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# EVALUATING THE FOURTH AMENDMENT EXCLUSIONARY RULE: THE PROBLEM OF POLICE COMPLIANCE WITH THE LAW

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Richard W. Lovely\*\*

How accurate are police officers' beliefs about constitutional rules of search and seizure? And—given the beliefs officers entertain about those rules—how often do officers engage in acts they believe to be prohibited by law?

These questions address issues of central importance for the fourth amendment exclusionary rule.<sup>1</sup> The purpose of the exclusionary rule, the Supreme Court has insisted in recent opinions, is to deter the police from engaging in illegal searches and seizures.<sup>2</sup> A prerequisite to deterrence, though, is that police officers know which acts are prohibited.<sup>3</sup> Furthermore, while it is often difficult to discover whether a

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1. The fourth amendment provides:

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

U.S. CONST. amend. IV.

The exclusionary rule prohibits the use of evidence in certain trial settings when that evidence was obtained in violation of a defendant's constitutional or other rights. For further discussion of the exclusionary rule, see *infra* notes 21-36 and accompanying text.

2. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347 (1974) ("[T]he [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . ."). See also *United States v. Leon*, 468 U.S. 897, 916 (1984).

3. See, for example, Jeremy Bentham's comment on the cognitive prerequisite to deterrence: "*Punishment must be inefficacious . . . [w]here the penal provision . . . is not conveyed to the notice of the person on whom it is intended to operate, as from want of due promulgation.*" J. BENTHAM, *Principles of Penal Law*, in 1 WORKS OF JEREMY BENTHAM 397 (1843).

sanