzing the data makes accountability for behavior possible; applying incentives and disincentives based on the analysis will make accountability happen.

## 2. Encouragement and Review of Citizen Complaints

Encouragement and review of citizen complaints must also form part of any system used to track and evaluate police behavior regarding search and seizure activities. Most early warning systems, including the one in use in Pittsburgh, include complaints against officers as one of the categories of data tracked. (In fact, in Pittsburgh the category of complaints against officers includes complaints both by citizens and by fellow officers; a separate category tracks commendations of officers, and the chief of the department has used the commendation data to put together specialized units.<sup>85</sup>) This complaint data should be disaggregated enough that complaints regarding search and seizure activity can be identified and reviewed as a separate category. In addition, departments need to make active efforts to encourage citizens to come forward with their complaints, and must revamp the complaint procedure to make the process easy and unthreatening, so that those with complaints will not hesitate to come forward.

Perhaps this seems counterintuitive. No one running a public agency would want to encourage members of the public to complain. But this shortsighted view misses the real value of complaints. An organization interacting with the public should see complaints not as an attack, or a hindrance, or as part of a battle. Rather, forward-looking organizations will look at complaints as a vital source of information and feedback—real data that can tell them exactly what at least some of their “customers” think regarding the organization’s product or service. In the world of business, many organizations see those who complain as customers the business has failed and who the business must win back. Thus, private industry regards complaints as valuable information. Many businesses therefore go to some lengths to encourage their customers to fill out surveys or complaint cards or online versions of these; they view them as information that will give them a chance to get better.

Public agencies, and perhaps especially police departments, have not adopted this attitude toward citizen complaints. Rather, they see complaints as attacks on them, as attempts by people who know nothing about police work to stick their noses in where they have no business, or as harbingers of lawsuits. This dovetails well with the unfortunate “nobody understands us but us, so no one has any right

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<sup>85</sup> *Id.* at 90–94.

to pass judgment on us” attitude that prevails in many modern police departments.<sup>86</sup> While common among police officers, this outlook represents a profound mistake. Complaints against police regarding how officers stop and search may not always reflect a correct knowledge of the law; citizens may not have an accurate understanding of the powers police officers have to stop, search, and arrest them. (For police departments, learning about citizens’ lack of knowledge concerning police powers would tell the agency that it might increase public support to some degree by making greater—or even just some—effort to educate the public concerning these issues.) Complaints against police may not always be presented politely or respectfully, and may show a misunderstanding of how police perform their jobs. Nevertheless, they represent a potential treasure trove of public opinion regarding how police should conduct themselves and perform their tasks. And even if some, or even many, citizens have mistaken understandings of police work, it does not seem unlikely that at least some of these complaints may reveal actions by police officers—either just on a single occasion or as a regular practice—that violate Fourth Amendment rules, and thus must change. This needs to happen not just because the officer’s practice violates one or another Fourth Amendment rule, which would constitute enough of a reason by itself; rather, violating the law can corrode citizen allegiance to rule following, and destroy confidence in and respect for police.<sup>87</sup>

### 3. Study of Public Feedback on Documented and Undocumented Police/Citizen Encounters

Police departments must look for ways to increase what they know about police/citizen encounters, and to verify the overall accuracy of the data they do collect. As mentioned above, any early intervention system suffers a weakness to the extent that it relies solely on unverified data reported by the officer, the individual that the system is designed to scrutinize. It is easy to imagine that officers might wish not to report certain incidents, or to report them differently than they occurred, in order for the data in the system to reflect better on them. Both of these concerns—having as much data as possible in order to maximize knowledge and understanding of police dealings with citizens, and ensuring the integrity of the data fed into the early warning systems by officers themselves—contain the seeds of problems, as both lack of knowledge and manipulation of the data that goes into the system can profoundly undermine it.

To address both issues, law enforcement agencies should again look to consumer-driven industries: police departments must make repeated, deliberate efforts to increase their knowledge about citizen experiences, through (1) the study of randomly-selected records, and (2) surveys of the larger population, some of whom may have had encounters with the police. The first step involves requiring

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<sup>86</sup> *Id.* at 154–71.

<sup>87</sup> *See supra* text accompanying notes 54–66.

supervisory personnel in police departments to periodically pull and examine a certain number of randomly-selected records of every officer's reported search and seizure activity. The supervisor would begin by studying the case, to ascertain whether it revealed any hint of problems in regard to the conduct of searches or seizures, as well as whether it reflects a full and proper following of record keeping protocols on this issue. Second, the supervisor would use the identifying information in the record to attempt to contact the member of the public with whom the police officer dealt in the encounter. The person would be asked what happened during the encounter—what the officer did or said, whether the person was given a reason for being stopped and searched, and whether anything happened as a result. The idea would be to test whether, as a general matter (not just in one particular case, in which recollections might simply differ) the officer appears to be creating a record that generally reflects what the citizen says happened, even if the citizen does not agree with the officer's recorded interpretation of the facts. This, of course, serves as a data integrity check: a pattern of errors in what is recorded would tip a supervisor off to the existence of problems. It would also give the supervisor a chance, as with complaints filed with the department, to learn how citizens perceive the department, its officers, and its search and seizure practices.

Police should couple this examination of randomly-chosen search-and-seizure reports with periodic surveys of citizens. These exercises would be useful as a general matter, just to gather information about the priorities citizens believe their law enforcement agencies should have, and about their support for and feelings about those agencies. More particularly, as part of these surveys, citizens should be asked whether they have had a search-and-seizure encounter of any kind with an officer in the last six months. If a search or seizure took place, the citizen should be asked for the date, location, and time of the encounter, and for a statement of what happened during the encounter, with as much precision as the citizen can muster. This information would, again, serve to help fill out what the police department knows about the search-and-seizure activities of its officers. It also serves a data integrity function in a way different from the study of randomly-selected files. If the citizen describes a search-and-seizure encounter with a police officer with enough identifying information, it should be possible to locate the officer's record of that encounter in the early intervention system, and to compare the two descriptions. The comparison would create another opportunity to examine how well the officer records the data; a failure to find any plausibly matching record, as part of a pattern of such failures, would, of course, raise real and troubling questions of data integrity.

#### *B. Technology: Regular Audio and Video Recording of Search and Seizure Events*

Skepticism should probably greet any proposal for technological solutions to police issues. After all, the introduction of technology into policing began not recently, but decades ago. The two biggest technological innovations in policing

in the past century—the introduction of patrol vehicles, which allowed officers to patrol much larger geographical areas, and radio communications, which enabled police departments to send alerts, calls for help, and other information to their officers instantaneously—were greeted with great fanfare and anticipation. The mobility of police cars, and connecting officers with radios, would revolutionize police work, many said.<sup>88</sup> And in some ways, this prediction came true: police could be almost anywhere in minutes, and could swoop in on criminals without warning. But these advances also led to changes that one could not view quite so positively. The officer walking a beat, familiar to the residents and merchants of the area, engaging in daily conversation information-sharing with all whose paths crossed his, was replaced by a faster, more mobile officer visible only from the shoulders up inside a moving car as it passed. This vehicle-bound officer had little or no relationship to the people he served and thus gathered no information from them; he was tethered to, and ultimately dependent upon, the radio that connected the officer to the stationhouse.<sup>89</sup>

Nevertheless, technological innovations do occur that promise to change law enforcement, with benefits for both the public and the police. One such technology is not so much new as it is now smaller, more mobile, and dependable enough to find a new use: wearable video and audio recording equipment, configured for use on the person of the police officer.

Police have used video and audio recording in different ways for some years: dashboard-mounted recording systems for police cars that can record traffic stops and other encounters with citizens at or near the patrol car, videotaping demonstrations or other kinds of mass gatherings, and sometimes making recordings of statements and confessions of suspects. With combined video and audio recording systems now nearly ubiquitous in mobile telephones, we have seen the power of such devices when used to record encounters between police and citizens. Witness the recorded video of a police officer and a bicyclist in New York City in 2008, on the occasion of one of the large bike rides in the city known as Critical Mass. The police officer arrested the rider, and charged him with various crimes that arose when the rider allegedly assaulted the officer during the mass ride.<sup>90</sup> But a cell phone video recording, made by a bystander unnoticed by the officer, showed an entirely different scenario. The rider had not been endangering or challenging the police officer in any way; rather, the officer had assaulted the rider violently, pushing him off of his bike and onto the sidewalk.

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<sup>88</sup> NAT'L COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON POLICE 90–98 (1931).

<sup>89</sup> HARRIS, *supra* note 34, at 20.

<sup>90</sup> Murray Weiss, Kati Cornell, & Kyle Murphy, *Rookie Cop Slammed for Cycle of Violence*, N.Y. POST, July 29, 2008, at 5, available at [http://www.nypost.com/seven/07292008/news/regionalnews/rookie\\_cop\\_slammed\\_for\\_cycle\\_of\\_violence\\_122079.htm](http://www.nypost.com/seven/07292008/news/regionalnews/rookie_cop_slammed_for_cycle_of_violence_122079.htm) (police officer arrested rider for attempted third degree assault on officer, resisting arrest, and disorderly conduct, and stated in his official report that rider had used his bicycle as a weapon to knock down the officer and caused a laceration on his arm, all of which was false).

The video, posted on YouTube,<sup>91</sup> directly challenged the officer's story, and resulted in the prosecution dropping charges against the rider, and the police officer coming under scrutiny.<sup>92</sup>

Police officers can now wear recording technology on the street. Small audio and video recording devices have become available that allow hands-free recording, continuously if desired. Police in the United Kingdom who refer to the technology as "head cams" or Body Worn Video [BWV], have field tested and deployed these devices, and after an assessment, have begun to put them into regular use.<sup>93</sup> At least two American companies now manufacture a version.<sup>94</sup>

As with patrol car-mounted video systems, developers of BWV conceived of the technology as an evidence-gathering tool. Given the ubiquity of cameras today, from public and private buildings to public spaces and highways, law enforcement and those who develop public safety products began to explore the idea of using recording technology from a location that allowed the gathering of evidence from the officer's own point of view, by mounting it on the officer. BWV came directly from these efforts.

The first small-scale pilot programs to assess BWV took place in Plymouth, England in 2005 and 2006. When those initial efforts proved successful, a full-scale pilot study took place in Plymouth between October 2006 and March 2007, involving more than three hundred officers using fifty BWV units.<sup>95</sup> The U.K. Home Office commissioned an independent evaluation of the pilot study, to

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<sup>91</sup> *Critical Mass Bicyclist Assaulted by NYPD Officer* (July 27, 2008), <http://www.youtube.com/watch?v=oUkiyBVytRQ>.

<sup>92</sup> Foxnews.com, *NYPD Officer Stripped of Badge After YouTube Video Shows Cyclist Shove*, July 29, 2008, <http://www.foxnews.com/story/0,2933,392901,00.html>.

<sup>93</sup> *'Smile, You're on Camera!' Police to Get 'Head Cams,'* LONDON EVENING STANDARD, Dec. 7, 2007, <http://www.thisislondon.co.uk/news/article-23403984-details/Smile,+you're+on+camera!'+Police+to+get+'head-cams'/article.do>.

<sup>94</sup> One model is called the VIE VU, sold by a company in Seattle, Washington, of the same name. The company describes its device as a "wire free wearable video camera," and it makes different versions for civilians and law enforcement. The VIE-VU is roughly the size and shape of a pager, and clips to the officer's shirt or jacket pocket or hat. See VIE VU, *Introducing the Latest Technology for Law Enforcement*, <http://www.viewu.com> (last visited Feb. 10, 2009). Taser International, the manufacturer of the most commonly used conducted energy weapon in the U.S., has its own model of body worn video, which uses a camera mounted on a head/earpiece. It describes its device, the TASER AXON, as "a tactical networkable computer combining advanced audio-video record/capture capabilities worn by first responders." The company claims that "AXON significantly changes officer efficiency by reducing report documentation workload while increasing accuracy and accountability, and describes the device as a way to "protect the truth when officers have to defend their actions" in court. Taser, *Taser Axon*, <http://www.taser.com/products/law/Pages/TASERAXON.aspx> (last visited Feb. 10, 2009).

<sup>95</sup> POLICE & CRIME STANDARDS DIRECTORATE, HOME OFFICE OF THE U.K, *GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 6* (July 2007), available at <http://police.homeoffice.gov.uk/publications/operational-policing/guidance-body-worn-devices?view=Binary>.

identify issues and assess benefits.<sup>96</sup> The Final Report by the independent evaluators showed that BWV provided significant benefits to police,<sup>97</sup> and the Police and Crime Standards Directorate of the Home Office used the Final Report to publish “Guidance for the Police Use of Body-Worn Video Devices” in July of 2007.<sup>98</sup>

The Home Office “Guidance” on BWV touts a number of benefits for police in its key findings. Among them are the following:

- 1) BWV can record evidence for use in court in real time, and the evidence is “far more accurate than was previously possible, and doubts as to what was done or said by any person present can be minimised.”<sup>99</sup>
- 2) Recording is far quicker than manual record keeping, giving the officer more time for police work on the streets, and tends to lead to guilty pleas more often (given the difficulty of contradicting the evidence), which also frees up more officer time.<sup>100</sup>
- 3) Use of the BWV vis-à-vis public order offenses reduced these infractions, and made adjudication and resolution of such cases faster. Camera-equipped officers got the same results in their patrols of “anti-social behaviour hotspots.”<sup>101</sup>
- 4) Deployment of BWV “assisted greatly” in the prosecution of domestic violence cases.<sup>102</sup>
- 5) BWV served as an exceptionally detailed record for purposes of investigating officer use of firearms.<sup>103</sup>

Certainly, given all of this, use of BWV can improve policing, but it also can help to ensure better compliance with Fourth Amendment rules. Video and audio recording equipment “mounted to the side of a police officer’s head with the ability to record video and sound”<sup>104</sup> could, if used as part of a suitable framework of rules, go a long way toward ensuring that police follow search and seizure standards. Hints of this possibility show up in the Home Office “Guidance.” Among the many advantages of BWV reported there, the “Guidance” says that the

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 7.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 7, 8.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> ROB SOMER, PLYMOUTH HEAD CAMERA PROJECT 4 (2007), [http://police.homeoffice.gov.uk/publications/operational-policing/Plymouth\\_Head\\_Camera\\_Project.pdf?view=Binary](http://police.homeoffice.gov.uk/publications/operational-policing/Plymouth_Head_Camera_Project.pdf?view=Binary).

devices have proven useful in handling citizen complaints against police. “BWV recordings have also been shown to those wishing to make complaints about police actions at the scene . . . . In a number of cases the complainants have reconsidered their complaint after this review, thus reducing investigation time for unwarranted complaints.”<sup>105</sup>

It requires no great insight to understand that recording encounters with citizens could also support citizen complaints. Thus BWV would likely improve police behavior overall. Knowing that any search or seizure they conduct could be reviewed based not on the officer’s *ex post* report or testimony but on a video recording of the event in question would minimize the possibility of both bogus citizen complaints and illegal police behavior. Police supervisors would, of course, have access to all recordings, and review of them could assist greatly in officer training, assessment, and discipline regarding Fourth Amendment-related conduct—or conduct of any kind. The effect of recording search and seizure encounters could therefore become profound: knowing that a virtual observer remains present at all times would no doubt change behavior for the better, forcing a way of doing things that follows law and regulations and policy and abides by training, instead of disregarding all of these because the ends justify the means.

Of course, to make this proposal work, the law, departmental regulations, or both, must require that officers record every search or seizure. Recording would have to become as routine as the proper way to approach a car at a traffic stop, and as regularized as asking for license, registration, and proof of insurance at the driver’s window. Along with the recording requirement, police appearing in court would operate under a presumption. In a criminal case in which police recover evidence that the prosecution wishes to use in court against the defendant and which the defendant moves to suppress, lack of a recording would carry a presumption that the court should not accept the officer’s testimony, absent a compelling explanation for the failure to record and a reason that reflects the interest of justice. Similarly, in a civil case against an officer or a police department alleging a Fourth Amendment violation, lack of a recording would entitle the plaintiff to a jury instruction that the jurors should accept the defendant’s version of the facts, absent a compelling reason not to do so. Since *all* encounters with citizens would have to be recorded, auditing protocols would be used to determine whether the officer abided by the recording requirement. For example, this could involve the type of citizen surveys described above; when any citizen reports an encounter with the police, supervisors should be able to locate a recording of that encounter. If no recording had been made for the supervisor to reference, this failure to record would be treated as a violation of departmental regulations. Further, every time a citizen files a complaint against an officer, departmental rules would require that the officer’s supervisor obtain the recording of the encounter.

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<sup>105</sup> POLICE & CRIME STANDARDS DIRECTORATE, *supra* note 95, at 7.

All of this would, of course, require a high level of confidence that BWV devices would function dependably, and that police officers could not easily manipulate either the cameras or the resulting recordings. The Home Office “Guidance” explicitly raises the issue of technical dependability.<sup>106</sup> Assuming those producing the technology could successfully address this issue, fewer ways would suddenly exist for a police officer to ignore the rules of search and seizure and get away with it.

I do not argue that portable, wearable video cameras constitute a panacea for police misconduct. Surely, widespread use of the devices could only follow adequate resolution of questions about reliability and security against manipulation. However, they represent one piece of answer when we ask ourselves how we can get better compliance with the Fourth Amendment. Provided that BWV achieves compliance with benchmarks of trustworthy operation, this technology could certainly become part of the answer.

### C. Strengthening Litigation Tools

Recall that in the section of Justice Scalia’s opinion in *Hudson* supporting abandonment of the exclusionary rule, he points out that litigation can now serve as a way of achieving compliance with the Fourth Amendment.<sup>107</sup> While the *ineffectiveness* of lawsuits as deterrence to police misconduct actually motivated the Supreme Court to impose the exclusionary rule on the states in the first place,<sup>108</sup> Scalia says, things have changed. Litigation now deters misconduct.<sup>109</sup> To bolster his argument, Scalia quotes an authoritative treatise on litigating misconduct cases against police to the effect that “much has changed” since the years before and immediately after *Mapp*.<sup>110</sup> Back then, lawyers would not take a civil rights case alleging police misconduct, but now “[c]itizens and lawyers are much more willing to seek relief in the courts for police misconduct.”<sup>111</sup>

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<sup>106</sup> *Id.* at 6 (“Importantly, there is the further possibility of other technical failures or operator errors that may hinder the production of the recorded evidence.”).

<sup>107</sup> *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

<sup>108</sup> *Mapp v. Ohio*, 367 U.S. 643, 651–52 (1961).

<sup>109</sup> *Hudson*, 547 U.S. at 597–98.

<sup>110</sup> *Id.*, quoting MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION*, at v (3d ed. 2005).

<sup>111</sup> *Hudson*, 547 U.S. at 597–98, quoting AVERY, RUDOVSKY & BLUM, *supra* note 110, at v. Like Justice Scalia’s use of Samuel Walker’s work in the *Hudson* opinion, *see supra* note 44, the quote from Avery, Rudovsky and Blum is correct, but its meaning as used by Scalia is 180° different than what the authors actually meant. In a 2008 version of their book, Avery and his colleagues added a footnote to the page from which Justice Scalia had quoted. “In a highly misleading citation, Justice Scalia quoted us in *Hudson* . . . as support for the proposition that the availability of civil remedies against police supports limitations on the application of the exclusionary rule in criminal cases. We invite the reader to judge the honesty of this assertion based on a full review of this book.” MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION*, at



Justice Scalia's suggestion that litigation actually deters police misconduct does not ring true. As it stands, the law governing enforcement of the Fourth Amendment through litigation is not strong, but weak. In reality, *even with the exclusionary rule in place*, ensuring police compliance with Fourth Amendment law requires a strengthening of these litigation remedies, not reliance on them as they now exist. And, if this is true with the exclusionary rule in place, it would only become a more urgent matter if the rule disappeared. At the very least, three significant changes must occur. First, we must come to grips with the way the qualified immunity doctrine distorts the effectiveness of litigation against police officers. Second, Congress must undo two of the Court's decisions interpreting the statute providing for attorney's fees in civil rights cases. Third, any damage awards resulting from police misconduct lawsuits must be payable only out of the budget of the police department itself.

1. Qualified Immunity for Police Officers in §1983 Actions: Overrule *Anderson v. Creighton*

When plaintiffs sue police officers for violations of the Fourth Amendment and federal civil rights laws, the officers can assert qualified immunity as a defense to these charges. First recognized as a defense in 1967 for police officers acting in good faith and with probable cause,<sup>112</sup> the Supreme Court modified the qualified immunity doctrine in a series of cases in the 1970s, holding officials immune in civil rights suits if, (1) they had a good-faith belief in the lawfulness of their actions, and (2) given the law at the time, their beliefs were objectively reasonable.<sup>113</sup> In *Harlow v. Fitzgerald*, the Court announced basic changes to this doctrine, focusing it on the state of the law at the time of the action in question, and left aside the question of any subjective good faith.<sup>114</sup>

The Court's singular focus in *Harlow* on whether the legal principle in question was clearly established (along with its allowance that the issue could be decided on summary judgment, without any factual development of the record through discovery) made it unlikely that a police officer could successfully assert "any claim that the lack of a clear factual precedent could be the basis for an immunity defense . . . ."<sup>115</sup> In other words, a police officer could not claim qualified immunity for actions undertaken against a background of law that clearly

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v n. 1 (3d ed. 2008). In this author's opinion, a fair reader of the book could only conclude that Justice Scalia's use of the work was less than honest.

<sup>112</sup> *Pierson v. Ray*, 386 U.S. 547, 557 (1967).

<sup>113</sup> See *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (mental hospital officials); *Butz v. Economou*, 438 U.S. 478 (1978) (federal cabinet officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state executive officials), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

<sup>114</sup> *Harlow*, 457 U.S. at 809, 816–19.

<sup>115</sup> AVERY, RUDOVSKY & BLUM, *supra* note 110, at 3–20.

established the rights that plaintiff asserted the officer had violated; the reasonableness of the officer's own subjective beliefs on the question, in spite of the clearly established law were, properly and logically, of no concern. After all, an officer's beliefs could not be reasonable if law supporting rights that ran contrary to those beliefs was clearly established.

In 1987, the Supreme Court changed its approach to qualified immunity in *Anderson v. Creighton*.<sup>116</sup> The case involved a warrantless search of a home for which (the plaintiff argued) the record contained no basis to believe that the police could find the fugitive they sought in the home. The Court decided that the police could claim qualified immunity, in spite of the existence of clearly established constitutional rights that their actions violated, if a reasonable officer would not have known that his or her particular actions would violate those same constitutional rights—that is, the officer's qualified immunity will apply if a reasonable officer could have believed that the search complied with the Fourth Amendment, even though it did not.<sup>117</sup> This rather odd conception of qualified immunity seems at best unsound, and at worst irrational. Perhaps all one can do is restate the rule plainly: *Anderson v. Creighton* extends qualified immunity to police officers whose conduct is somehow objectively reasonable, even though it is (and was at the time) unconstitutional.

Thus, in order for litigation over violations of Fourth Amendment rights to act as a restraint on police conduct, the Supreme Court must at the very least reverse *Anderson v. Creighton*. To state, as Justice Scalia does in *Hudson*, that lawsuits alleging Fourth Amendment violations deter police wrongdoing surely assumes too much; the rule in *Anderson* resembles nothing so much as a free pass for officers charged with misconduct, in the form of immunity from suit. As the dissent in *Anderson* put the point, the majority's opinion "stunningly restricts the constitutional accountability of the police."<sup>118</sup> The treatise quoted by Justice Scalia for support in *Hudson*<sup>119</sup> registers clear disagreement with him in the context of *Anderson*: "Having failed to act reasonably under settled standards . . . , the defendant can still prevail if he can show that a reasonable police officer would have thought that under the facts [he acted reasonably]."<sup>120</sup> Another commentator has said that, with the focus on the officer's reasonable belief about the facts, juries have difficulty finding the police officer liable "if the conduct is objectively unreasonable but somehow understandable."<sup>121</sup> However murky the *Anderson* rule

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<sup>116</sup> 483 U.S. 635 (1987).

<sup>117</sup> *Id.* at 638–41.

<sup>118</sup> *Id.* at 647 (Stevens, J., dissenting).

<sup>119</sup> See AVERY, RUDOVSKY & BLUM, *supra* note 110.

<sup>120</sup> *Id.* at 3-22 (quoting Judge Richard Posner's statement that the *Anderson* standard gives the defendant "two bites of the apple." *Llaguno v. Mingey*, 763 F.2d 1560, 1569 (7th Cir. 1985), *abrogated on other grounds by County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

<sup>121</sup> Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1506–07 (1993).

seems, it does constitute strong encouragement to jurors to put themselves in the officer's position and make judgments from that point of view. Without a correction of *Anderson*, no one can make a tenable argument that litigation of Fourth Amendment claims could serve as an adequate substitute for the exclusionary rule.<sup>122</sup> As the commentators quoted by Justice Scalia in *Hudson* have said, “[f]or plaintiffs in police misconduct litigation, the Supreme Court’s molding and manipulation of the qualified immunity defense to provide the utmost deference for law enforcement officials has had its most damaging impact in the Fourth Amendment area. . . . [T]he qualified immunity defense, as recently formulated by the Court, wraps a protective layer around conduct that is, in fact, objectively unreasonable.”<sup>123</sup>

## 2. Attorney’s Fees as a Way to Ensure Compliance with Civil Rights Laws: Put the Law Back in Working Condition by Overruling Cases that Subvert Its Purposes

Another of Justice Scalia’s points, namely, that lawyers will bring cases enthusiastically for violation of Fourth Amendment because they will earn money doing this, has great appeal for anyone concerned with police compliance with the law. In the years after *Mapp*, Justice Scalia says, few lawyers would have taken cases alleging Fourth Amendment violations.<sup>124</sup> But this has changed, Scalia tells us, and he credits the enactment of 42 U.S.C. §1988 (b), which allows the prevailing party to obtain attorney’s fees even when the civil rights violations alleged “would yield damages too small to justify the expense of litigation.”<sup>125</sup>

Because of the existence of the attorney’s fees statute, federal civil rights claims can be vindicated even when the free market for legal services would not provide counsel willing to undertake this work, and this is clearly what Congress intended in enacting the statute.<sup>126</sup> Unfortunately, a pair of the Supreme Court’s own decisions have badly weakened the attorney’s fees statute’s ability to serve the function for which Congress designed it. In *Marek v. Chesny*,<sup>127</sup> the Court gave its

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<sup>122</sup> As even those who do not support the exclusionary rule have conceded, litigation could not serve as an effective substitute because of the “substantial web” of protection afforded by qualified immunity. Brief for Criminal Justice Legal Foundation as Amica Curiae Supporting Respondent at 10, *Hudson v. Michigan*, 547 U.S. 586 (No. 04-1360), 2005 U.S. S. Ct. Briefs LEXIS 822, at \*\*20 (2006).

<sup>123</sup> AVERY, RUDOVSKY & BLUM, *supra* note 110, at 278–79.

<sup>124</sup> *Hudson v. Michigan*, 547 U.S. 586, 597 (2006).

<sup>125</sup> *Id.* at 597–98.

<sup>126</sup> See, e.g., Jeffrey S. Brand, *The Second Front in the Fight of Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 309–10 (1990) (“Indeed, when the Fees Act was passed, the paucity of civil rights counsel had been well documented,” and the purpose of the statute was “[m]aking more lawyers available for private enforcement of the nation’s public interest.”).

<sup>127</sup> 473 U.S. 1 (1985).

blissing to an interpretation of Rule 68 of the Federal Rules of Civil Procedure regarding settlement offers. This seemingly arcane decision had huge consequences for civil rights litigation. The Court's opinion in *Marek* meant that if defendant makes an offer of settlement to the plaintiff in a police misconduct case, the plaintiff rejects the offer, and the final judgment in the case is less than the amount of the offer, plaintiffs would receive no attorney's fees for any work done after rejecting the offer.<sup>128</sup> Yet, it would not be surprising if considerable resources had to be expended after the rejection of such an offer, especially if the defendant made the offer early in the process; making an early (and low) offer thus gives the defendant the opportunity to create leverage on plaintiff's counsel to settle early and perhaps for less than the claim seems to be worth, for fear of missing out on fees almost entirely.

In the second case, *Evans v. Jeff D.*,<sup>129</sup> the Court approved another procedural maneuver designed to avoid the awarding of attorney's fees under the statute. In *Jeff D.*, the defendants offered to settle, but made their offer contingent on plaintiffs waiving their claims to attorney's fees. Since an amount to settle the claim would go to the plaintiffs, but the fees recovered from defendants would go to counsel, making the offer contingent on the waiver of fees appeared to drive an ethical wedge between plaintiffs and their lawyers: the lawyers must of course act at all times in the client's interest, but recommending the settlement would act directly against counsel's interest.<sup>130</sup> The Supreme Court found that this type of settlement offer presented no problem, and was not barred by the attorney's fees statute.<sup>131</sup> Of course, this ignores the fact that without the potential for a fee recovery, plaintiff's counsel might not have undertaken the case for the plaintiff in the first place. Thus, the decision undermined the purpose of the statute, which was to insure that plaintiffs would have access to counsel in civil rights cases, because counsel would receive fees.

These two cases hobble the attorney's fees statute, by directly and forcefully attacking its capacity to achieve the objective for which Congress designed it. Both *Evans v. Jeff D.* and *Marek v. Chesny* add up to a blatant substitution of the Court's will for that of the Congress. Defense lawyers for police in civil rights cases will, of course, use these cases to their clients' advantage:

[I]t is likely that after *Evans* defendants will routinely request fee waivers to avoid liability for statutory fees [and] *Marek* will likely inspire defense counsel to make routine lowball Rule 68 offers in the hope of garnering a windfall settlement based on plaintiffs' counsels'

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<sup>128</sup> *Id.* at 9.

<sup>129</sup> 475 U.S. 717 (1986).

<sup>130</sup> *Id.* at 721–22.

<sup>131</sup> *Id.* at 730–32.

fears of nonrecovery of post-offer statutory fees. Each of these scenarios contradicts congressional intentions.<sup>132</sup>

Congress clearly has the power to overrule these cases, and it must do so to make sure the attorney's fees statute works as intended. As things stand, the Supreme Court has effectively rendered the law useless. Unless Congress undoes the *Marek* and *Evans* rules, these cases will continue to deter counsel from taking meritorious cases. This puts one of Justice Scalia's main points in *Hudson* in doubt, to say the least. The idea that litigation under the civil rights laws could substitute for the exclusionary rule seems dubious if the underpinnings of the litigation structure do not work.

### 3. Changing the Economic Incentives: Require that Police Departments Bear the Cost of Damages Awarded Against Them for Police Misconduct

As explained above, even millions of dollars in damages over many years has failed to force police departments to confront police misconduct, because departments do not pay these damages; instead, they come out of the general funds of municipalities.<sup>133</sup> This must change. Police departments will pay no attention to damages unless they ultimately bear the burden of accountability for the damages.

This issue is complex, but not impossible to resolve. The first barrier to a solution is that most American police departments (excluding federal agencies such as the FBI) are local, and thus a solution must come from the municipal, county, or state government itself. Fortunately, a model exists that shows us how to accomplish this. In 1996, San Francisco citizens, tired of paying for police misconduct damages, passed Proposition G, a series of changes to the city charter designed to address the issue. First, all damages paid (whether because of a court's verdict or a negotiated out-of-court settlement) in police misconduct cases must come from a line item in the police department's own budget, and cannot come from the city's general fund.<sup>134</sup>

Second, the department could not pay the damages by reducing the number of police personnel below a set number.<sup>135</sup> The idea behind the second rule is that, since personnel—their salaries, benefits, and the like—make up the largest

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<sup>132</sup> Brand, *supra* note 126, at 361.

<sup>133</sup> See *supra* text accompanying notes 30–42.

<sup>134</sup> S.F., CAL., CITY CHARTER art. IV, § 4.127 (2004), available at <http://www.municode.com/Resources/gateway.asp?pid=14130&sid=5> (“Monetary awards and settlements disbursed by the City and County as a result of police action or inaction shall be taken exclusively from a specific appropriation listed as a separate line item in the Police Department budget for that purpose.”).

<sup>135</sup> *Id.* (“The police force of the City and County shall at all times consist of not fewer than 1,971 full duty sworn officers. The staffing level of the Police Department shall be maintained with a minimum of 1,971 full duty sworn officers thereafter.”).

proportion of the budget, the department could not pay for the damages by getting rid of officers, perhaps creating a threat to public safety. Instead, the department would have to return to the city's Board of Supervisors to ask for supplemental monies to cover the damages. In other words, the ordinance would require a moment of public political accountability concerning the spending of public funds. This would force the department's leadership to take action to address the problems that caused the damages; any chief who did not at least attempt to do so would not last long.

Suppose, however, that the municipality in question could not see the wisdom in this approach, and continued to allow its police department to externalize, and therefore ignore, the damages against it. The federal government, of course, could not simply order state and local police forces to do things its way; the states (and their municipal creations) have autonomy in these matters.<sup>136</sup> But, the federal government does not lack for leverage. Every year, the federal government makes many millions of dollars available to local police to fund all manner of initiatives, training, programs, and equipment. These grants go to police agencies large and small. The American Recovery and Reinvestment Act of 2009,<sup>137</sup> the so-called stimulus bill, contained roughly four billion dollars for these purposes.<sup>138</sup> Congress need only make the acceptance of these funds conditional on handling damages in the way specified here. This would gain rapid acceptance, given the desire and the need for the federal funding.

## V. THE DAY AFTER THE EXCLUSIONARY RULE DISAPPEARS: POLICE ACCOUNTABILITY MECHANISMS AS THE BEST SUBSTITUTE

### A. *What if the Exclusionary Rule Disappears?*

Recall that Justice Scalia, for himself and three other justices, stated in *Hudson v. Michigan* that the time of the exclusionary rule has passed.<sup>139</sup> Even if this position does not yet have the five votes necessary to command a majority, the Court's 2009 opinion in *Herring* might lead one to believe that the end of the rule will come soon.<sup>140</sup> Thus, whether supporters of the exclusionary rule like it or not, they must consider a question beyond how to bolster the rule as it exists now.

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<sup>136</sup> See, e.g., *Printz v. United States*, 521 U.S. 898 (1997) (federal government had no power to order local law enforcement officials to take action to implement the Brady Handgun Violence Prevention Act).

<sup>137</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>138</sup> Jim McKay, *Stimulus Bill Revives Key Law Enforcement Grants, Funds Firefighters*, GOVERNMENT TECHNOLOGY, Feb. 18, 2009, <http://www.govtech.com/gt/619771> (Act contains roughly 4 billion dollars in federal funding for state and local law enforcement).

<sup>139</sup> See *supra* text accompanying notes 7-14.

<sup>140</sup> *Id.*

They must ask what should substitute for the rule *if*, or perhaps more accurately *when*, the Court abolishes it.

Of course, proposed substitutes for the exclusionary rule have long constituted a staple of scholarship in criminal procedure. Critics have targeted the rule for many years, almost since the Supreme Court first imposed it in the federal system in 1914, in *Weeks v. U.S.*<sup>141</sup> Probably the most famous remark about the rule came well back in the twentieth century, just a dozen years after *Weeks*, from Benjamin Cardozo, then a member of the Court of Appeals of New York: “There has been no blinking the consequences. The criminal is to go free because the constable has blundered.”<sup>142</sup> The Supreme Court’s imposition of the exclusionary rule on the states in 1961 in *Mapp v. Ohio*<sup>143</sup> meant that the number of cases the exclusionary rule affected multiplied many times over. With this came a steady stream of criticism over the years. Professor Akhil Amar has called Fourth Amendment law “an embarrassment” and a “doctrinal mess.”<sup>144</sup> Elsewhere, I compared the confusing welter of Fourth Amendment rules and exceptions to an old, threadbare coat “tattered and full of holes.”<sup>145</sup> Professor Amar and I are only two of many commentators who have criticized the inconsistency and incoherence of the Supreme Court’s rules for search and seizure; much of this criticism has also proposed alternatives to the rule.<sup>146</sup> Many of the suggested alternatives would

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<sup>141</sup> 232 U.S. 383, 398 (1914).

<sup>142</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), *cert. denied*, 270 U.S. 657 (1926). See also *Stone v. Powell*, 428 U.S. 465, 489–90 (1976) (footnote omitted) (“The costs of applying the exclusionary rule even at trial and on direct appeal are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.”).

<sup>143</sup> 367 U.S. 643 (1961).

<sup>144</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757, 759 (1994).

<sup>145</sup> David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 556 (1998). Professor Amar proves my equal and more in use of over-the-top prose just a few pages into his article, stating that “Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs.” Amar, *supra* note 144, at 759.

<sup>146</sup> See, e.g., Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 969–80 (1983) (proposing damage-based procedure); Robert Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 252–56 (1976) (discussing internal police department disciplinary system); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J. L. & PUB. POL’Y 111, 115–16 (2003) (advocating the use of post-trial sentence discounts); Michael J. Daponte, *Discretion and the Fourth Amendment Exclusionary Rule: A New Suppression Doctrine Based on Judicial Integrity*, 30 MCGEORGE L. REV. 1293, 1311–23 (1999) (proposing discretionary suppression of evidence based on a balancing of multiple factors related to judicial integrity); Robert P. Davidow, *Criminal Procedure Ombudsman Revisited*, 73 J. CRIM. L. & CRIMINOLOGY 939, 939–41 (1982) (supporting system combining the use of juries and ombudsman); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 690 (1972) (advocating agency rulemaking); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 744–52 (1998) (arguing for administrative damages proceedings to address violations); Virgil W. Peterson,

make sense, at least on some level. But the accountability-based policing mechanisms suggested here as a way to bolster the exclusionary rule as it exists now would also constitute a better substitute for the exclusionary rule than these other possibilities.

*B. An Explicit Assumption: Do Not Return to the Bad Old Days*

Before going any further, I should make explicit an important assumption. I believe that we would not be better off returning to the way law enforcement in the states observed (or rather, did *not* observe) the Fourth Amendment before the imposition of the exclusionary rule in 1961. With regard to the Fourth Amendment, state and local police could do anything they wanted. They did not have to obey any limits regarding probable cause, warrants, or anything else, and at least from a legal perspective, they could get away with it. Failure to observe Fourth Amendment limits carried no negative legal consequences in any trial of the defendant that followed. Police officers did not worry about following search and seizure law; rather, for all practical purposes, they themselves were the law.

For at least some, those times were—and still would be—considered the good old days. Consider the story of Remo Franceschini, a former New York City police detective. In his book, *A Matter of Honor: One Cop's Lifelong Pursuit of John Gotti and the Mob*,<sup>147</sup> Franceschini, who joined the NYPD in the days before *Mapp*, describes the way he and his fellow officers operated then:

We used to go into what we called the Valley, down on Eighth Avenue in Harlem, and raid the pool rooms. We didn't have search warrants, we just went into the place and started something. . . . We'd line them up, search them, and lock them up for "discon," disorderly conduct. Some for possession. We'd call the wagon and take fifteen people out of there, take the whole crew down.

. . . . [T]hey didn't give us a hard time. That's the kind of fear and respect we commanded; they knew we controlled the streets and they knew we controlled that room.

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*Restrictions in the Law of Search and Seizure*, 52 NW. U. L. REV. 46, 62 (1958) (proposing the creation of a civil rights office tasked with investigating unconstitutional police misconduct); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 366 (arguing that exclusion of evidence should occur in cases of flagrant violations of the Fourth Amendment, but otherwise penalties for violations should be monetary penalties); James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT'L & COMP. L. REV. 77, 82–83 (1999) (advocating a Canadian-style discretionary exclusionary rule as the best substitute for the current American all-or-nothing rule); Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 231–32 (1978) (arguing for "mini-trial" following criminal trial, which would include penalties on individual officers plus a civil remedy for nonprosecuted cases).

<sup>147</sup> See FRANCESCHINI & KNOBLER, *supra* note 29.



That all stopped with *Mapp v. Ohio*.

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All of a sudden you couldn't stop a guy on the street and give him a toss. You had to have probable cause. You couldn't bring somebody in because you knew he was dirty, you had to see him being dirty. The exclusionary rule essentially shut down police procedure that had been going on for a hundred years.<sup>148</sup>

The world that Franceschini and his fellow officers seemed to inhabit—colorful and reassuring, with tough cops imposing order on the strength of their authority—will certainly appeal to some. But I, for one, would not wish to return to a time when my rights and those of my neighbors existed only as long as Franceschini and his colleagues decided that those rights meant something, or that I was (from his point of view) worthy of respect. I suspect I might feel even more strongly about this if I happened to be black and living in Harlem, where Franceschini felt so free to just “take the whole crew down” after “giv[ing] [someone] a toss,” the law be damned.

Such a regime might maintain order more efficiently than the cumbersome rule of law does. But our history contains too many examples of police abuse flourishing without oversight. The exclusionary rule may indeed cause problems of its own, but it does force police to follow the rule of law—not always and not enough, clearly, but at least some significant part of the time. And I do not believe we would be better off with police who feel free to ignore the law. So if the exclusionary rule goes, we will need something else to replace it that can restrain search and seizure misconduct.

### 1. The Major Criticisms of the Exclusionary Rule

In order to assess how good a substitute the accountability measures I propose here would be for the exclusionary rule, we need to familiarize ourselves with the main criticisms of the rule. I list them here in brief form.<sup>149</sup>

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<sup>148</sup> *Id.* at 35–36.

<sup>149</sup> My objective is not to construct a comprehensive bibliography of these criticisms and the arguments over them, but rather to give the reader a quick overview of the main points of argument over the years. For anyone wishing for more information on some or all of these critiques see, for example, JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES* 464–72 (2d ed. 2003) (stating that “[d]ebate regarding the exclusionary rule commenced almost as soon as the decision [in *Mapp*] was announced, and it has not ceased,” and surveying the main arguments for and against the use of the rule); WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* 108–13 (4th ed. 2004) (“The validity and efficacy of this exclusionary rule have been vigorously debated over the years. Much of this debate is more remarkable for its volume than its cogency.”). See also RUSSELL L. WEAVER ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE* 254–

i. The Loss of Probative Evidence from the Trial Process

When a police officer collects evidence, resulting in charges against a defendant, the defendant may, of course, argue that the officer found the evidence in a way that violated the Fourth Amendment. The evidence, particularly in cases alleging possession of contraband, may constitute the main (and sometimes the only) evidence in the case. If the court agrees that the police officer violated the Fourth Amendment and suppresses the evidence, the obviously guilty defendant will go free. The exclusionary rule therefore distorts the truth-finding function of the trial process, critics say, by depriving courts of the evidence already in the possession of the police that proves the defendant's guilt.<sup>150</sup>

ii. An Undeserved Windfall for Unsympathetic Litigants

This criticism follows from the first. It inspired Cardozo's famous remark about the criminal and the constable.<sup>151</sup> The distortion of the trial process by the exclusion of probative evidence means that the case against the defendant at the very least becomes weaker without the evidence; in cases of possession of contraband—which would, of course, include every drug possession case—exclusion of the evidence effectively destroys the case. The defendant gets a windfall: no conviction in a case in which he or she clearly deserved a guilty verdict (in the case of a possession-of-contraband case), or a significantly weakened prosecution case.<sup>152</sup>

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59 (3d ed. 2008) (stating that exclusionary rule has always been disfavored and controversial for many reasons, but that few if any alternatives work).

<sup>150</sup> Certainly one cannot disagree with the fact that the loss of evidence that the jury could use to decide guilt or innocence does have a distorting effect. But the Supreme Court has noted that the exclusionary rule merely makes operational what the Constitution commands. As Justice Scalia has pointed out, the Bill of Rights puts certain modes of evidence gathering beyond the government's use, even though using them might result in the uncovering of incriminating evidence that would prove useful to the prosecution. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona v. Hicks*, 480 U.S. 321, 329 (1987) (declaring that merely lifting a piece of audio equipment to see a serial number not visible otherwise constituted a search).

<sup>151</sup> See *supra* text accompanying note 142.

<sup>152</sup> The idea of the exclusion of the evidence, of course, is that police officers, not wanting to see obviously guilty defendants walk away without suffering the proper consequences of their criminal actions, will find themselves deterred from violating search-and-seizure rules in subsequent cases, benefitting everyone in our society. Assuming this happens, the immediate consequences in the defendant's own case seem both more direct and clearly perverse: a guilty person goes free and does not deserve to, in order to attain some greater societal good. The defendant litigates the Fourth Amendment claim on behalf of the rest of us, but the defendant's unattractiveness as a "plaintiff"—a guilty party getting a benefit he does not deserve and defeating the efforts to impose justice in his own case as he does so—sticks in the collective craw.

iii. Avoidance of the Exclusionary Rule by Courts and the Resulting Distortion of the Law

Judges, like other citizens, sometimes find the windfall received by guilty defendants hard to stomach, and may attempt to avoid this outcome in cases before them. This occurs at every level of the judiciary: state and federal, trial and appellate. When trial judges find a case before them calling for exclusion of the evidence because of the violation of search and seizure rules, they may adopt a distorted view of the facts in order to find the relevant police actions within the parameters of existing law. Worse yet, trial judges and appellate judges may find themselves making decisions and writing opinions that distort and bend the law in order to avoid suppressing the evidence. Judge Guido Calabresi describes the process this way:

Judges—politicians' claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities . . . . [T]he judge facing a clearly guilty murderer or rapist [claiming a Fourth Amendment violation] will do her best to protect the fundamental right *and* still keep the defendant in jail . . . .

This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes the precedent for the next case. The next close case comes up and the precedent is applied: same thing, same thumb on the scale, same decision. . . . [C]ourts [thus] keep expanding what is deemed a *reasonable* search or seizure.<sup>153</sup>

When appellate courts and especially the United States Supreme Court engage in this process, they change and stretch the currently applicable law in order to support trial court decisions that keep evidence in (or reverse trial court decisions that exclude evidence), for the same reasons trial judges do: they do not wish to see the guilty evade punishment. As Judge Calabresi says, this creates yet wider (not to say confusing) exceptions to the exclusionary rule that, when seen in the context of existing Fourth Amendment law, create legal inconsistencies and problems for the next set of cases.

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<sup>153</sup> Calabresi, *supra* note 146, at 112.

#### iv. “Ends Justify the Means” Thinking and Police Perjury

Commentators have long recognized that some police officers do not tell the truth when they testify in court.<sup>154</sup> This constitutes no new revelation. However, police officers seem to have a special disdain for the oath in the context of testimony on search-and-seizure issues. They feel the rules for searches and seizures have little if anything to do with what they do on the street; when they find drugs or an illegal gun on a suspect, they know they have found a criminal. If, in order to make the case “stick” against the guilty party, they have to tell the court under oath that the search or seizure happened a little differently than what actually happened, they feel justified in doing this because making sure the criminal gets his just desserts is more important than an arcane legal rule. In other words, the ends justify the means. This way of thinking and the giving of untruthful testimony under oath on search and seizure issues had become so routine by the early 1990s in the New York Police Department that the 1994 report of an independent commission called it the most common and pervasive type of corruption infecting the Department. Perjury among officers in these circumstances in the NYPD “[wa]s so common in certain precincts that it ha[d] spawned its own word: ‘testilying.’”<sup>155</sup>

#### v. No Remedy for Innocent Parties Illegally Searched or Seized

The critics of the exclusionary rule also point to the situation of innocent parties whom the police subject to an illegal search or seizure. When an illegal search or seizure occurs, that action violates the law whether or not police actually recover any evidence. However, only those persons from whom the police recover evidence with an illegal search or seizure would have any recourse through the exclusionary rule. In other words, it will only be in the cases in which the police found and seized evidence—that is, cases in which defendants were guilty—that the state will bring a case, in which the defendant might then file a motion to suppress. For innocent persons—those from whom no evidence is seized—no

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<sup>154</sup> Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596 (“Every lawyer who practices in the criminal courts knows that police perjury is commonplace. The reason is not hard to find. Policemen see themselves as fighting a two-front war—against the criminals on the street and against the ‘liberal’ rules of law in court. All’s fair in this war, including the use of perjury to subvert ‘liberal’ rules of law that might free those who ‘ought’ to be jailed.”); Calabresi, *supra* note 146, at 113 (“[I]t is also my sense that this situation has led police to lie in order to prevent certain evidence from being excluded.”). Alex Kozinski, a judge on the U.S. Court of Appeals for the Ninth Circuit, has said that “[i]t is an open secret long shared by prosecutors, defense lawyers, and judges that perjury is widespread among law enforcement officers.” Stuart Taylor, Jr., *For the Record*, AM. LAW., Oct. 1995, at 69, 71.

<sup>155</sup> Mollen et al., *supra* note 53, at 36 (widely known as the Mollen Commission Report). See also I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L. J. 835, 836 (2008) (lying by police during suppression hearings should not “come as a surprise”); Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1.

charges will follow the police actions, and no evidence exists for a court to suppress. Thus innocent parties subject to illegal searches get no benefit from the exclusionary rule.

## 2. How Accountability-Based Policing Replaces, and Responds to Criticism of, the Exclusionary Rule

As one makes the case for accountability-based policing as a replacement for the exclusionary rule, one fact jumps out first: Without the exclusionary rule, and with an accountability-based regime in place, courts will not suppress probative evidence. This addresses the first criticism stated above regarding damage to the truth-finding function. (Of course, this would also be true with other proposed replacements for the current system that do not attempt to retain the feature of suppression in any form.) More important for present purposes, however, any explanation for why accountability-based policing would perform better than the current exclusionary rule necessarily also shows how these proposals answer the criticism of the exclusionary rule as it exists now.

### i. Accountability-Based Policing Focuses Directly on Increasing Compliance by Modifying Police Behavior, Not on Hoped-For Secondary Effects.

Creating an early intervention system focused on search-and-seizure behaviors (e.g., stops, frisks, car stops, searches with and without warrants, and the like) supplies managers within police departments with actual data enabling them to understand what the officers under their commands have done and, without intervention, will continue to do. With this kind of tool, if supervising sergeants and lieutenants observe patterns of behavior that do not comply with Fourth Amendment rules, they can take direct action to influence that behavior. An officer who does not obey search-and-seizure rules can receive extra training, get the benefit of a period of close observation from supervising officers, or might find him- or herself the recipient of sanctions, either in the form of discipline or the withholding of desired rewards.

Actions like these give police departments and supervisors the best chance to change the way their police officers do things; having an impact on the officer's own situation will communicate that the officer must change his or her old way of doing things, or suffer personal consequences. Similarly, recordings of officers' search-and-seizure actions, and the greater possibility of successful litigation against them and their departments, will focus the attention of all involved on meeting Fourth Amendment standards.

These methods promise a far greater chance of creating real changes in officer behavior than the exclusionary rule alone would, because even making the strongest assumptions about the rule's efficacy as a deterrent to police misconduct, the exclusionary rule only works on a secondary level. The exclusionary rule tells

judges to exclude the evidence when the police fail to follow the Fourth Amendment. What we actually want is not the exclusion of evidence, but the transmission of a message to the police officer and the police department: "If you break Fourth Amendment rules to gather evidence, you will suffer negative consequences that matter to you. You can avoid this outcome in the future by following the Fourth Amendment."

Under the exclusionary rule, however, this message may seem both distant and diluted. After all, police officers rarely if ever suffer personal or professional consequences for disobeying Fourth Amendment rules; rather, the other components of the criminal justice system suffer more direct effects. And any effect on the system as a whole has become diluted by the Supreme Court's constant bending of search and seizure rules, excusing many types of police failures to follow search and seizure rules from the consequences of exclusion.<sup>156</sup> A more direct approach to affecting police behavior would seem a wiser and more promising course going forward. One lesson of Gould and Mastrofski's work is that some substantial number of officers find it easy, or worthwhile in some way, to ignore the exclusionary rule for what they perceive as good and sufficient reasons. They seek evidence in legally proscribed ways, despite knowing that, if found out, suppression of the evidence could result. For whatever reasons, the possible invocation of the rule does not deter their behavior. Focusing directly on, and attaching negative consequences to, police officer misbehavior would, at least, put the officer in mind of direct personal and professional outcomes he or she might suffer. Thus the message police officers receive under accountability-based policing differs from the one sent by the exclusionary rule. Rather than "if you break Fourth Amendment rules in collecting evidence in this case, the prosecutor may have to dismiss it if the judge rules for the defendant," the message becomes "if you break the rules and your supervisor learns of this through the early warning system, a citizen complaint, or a video and audio recording made of the event, you, personally, will suffer unpleasant effects."

ii. Internally-Generated Rules Will Help Attain Better Fourth Amendment Compliance than External Rules Have

Police officers and police departments, as individual actors and organizations within the criminal justice system, must obey rules designed to regulate their behavior. Some of these rules originate from other institutions within the government: laws passed by the legislature; orders, guidelines, and budget constraints that originate with the executive officers of the jurisdiction; and case

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<sup>156</sup> *Hudson v. Michigan*, 547 U.S. 586, 599 (2006), itself is an example of just such a dilution through Supreme Court rule bending. A violation of the knock-and-announce rule was conceded by the State of Michigan; no one disputed that the police had not followed existing Fourth Amendment rules. But the Supreme Court declared nevertheless that henceforth, the exclusionary rule would not apply to knock-and-announce violations. Thus the case displays an undisputed violation of the Fourth Amendment, and no consequences.

law, constitutional interpretations, and enforceable orders issued by courts. Other rules police officers follow come from inside their own organizations: departmental policies on everything from use of force to proper use of squad cars; standard operating procedures for routine enforcement matters and the following of certain administrative protocols; enforcement priorities set by departmental chiefs; or deployment orders from precinct commanders.

Naturally, we expect police officers to follow all of these rules, wherever they originate. However, for police officers, these assumptions simply may not hold. In many ways, the world of policing constitutes a separate and distinct culture, an insular world. Many police officers view regulation of their practices by individuals or institutions from outside law enforcement as less than legitimate—as interference from those who have no understanding of the realities officers must deal with every day. Put simply, rules coming from and imposed by outsiders lack legitimacy in the eyes of officers.

As Wayne LaFave has argued, administrative regulation of police behavior from within officers' own organizations can govern police behavior much more effectively than can externally generated and imposed rules.<sup>157</sup> Particular rules that come from officers' own chains of command may seem no more desirable or sensible in terms of what they require officers to do than rules that come from a legislature or a federal judge's decree. However, because they originate within the law enforcement organization itself, they come with a presumption of legitimacy in the eyes of those regulated. Generally speaking, such rules should attain a higher rate of compliance.

At least the first two parts of the system described in this article—the use of an early intervention system, and the use of BWV recording technology in routine police/citizen encounters—could fit within the definition of internally-generated regulatory systems or rules. Both reforms need not come from legislatures or executive orders; departments wishing to replace the exclusionary rule with another regime that would ensure Fourth Amendment compliance could themselves order that these measures go into effect. Even if the order to put such systems in place came from a legislative requirement (e.g., a law that each police department shall equip its officers with BWV), the details of how to implement the law would remain within the police department's discretion and policy making authority to decide. For example, the details concerning what search and seizure behavior the early intervention system would track, and the standards set for each tracked behavior (in order to know when an officer falls outside the acceptable range) would necessarily have to come from the department itself. A legislative body, by nature, makes generally applicable laws that could not take account of local factors, whereas an organization in a particular jurisdiction would know just how to do this.

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<sup>157</sup> Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and NonUse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 451 (1990).

iii. The Accountability-Based System Provides a Remedy for the Innocent When Police Violate Their Rights

As discussed above, the exclusionary rule provides no remedy for persons subjected to illegal searches and seizures that do not result in the recovery of any evidence, i.e., innocent parties. While Justice Scalia and his allies on the Court assume that people in this situation can turn to civil rights litigation for redress,<sup>158</sup> the Court's own case law as it stands today discourages victims of search and seizure violations from doing so.<sup>159</sup>

The accountability-based approach outlined in this article promises a remedy. The changes to the law discussed here aimed at strengthening the possibility of successful litigation to address police violations of the Fourth Amendment<sup>160</sup> at least create the possibility that a person with a legitimate claim, but from whom police recovered no evidence, could bring and even win a case. Qualified immunity would resume its rightful place as a doctrine limiting liability of officers who act reasonably, but not unconstitutionally. Attorney's fees for lawyers could again become the realistic possibility that Congress intended in order to make private counsel available to litigants who want to vindicate constitutional rights even if damage awards might prove small. Without these changes to federal law, the possibility of recourse for victims of Fourth Amendment violations who cannot suppress evidence remains a pipe dream; if implemented, these modifications would go some distance toward replacing the current regime with a better one—one in which non-criminal actors would have an opportunity to get some redress.

iv. Creation of the Best Possible Record Ensures Greater Compliance

With the requirement that officers record every search-or-seizure encounter with BWV recording equipment, officers themselves will create the best possible record of the interaction. If BWV works as well for accountability purposes as it seems to for evidence gathering and public order policing (and there is no reason it should not), a complete recording of the incident will exist, and the officer will know this. This should limit the temptation an officer may feel to burnish—even fabricate—reports of facts and later testimony on search and seizure issues. "Testilying" could become, if not a thing of the past, then at least the exception to the rule.

One should not have impossible expectations of the capabilities of recording devices in the field, or of the possibilities they offer to make a true, clear record. Video or audio or even both may fail in any particular device on any occasion. Even when everything functions perfectly, the picture of the scene provided by the recording may prove incomplete, even misleadingly so. However, the presumption

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<sup>158</sup> See *supra* text accompanying notes 12–13.

<sup>159</sup> See *supra* text accompanying notes 112–17, 127–32, 133.

<sup>160</sup> See *supra* text accompanying notes 118–23, 134–37.



that, in the regular course of things, officers will record police/citizen interactions has the power to reshape an important underlying assumption. As things stand, without any rule requiring recording, officers can assume that they remain free to tailor, or even make up, the facts necessary to ensure that the court will not suppress the evidence. Perhaps just as importantly, they assume (almost certainly correctly) that, in a case requiring testimony in a suppression hearing, the judge will believe their version of the story as opposed to the defendant's. The availability of a recording cuts against these assumptions. Assuming that manufacturers and police administrators can successfully address concerns about reliability and tampering, an officer would have to assume that he or she could not, with impunity, just "make it up" whenever necessary to secure the conviction of the accused. In a post-exclusionary rule world, of course, the courts would not suppress evidence, and this by itself would dispel much of the temptation to lie. But any legal action alleging search or seizure misconduct, in which a citizen might seek redress would likely also require testimony from both the officer and the civilian involved. Thus the record created by the recording would still serve to keep testimony as close as possible to the truth.

One other aspect of the use of BWV recording may make this part of the accountability-based approach more popular with police officers than might initially seem likely. Recall that, in some police departments, many police vehicles have operating video and audio recording systems installed to record traffic stops and other incidents. Despite the cost of this equipment (roughly five thousand dollars per car), a growing number of police departments want this technology for their vehicles. More importantly, police officers who, at first, resist the idea of in-car recording devices, often come to value it greatly. Experience soon teaches them that, for all their fears that the recording system only constitutes a spying system for management or a way to cut into their autonomy, the systems most often help and protect them. The cameras gather evidence of crimes, constructing an unimpeachable record of whatever happened, as long as the machine records the action. But, the cameras have also collected evidence that has protected officers against spurious accusations from the public.<sup>161</sup> They soon conclude the tradeoff (in terms of any encroachment they feel on their autonomy) is well worth it.<sup>162</sup>

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<sup>161</sup> *All Things Considered: N.J.—State Troopers* (National Public Radio radio broadcast Feb. 17, 2000), <http://www.npr.org/templates/story/story.php?storyId=1070488> (last visited Feb. 27, 2009) (40 complaints of racial harassment against New Jersey State Troopers dismissed after in-car video recording systems showed that complaints were untrue).

<sup>162</sup> See generally HARRIS, *supra* note 34, at 193–95.

v. Without Evidentiary Exclusion, Judges Would Feel No Pressure to Distort the Law to Ensure that Guilty Parties Do Not Escape

Judge Calabresi's eloquent description of the process by which judges seek *not* to allow the guilty to escape punishment (even in the face of Fourth Amendment violations) by constantly widening the legal standards for what constitutes reasonable search or seizure behavior encapsulates perfectly one of the biggest problems with the exclusionary rule. With the exclusionary rule eliminated, the need for this kind of action will disappear. The accountability-based policing regime I have proposed here to replace the rule will not introduce any other similar pressure that might cause judges to replicate this distorting behavior. The accountability-based approach will eliminate this problem; distorting the law will no longer prove necessary.

C. *The Superiority of an Accountability-Based Approach to Other Substitutes for the Exclusionary Rule*

If the accountability-based approach described here would do well as a substitute for the exclusionary rule, a final question remains. Would the accountability-based approach work better than other proposed substitutes?

Many commentators have attempted to sketch out their visions of a better system without the rule, or with a modified version of it.<sup>163</sup> Most have done this as a way to answer the questions raised by the five major criticisms discussed above.<sup>164</sup> The current circumstances—the recent empirical evidence from Gould and Mastrofski showing how poorly the exclusionary rule performs in ensuring Fourth Amendment compliance, and the rumblings in *Hudson* and *Herring* suggesting the Court may soon overturn the rule—makes this not the theoretical exercise it has been in the past, but an urgent question we must answer in practical terms. Thus we need to ask how these other ideas would address the criticisms of the rule, and whether the accountability-based approach might do a better job.<sup>165</sup> To do this, I will address five of the best known alternatives to the exclusionary rule, and then compare them to accountability-based approach to see which do the best job of addressing the issues raised here.

1. Jury Trials Against Police for Fourth Amendment Violations

In his 1994 article *Fourth Amendment First Principles*,<sup>166</sup> Professor Akhil Amar proposed using tort suits tried by juries to determine police liability for

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<sup>163</sup> See Calabresi, *supra* note 146.

<sup>164</sup> See *supra* text accompanying notes 149–55.

<sup>165</sup> See *supra* text accompanying notes 147–48 (All of this, of course, assumes that we are better off with some regulation of police search and seizure activity than we would be without it.).

<sup>166</sup> Amar, *supra* note 144.

Fourth Amendment violations, instead of the exclusion of evidence. Professor Amar would make entities, that is, police departments, liable for police abuse, and would do away with immunities for officers.<sup>167</sup> He would also use strict liability, make punitive damages available to plaintiffs to ensure deterrence,<sup>168</sup> allow the award of attorney's fees in any successful suit regardless of the amount of the damages, and would permit the use of class actions and presumed damages.<sup>169</sup> And he would make it easier for plaintiffs to attain injunctive relief, to prevent future harm.<sup>170</sup>

Amar's proposal is worthy of consideration. It would address some of the frequent criticisms of the exclusionary rule. First, of course, no court would suppress any probative evidence. Second, no judge would feel pressure to twist the law to admit evidence of guilt, and police officers would have no reason to lie to attain the same goal. Further, the guilty would enjoy no windfall in the form of a pass for obviously criminal conduct because of an improper search or seizure.

This is where the strengths of Amar's proposal as a Fourth Amendment remedial device end. As some critics have said, tort suits did not work before *Mapp* to stop Fourth Amendment misconduct, and no new reasons exist to think they would work now.<sup>171</sup> There is nothing in Amar's proposal to suggest that police departments would take any more notice of damages resulting from his tort suits than they do now, because nothing in the proposal would obligate or motivate departments to react.<sup>172</sup> An even more fundamental problem exists, however, with regard to Professor Amar's proposal: It seems difficult to imagine that those whose rights the police violated could persuade a jury to side with them. This would be especially true when the victims of police abuse are guilty, i.e., the illegal search or seizure produced undeniable evidence of their guilt, but the police violated the Fourth Amendment in collecting the evidence. The reasons for this are not hard to grasp for anyone who has spent time in a courtroom watching the behavior of juries. As Judge Guido Calabresi has explained:

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<sup>167</sup> *Id.* at 812–13.

<sup>168</sup> *Id.* at 814–15.

<sup>169</sup> *Id.* at 815.

<sup>170</sup> *Id.* at 815–16.

<sup>171</sup> See, e.g., Donald Dripps, *Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 629 (1990) (identifying “two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates.”); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 59–63 (1994) (finding Amar's preference for a tort regime unpersuasive at best, given legislature's almost certain unwillingness to enact anything resembling a robust tort system of the type Amar recommends).

<sup>172</sup> See *supra* text accompanying notes 30–41.

The reason that tort suits—that great American pastime—work the way they do in most civil cases is because juries identify with the plaintiff. They see the plaintiff as someone like themselves and consequently decide in favor of the plaintiff.

Jurors are considerably more reluctant to identify with a criminal defendant who brings a tort action against the police for violation of his rights. In these cases, the plaintiff is a criminal and the jurors do not see themselves in that way.<sup>173</sup>

Therefore the guilty would likely remain without any remedy, no matter how egregious the violation of their rights. Even if plaintiffs alleging a violation can claim perfect innocence—the police violated their Fourth Amendment rights but found no evidence and therefore the state brought no charges—these cases will remain difficult to win, because jurors as a rule identify with police, not with people police search, and perhaps see those searched as potential criminals. As has been noted:

[T]he mechanism works a little bit better when the illegal search [is] of innocent people. Even there, however, the jurors tend not to identify with the people searched. All too often, jurors think those people are the sort likely to be criminals even if they have not committed a crime in the case at hand.<sup>174</sup>

And, high profile cases aside, this usually does not change even if the police have done real physical damage to the plaintiff.<sup>175</sup> Thus, Amar's proposal does not produce a viable substitute for the exclusionary rule.

Compared to Amar's proposal, the accountability-based approach promises a much greater likelihood of successfully addressing the real problems involved. Perhaps it does only a little better than Amar's proposal in the context of litigation: the changes proposed to strengthen litigation remedies cover some of the same ground Amar does. However, the measures proposed here would also make police departments liable for damages out of their own budgets, forcing them to pay attention to these verdicts and settlements instead of just passing them on to the general fund. More importantly, the accountability-based approach's first component—an early intervention system for search and seizure issues—would create a direct link between police behavior that violates the Fourth Amendment and the officer's rewards and benefits, and would have an impact on his or her career on the force. Under Amar's system, officers could still ignore the findings

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<sup>173</sup> Calabresi, *supra* note 146, at 114.

<sup>174</sup> *Id.* at 114–15.

<sup>175</sup> *Id.* at 115 (“Even in the most serious cases, where people have been badly beaten up by the police, it is, in my experience, very unlikely that a jury will render a plaintiff's verdict.”).

of a jury, as long as they were not hugely and directly impacted financially, which seems quite unlikely, and they could surely ignore any findings by the jury against the police department (as could the department). So, any effect of these jury verdicts on whether or not officers comply with the Fourth Amendment will only come indirectly, if at all.

## 2. Sentencing Discounts Plus Police Punishment

Judge Calabresi, who calls the exclusionary rule an “absurdity,”<sup>176</sup> has made his own proposal for replacing the rule.<sup>177</sup> He would abolish the rule, so that courts would no longer exclude probative evidence, but substitute for it a post-conviction hearing. At the hearing, “the court would determine whether the evidence was obtained wrongfully through negligence, gross negligence, or wanton and willful behavior.”<sup>178</sup> If the judge determines that the police conducted the search or seizure illegally, he or she would discount the sentence that the offender would normally receive by some small but not insignificant percentage.<sup>179</sup> The size of the discount would depend, (1) on the seriousness of the violation of the Fourth Amendment (the more serious the violation, the larger the discount), and (2) on a calculation of how much of a sentence discount would motivate offenders to bring allegations of police search and seizure misconduct to the attention of the court.<sup>180</sup>

This discount system would, he argues, provide a remedy. By itself, however, it would do nothing to curb the misconduct: Police officers would have no reason to care about a small reduction in sentence the guilty perpetrator might receive.<sup>181</sup> Therefore, Calabresi couples his sentence discounts with police punishment. Any time a court found that police violated the Fourth Amendment in collecting evidence, the court would administer punishment to the individual police officer. As with the sentencing discounts, the severity of these punishments would vary, from “very slight” for “simply negligent” violations, to “much more severe” for intentional misconduct.<sup>182</sup> This is necessary, Calabresi states, to control what he calls the “cowboy cop” who does not care what the court system does with the

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<sup>176</sup> *Id.* at 117.

<sup>177</sup> Calabresi, *supra* note 146.

<sup>178</sup> *Id.* at 116.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* Judge Calabresi says that, at what he calls the “half-baked” stage at which he articulates this idea, the exact size of the discounts involved is something he has not calculated, nor does he consider it important at this stage. Rather, it is “something to be worked out later” and will be based on “figuring what ‘price’ suffices to provide the right incentives” for offenders to bring this information to the court. *Id.* He also observes that in his time as a judge, he has seen that convicted offenders see even minimal reductions in their sentences to be well worth pursuing—“even when people have been sentenced to thirty of forty years in jail, they fight desperately to get” a reduction of five years. *Id.* at 115.

<sup>181</sup> *Id.* at 117.

<sup>182</sup> *Id.* at 116–17.

perpetrator he apprehended. Pairing sentencing discounts, which will give criminals incentives to come forward and disclose police misconduct, with punishment for individual police officers, will bring testimony concerning the misconduct to the court and “be far more effective in controlling the police than anything we have now” or than Amar’s tort system.<sup>183</sup>

Would Judge Calabresi’s proposal work better than the accountability-based approach suggested in this article? As with Professor Amar’s proposal, the disappearance of the exclusionary rule (and not the proposal itself) eliminates the problems of the loss of probative evidence, and the temptations of courts to twist the law and of police to bend the truth. Judge Calabresi’s proposal, however, does promise to deliver more than the illusory relief of Professor Amar’s system. It creates a real remedy for police law breaking for the guilty, by creating the possibility for sentencing discounts. Decision-making on these remedies by judges, instead of juries, eliminates the problem of jurors not identifying with the plaintiffs. And the system of police punishments would at least get the attention of individual officers.

That said, Judge Calabresi’s proposal falls short in some significant ways, and does not provide anything like the fix for the system that the accountability-based approach would. First, Judge Calabresi’s proposal changes nothing about a fundamental problem of the current structure: It would make no redress available to innocent people subjected to illegal searches or seizures, which turned up no evidence. In these cases, with no charges and thus no convictions, judges would have no sentences to discount. And this part of the problem of redress looms far larger than does redress for the guilty. Recall that among the most important findings of Gould and Mastrofski was that most of the illegal searches involved not guilty parties, but innocent ones.<sup>184</sup> Thus, leaving them with no remedy does not address a major part of the problem with Fourth Amendment noncompliance. Also, to the extent that innocent people make up most of the pool of possible parties the courts would rely on for information about Fourth Amendment police misconduct, the fact that innocent people receive no redress would undermine that part of the proposal.

By contrast, the accountability-based approach supplies the possibility of remedies for both the guilty and the innocent through its strengthened regime of robust litigation. By making lawsuits against both police officers and their departments a real possibility, all persons illegally searched or seized would have a chance to get justice, rather than just the guilty. While Judge Calabresi’s criticism of Professor Amar’s tort suit proposal (that juries just will not sympathize with plaintiffs in these cases) would also apply to my solution, the strengthening of litigation tools I include that Professor Amar does not would make it the stronger alternative.

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<sup>183</sup> *Id.* at 117.

<sup>184</sup> Gould & Mastrofski, *supra* note 26, at 332.

Second, Judge Calabresi's proposal would not do as much as the accountability-based approach, and in some respects would do nothing, to improve police compliance. It contains nothing that would force police *institutions* to improve their performance; all of the punishment focuses on individual officers. Under the accountability-based approach, police departments would have incentives and even tools to improve themselves and their officers through the use of the early intervention systems, which could show them where problems existed, and through feedback systems involving the public, so they could understand how to improve themselves in the eyes of the taxpayers. Departments would also find themselves more interested in compliance with the Fourth Amendment because of the improved ability of plaintiffs to get jury verdicts, and would pay attention to these possibilities because damages would have a direct impact on their budgets. Simply put, the accountability-based approach focuses not just on individual officers but on the organizational level, and provides incentives and tools to improve. Judge Calabresi's proposal does not.

Third, the system of police punishments would likely lead us back to square one on the question of gaining police compliance. Any system of hearings which could result in small reductions in punishment for the convicted defendant would likely not attract police attention, or at any rate not very much. It is easy to imagine defendants testifying about police conduct, without much (or even without anything) by way of rebuttal from the police. After all, the criminal will still go to jail; the police would not have a strong incentive to get involved. However, any such system of hearings that resulted in sentencing reductions *and* punishments handed out to officers would be very likely indeed to attract strong rebuttal testimony from the police officers involved. This would bring the system back to where we started in an important respect: police would, again, have a strong incentive to "testily." Though the credibility of the police testimony would not affect the admissibility of evidence, it seems likely that courts might still feel strongly inclined to believe police officers and not those testifying against them—to give the officers, who judges would see day after day in court, the benefit of the doubt. This would not, therefore, advance the cause much. Of course, this is true also in the accountability-based system I propose, but my system has an additional advantage: the requirement that officers record search and seizure encounters with BWV. As discussed, the ready availability of these recordings would at the very least put a damper on the temptation to help oneself by lying on the witness stand.

### 3. Using Administrative Proceedings to Address Fourth Amendment Violations

Two proposals center upon the idea of addressing Fourth Amendment violations with an administrative proceeding. Professor Christopher Slobogin proposes replacing the exclusionary rule with an administrative scheme to assess

damages directly against police officers and their departments.<sup>185</sup> L. Timothy Perrin and his co-authors propose not getting rid of the exclusionary rule entirely, but scaling back its use dramatically. In addition, Perrin proposes an administrative process to hear complaints about Fourth Amendment violations in place of the current regime of exclusion of evidence.<sup>186</sup>

Professor Slobogin's suggestion for reform, based in behavioral science and legitimacy-compliance theory,<sup>187</sup> is straightforward, elegant and powerful. While it does not do as much work in the direction of police reform as the accountability-based approach would, his proposal is one of the ideas in the literature that would function reasonably well in the real world. Slobogin begins by making a convincing case for the exclusionary rule's inadequacy along a number of dimensions. He describes an alternative to litigating exclusion and civil suits: He would substitute an administrative process in which aggrieved parties could seek damages for violations of their rights. These parties would bring a complaint, which a state-paid lawyer would litigate, after evaluating the claims to screen out frivolous ones. The administrative factfinding body would function as a bench court, with a judge or judicial officer hearing the evidence and making a decision. Successful plaintiffs would receive statutory liquidated damages for proven violations (as well as compensatory damages for injury to person or property). Damages would be assessed against officers themselves, if they acted in bad faith, and against their departments in all other cases.<sup>188</sup> Slobogin would limit departments' abilities to indemnify their officers, as this would blunt his proposal's ability to effect change in officers' behavior.<sup>189</sup>

Perrin's proposal bears some similarities to Slobogin's, and it also attempts a somewhat more global solution. He proposes, first, that the exclusionary rule remain in place in cases in which "evidence [was] obtained as a result of intentional or willful misconduct by police."<sup>190</sup> However, the rule would not apply to evidence police find through less egregious misconduct, whether innocent, negligent, or even reckless.<sup>191</sup> And in all cases, even those involving intentional or willful misconduct, "all individuals injured by police misconduct would have

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<sup>185</sup> Slobogin, *supra* note 146, at 366 ("[T]he [exclusionary] rule *can't* work in the normal scheme of things . . . [but] if several structural changes are made, among them the adoption of an independent entity for bringing [a] damages action, [the new system] would be much more effective than the exclusionary rule as an enforcement mechanism.").

<sup>186</sup> Perrin et al., *supra* note 146.

<sup>187</sup> Slobogin, *supra* note 146, at 373-84.

<sup>188</sup> *Id.* at 405-06.

<sup>189</sup> *Id.* at 406, 410 ("The individual officer would be personally liable for the damages unless he or she acted in good faith . . . without direct punishment of miscreant officers, individual deterrence is minimal.").

<sup>190</sup> Perrin et al., *supra* note 146, at 743.

<sup>191</sup> *Id.* Note the similarity and difference between Perrin's suggestions on this point and the Supreme Court's decision in the *Herring* case, 129 S. Ct. 695, in which the Court said that the rule should apply to reckless, intentional police misconduct, but not to negligent acts.



access to a civil administrative process,"<sup>192</sup> which in turn "would include the availability of monetary recoveries for victims from police officers and their employers."<sup>193</sup>

Perrin would create an administrative agency modeled on the California Employment and Housing Act to handle these cases. The process would begin any time an aggrieved party filed a complaint. This would "trigger a preliminary review" to determine whether the allegations in the complaint justify further investigation.<sup>194</sup> Should the preliminary review determine that the complaint has prima facie validity, lawyers employed by the agency would file a formal complaint on behalf of the person involved, and would notify the officers and agencies named in the complaint.<sup>195</sup> An evidentiary hearing would ensue, in which the parties would present evidence and examine witnesses.<sup>196</sup> The factfinder at the hearing would then render a decision. In order that police not feel overdeterred or, as Perrin says, to "preserve the freedom of police officers to do their jobs without chilling their proper law enforcement function,"<sup>197</sup> officers should have the shelter of a good faith exception: The factfinder would not find liable any police officer who acted in an objectively reasonable fashion. Thus, Perrin would not second-guess reasonable officers, but those acting unreasonably would suffer the consequences. Since those consequences—damages—often add up to only minor sums, providing no incentive for aggrieved parties to bring these complaints forward, and thus little reason for attorneys to provide representation (thus the reason for the federal attorney's fee statute, discussed above), Perrin suggests a regime of "statutorily mandated liquidated damages" for successful complainants.<sup>198</sup> He also argues that "[p]unitive damages should be available for instances of intentional and willful misconduct by police to create the strongest possible deterrent of egregious police violations."<sup>199</sup>

The Slobogin and Perrin proposals have many appealing features. Slobogin makes a strong case for his administrative scheme as a better alternative to the exclusionary rule, and his would function more cleanly and simply than Perrin's would. It would provide relief for the guilty and the innocent, and eliminate the temptation for judges to bend the law to avoid the perceived injustice of suppression. It would minimize, if not eliminate, testilying by police officers. It would also provide direct deterrence against both officers and their departments. In fact, an administrative system for assessing damages would fit in well with the

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<sup>192</sup> Perrin et al., *supra* note 146, at 743–44.

<sup>193</sup> *Id.* at 744.

<sup>194</sup> *Id.* at 745.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 746.

<sup>198</sup> *Id.* at 749.

<sup>199</sup> *Id.*

accountability-based approach I advocate. I could easily accept Slobogin's administrative scheme in lieu of my suggestions in this article for strengthening existing litigation tools.

For his part, Perrin correctly points out that his system "would provide a remedy for all instances of police misconduct, regardless of the ultimate disposition of the criminal charges."<sup>200</sup> In other words, Perrin would provide an avenue of redress for not just the guilty, as the exclusionary rule does, but for the innocent also. Most defendants would receive no suppression windfall. Those that did would constitute a smaller group than would be true under the current exclusionary rule, and they would be the ones who have suffered the largest insult to their constitutional rights. It would eliminate the incentive to file motions to suppress in all but the most egregious cases, so that loss of probative evidence, and incentives for courts to bend the law and police to bend the facts, would diminish proportionately. It would also provide direct deterrence through a direct impact on police officers involved in the misconduct, in a way that excluding the evidence does not.<sup>201</sup> Moreover, the proposal removes the incentive to file suppression motions, especially frivolous or borderline ones, in the great majority of cases.

Despite these many positive aspects, I believe that the accountability-based approach would do a superior job. First, under the accountability-based approach as a substitute for the exclusionary rule, the problems partially or mostly eliminated under Perrin's system—the windfall for the guilty, the suppression of probative evidence, and the temptations for courts to bend the law and for police to "testily"—disappear entirely. Under the Slobogin proposal, these problems are more thoroughly eliminated than under Perrin's; the accountability-based approach does at least as well as Slobogin's.

Second, Perrin's proposal also adds a layer of complexity because it would require litigation over the meaning of "egregious," i.e., determining what separates cases in which the exclusionary rule would continue to apply from those in which it does not. Third, the administrative hearings for the complaints of parties aggrieved by police misconduct could still become the setting for law bending and testilying, since police officers and their departments would have a considerable stake in gaining favorable outcomes, and the factfinders at the hearings might prove just as loathe as judges currently seem to be to rule against police, and therefore might bend the law in favor of law enforcement. The accountability-based approach obviously relies (in part) on an adversarial determination of facts as well, but has the additional feature of the presumption that the interaction that lies at the heart of the dispute be recorded, so as to lessen (though of course not eliminate) factual disputes.

The liquidated damages remedy could also prove problematic: A police department or police officer or supervisor could simply decide that, given the importance of finding evidence in a particular case, committing violations of the

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<sup>200</sup> *Id.* at 750.

<sup>201</sup> *Id.*

Fourth Amendment in any given instance might prove “worth it”—the violation and any resultant statutory damages might seem a fair price to pay for getting the goods on a given criminal. This would prove problematic, given the fact that police departments seem largely undeterred now by the growing number of multi-million dollar judgments against them.<sup>202</sup> This tendency might become even more pronounced if police departments could simply commit themselves to paying the standard damages (for themselves, and perhaps on behalf of their officers) as a cost of doing business in important cases. In other words, the departments could simply decide to purchase for themselves a way out of Fourth Amendment compliance whenever they considered the case at hand sufficiently important. Last, Perrin’s approach would have virtually no effect on police institutions, except to the extent that they might wish to avoid punitive damages—something that we cannot count on, since even large damage awards seem to have relatively little deterrent effect.

Slobogin is correct in arguing that his proposal should have some effect on the police departments involved, but it would have less impact than the accountability-based approach, which focuses first and foremost on improving the performance of officers and police departments through the use of early intervention systems and feedback from the public, and imposes meaningful sanctions on officers from inside police departments in ways which do not allow the departments to purchase a pass. These methods concentrate on spotting issues before they become problems, complaints, or lawsuits for the individual officers or their law enforcement agencies, thus improving Fourth Amendment compliance.

#### 4. A Canadian-Style Discretionary Exclusionary Rule

James Stribopoulos, a Canadian lawyer who has studied the American system of regulating search-and-seizure activity via the exclusionary rule, recommends looking to Canada for a better alternative.<sup>203</sup> Stribopoulos says that in the last four decades, four British Commonwealth nations (Canada, Australia, Scotland, and the U.K.) have considered, and rejected, the American approach of excluding all evidence when courts find that police have violated search and seizure rules. All have, instead, opted for a system that does not *require* exclusion, but *allows* for it based on a system of factors that courts examine and balance.<sup>204</sup>

The Canadian system in particular, he says, has much to recommend it, particularly given the cultural similarities, legal parallels, and geographical proximity between Canada and the United States. Canada, like the United States, “has imposed constitutional restraints on police powers.” The Canadian Charter “contains an explicit provision addressing how to deal with unconstitutionally

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<sup>202</sup> See *supra* text accompanying notes 31–42.

<sup>203</sup> Stribopoulos, *supra* note 146.

<sup>204</sup> *Id.* at 85–93.

obtained evidence.”<sup>205</sup> Unlike the American exclusionary rule, however, the Canadian provision “does not automatically result in exclusion once a constitutional violation is established. Instead, if evidence has been obtained in an unconstitutional manner, a discretionary analysis is triggered to determine its admissibility.”<sup>206</sup>

Canadian courts consider three factors in deciding whether to exclude illegally-obtained evidence. First, the court weighs whether the admission of the evidence would affect trial fairness.<sup>207</sup> If the court has before it real evidence (e.g., drugs, weapons, other contraband, or documents), trial fairness is not much affected because nothing about the illegal police conduct brought the evidence into existence the way that, for example, misconduct creates a coerced confession.<sup>208</sup> Second, if admission of the evidence would not affect the fairness of the trial, the court then weighs the seriousness of the violation.<sup>209</sup> The idea is not to administer police discipline or remedy the misconduct, but to ensure that the judicial system does not become tainted by condoning misbehavior by officers. This factor focuses on the conduct of the authorities, and the court examines whether the violation occurred through actions taken in good faith, through negligence, or through willful or purposeful misconduct, with each of these more likely than the last to lead to suppression.<sup>210</sup> Third, the court examines the effect of excluding the evidence: will the legal system’s reputation suffer more by exclusion of the evidence, or by its admission?<sup>211</sup>

Canada’s system for handling violations of constitutional restraints on searches and seizures has some distinct advantages. Most of the guilty defendants in cases in which police have violated search-and-seizure rules would receive no unfair windfall in the form of suppression of the evidence against them. Second, the Canadian approach would lessen the temptation of courts to bend the law in order to avoid unpalatable and unjust results, and would also decrease the temptation of police officers to bend the truth in order to avoid suppression. All of this, Stribopoulos says, would lead to “a more expansive and honest definition of constitutional rights” because courts would not be “continually pre-occupied with the consequences that flow from their” decisions.<sup>212</sup>

Surely these constitute positive outcomes, but the words used here to describe these benefits—“most guilty defendants,” “lessen the temptation,” “decrease the temptation”—make clear that this solution may mitigate these problems, but it

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<sup>205</sup> *Id.* at 83.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 122.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 124.

<sup>210</sup> *Id.* at 124–25.

<sup>211</sup> *Id.* at 125.

<sup>212</sup> *Id.* at 84.

does not eliminate them. Further, the Canadian approach does nothing to protect the rights of the innocent. Unlike the accountability-based approach, it offers no procedure, no enhanced ability to litigate, or the like for those persons against whom the search or seizure produced no evidence. If the exclusionary rule, though cumbersome and troubling, at least results in some degree of deterrence that ultimately benefits innocent parties by sparing them from police misconduct, the Canadian approach actually makes this less likely by lowering the number of cases in which it would apply.

Moreover, the Canadian approach would do little to address the issue of Fourth Amendment compliance by police. Since the likelihood of suppression depends, in part, on the seriousness of the violation, less serious, non-willful violations would effectively become matters of little or no concern. If most misconduct does not fall into the flagrant category, the Canadian rule actually lessens the need for police departments to ensure compliance. The police need only avoid “willful or flagrant” violations. In contrast, the accountability-based approach maintains a primary focus on building compliance through the use of early intervention systems. Strengthening the institution of policing will ultimately push individuals toward greater compliance; the accountability-based approach does this, while the Canadian approach does not.

Last, a Canadian approach would result in very little reduction of Fourth Amendment litigation by the guilty. As the standards described by Stribopoulos make clear, the answer to questions of “trial fairness,” of whether the court should view a violation of search and seizure rules “willful” or “flagrant” or only “inadvertent” or “technical” share a problem: They are vague and not self defining, and the answers to these questions carry great consequences. Given the possibility for suppression based on these broad standards, it becomes hard to imagine the defendant who would not at least attempt to suppress the evidence. The defendant would have little to lose and much to gain, and the unclear terminology used seems to beg for the filing of motions.

## 5. Summary

The accountability-based approach compares favorably to the main alternatives to the exclusionary rule proposed by others. The accountability-based approach does the best job of focusing on the institutional framework—police departments themselves—within which the search and seizure activities of individual officers take place. The alternatives do little to promote actual change and sustained improvement by police departments while also insisting on compliance by officers, which the accountability-based approach makes its centerpiece. While some of the other alternatives, most notably Professor Slobogin’s, would construct reasonable mechanisms that would allow the innocent and the guilty to seek redress, others overlook this problem. And none of the others look to improve compliance through the use of available recording technology that could profoundly change the way that any decision maker—be it a

judge, an administrative officer, or a police officer's supervisors—learns the facts of the situation. Under the accountability-based approach, the specter of officer versus civilian swearing contests will not end entirely. But we will take a significant step toward a contemporaneous record of events with a reasonable guarantee of truthfulness and fuller context, and without the bias of any one party.

## VI. MAKING IT HAPPEN

One question remains. For years, opposition to the exclusionary rule has not abated; rather, it has come consistently from all quarters. Why, then, would Congress, or any state or local government, move to either bolster the rule if it remains in place, or to create a substitute if the Supreme Court eventually gets rid of it entirely? There are three answers to this question, all from different perspectives, that help us understand why the accountability-based solution described here is more than pie-in-the-sky.

The first has to do with the police themselves, and the mindset one now finds in police departments, especially within the leadership. At this juncture, one probably could not find a police department that does not at least say that it subscribes to the idea of community policing. Certainly, many agencies mouth the words without actually incorporating the philosophy of community policing into their actions—for them, it is an add-on or a public relations ploy. But an increasing number of agencies over the last fifteen to twenty years have actually made community policing their philosophy—the guiding principle of both their mission and their actions. In a nutshell, community policing recognizes that police cannot fight crime and create public safety alone; rather, doing this successfully and on a sustained basis requires the creation of a real partnership between police and the communities they serve. There must be a cooperative relationship of mutual responsibility and respect, in which police and the public exchange information on threats to safety and problems that need action. This, of course, brings us back to the work of Jeffrey Fagan and Tom Tyler: This kind of cooperation requires trust, and people will not trust the police if they do not act in ways that build their legitimacy.<sup>213</sup> Thus, police attuned to the benefits of community policing will see it as in their interest to adopt measures that enhance their standing among those they serve, and with it the likelihood of cooperation they will get from citizens. For many agencies, going back to the old search and seizure ways will not do; they would lose too much in terms of the way they do things now. Thus, we may find at least some departments surprisingly accepting of the ideas discussed here—perhaps enough that they would make many of these changes on their own, by internal rules.<sup>214</sup>

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<sup>213</sup> See Fagan & Tyler, *supra* note 57.

<sup>214</sup> This may seem unlikely, but consider that hundreds of police departments have put in place their own rules on racial profiling, a subject few of them would even acknowledge ten years ago. These agencies have seen it as in their own interest to take action and define the issue and their responses, rather than waiting for a remedy to be forced on them. See, e.g., Northeastern Univ. Inst.

Second, a new type of authority, which came into being only fifteen years ago, may help prod police departments and cities in the right direction. In 1994, the Congress created the so-called “pattern or practice” statute, 42 U.S.C. § 14141.<sup>215</sup> That law gives authority to the Department of Justice to file suits in federal court to address cases in which it observes a “pattern or practice” of illegal conduct by any law enforcement agency.<sup>216</sup> Under this provision, DOJ can bring cases in federal court, demanding reforms in the form of equitable and declaratory relief. In practical terms, this authority has translated into consent decrees in numerous cities and towns in which the local government and police department have agreed to considerable structural changes,<sup>217</sup> among them often the creation and use of early intervention systems.<sup>218</sup> These cases have created a climate in which police leadership, seeing other departments become the subject of the federal government’s interest, have decided they would rather make changes themselves. In the words of one official, they have decided they prefer to “manage their way into compliance,” instead of having a federal court force them to do things they might not want.<sup>219</sup> Strategic exercise of the pattern and practice authority, with Fourth Amendment compliance as a priority goal, would go a long way toward motivating the kind of changes recommended here.

Third, an influence outside of police departments and law enforcement entirely may turn out to play a big role in bringing many of these changes to fruition. The large damages police departments have incurred mean that most of them, along with their cities, need insurance. Some may choose to self-insure.

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on Race and Justice, Data Collection Resource Center, Jurisdictions Currently Collecting Data, <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php> (last visited Sept. 6, 2009) (map showing which jurisdictions in each state voluntarily collect racial profiling data).

<sup>215</sup> 42 U.S.C. § 14141 (1994).

<sup>216</sup> A more detailed explanation of the Department of Justice authority under 42 U.S.C. § 14141, and the actions it has taken pursuant to that authority, can be found on the Department of Justice web page that pertains to the Special Litigation Section, the segment of the DOJ Civil Rights Division that handles these cases. U.S. Dep’t of Justice, Special Litigation Section, Law Enforcement Misconduct, <http://www.usdoj.gov/crt/split/index.php> (last visited Feb. 28, 2009).

<sup>217</sup> See U.S. Dep’t of Justice Civil Rights Division, Special Litigation Section Documents & Publ’ns, Settlements and Court Decisions, <http://www.usdoj.gov/crt/split/findsettle.php#settlements> (last visited Sept. 6, 2009) (detailing all consent decrees and similar documents).

<sup>218</sup> Among the police departments ordered to put early intervention systems in place were the Pittsburgh Police Bureau, Consent Decree, *United States v. Pittsburgh & Pittsburgh Police Bureau*, Civ. No. 97-354 (W.D. Pa. 1997); the New Jersey State Police, Consent Decree, *United States v. New Jersey*, Civ. No. 99-5970 (MLC) (D. N.J. 1999); and the Los Angeles Police Department, Consent Decree, *United States v. City of Los Angeles & the Los Angeles Police Department*, Civ. No. 00-11769 GAF (C.D. Cal. 2001).

<sup>219</sup> Remarks of Joseph Brann, Former Dir. of Office of Cmty. Oriented Policing Services at the U.S. Dep’t of Justice, Remarks at Forum sponsored by the Police Executives Research Forum at the Annual Meeting of the International Association of Chiefs of Police in San Diego, Cal. (Nov. 13, 2000) (cited by DAVID A. HARRIS, *PROFILES IN JUSTICE: WHY RACIAL PROFILING CANNOT WORK* 205 (2002)).

However, even those that do self-insure now increasingly use a concept borrowed from the insurance industry: risk management.

Carol A. Archbold has discussed how managing risk, and attempting to minimize it, has become an increasingly important part of law enforcement management.<sup>220</sup> Those municipalities that wish to insure against their risks are increasingly forced to engage in risk management and have people skilled in this field as part of their organizations. For other cities, the idea of looking carefully at risks and looking for ways to cut them has become an increasingly common way of doing everyday business. This has, and will continue to, change the management environment in which police agencies and their personnel function. With risk managers looking over their shoulders, the assurances of police chiefs that they believe their officers perform well and show no signs of trouble will no longer be enough; the risk managers will demand not assurances, but data. This will lead inevitably to the wider adoption of early intervention systems, recording systems, and other programs that will allow departments to better predict, contain, and lower the risks they face.

## VII. CONCLUSION

Scholarship searching for a replacement for the much-maligned exclusionary rule has long occupied observers of criminal procedure. The contextual questions have always remained rather static, if not wholly academic. The rule functions reasonably well (if not perfectly) as a remedy for Fourth Amendment violations and a deterrent for police misconduct, but it has not-insignificant negative side effects. Surely we can find a better way.

The current facts and circumstances of Fourth Amendment jurisprudence have produced a unique vantage point. First, *Hudson* and *Herring* have made it clear that the Supreme Court may choose to dispense with the exclusionary rule at some point in the near future. Second, even if the Supreme Court does not go that far, empirical evidence of police behavior in the field produced by criminologists Gould and Mastrofski tells us that the rule actually does not perform well as a remedy for Fourth Amendment problems. Thus, the search for something more than what we now have takes on both added urgency (in case the rule is eliminated soon), and must apply in either dimension—either in a world in which the exclusionary rule continues to function but finds itself in dire need of bracing up, or in a world without an exclusionary rule.

In either event, the best solution lies in focusing on police accountability. Compliance with Fourth Amendment standards will increase with the use of an early intervention system that focuses every level of police enforcement on correct behavior, and that matters to the officer on the street in the sense that findings of

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<sup>220</sup> CAROL A. ARCHBOLD, POLICE ACCOUNTABILITY, RISK MANAGEMENT, AND LEGAL ADVISING 1 (2004) (“Some police managers . . . have begun to take proactive measures to reduce exposure to liability risks . . . [through] the use of risk management techniques.”).



violations will bite in ways important to the officer. When coupled with a strengthened set of litigation tools, which will enable the guilty and the innocent alike to move effectively for redress for violations of their rights, as well as the removal of over-protective legal immunities, both officers and institutions will find themselves motivated to comply. And new recording tools, capable of recounting exactly what happened in any given search and seizure incident as well as the surrounding context, will ensure the most accurate possible record of events, and remove both the incentive and opportunity for “testilying.” In combination, this set of proposals can move police in the right direction—whether the exclusionary rule stays or goes.

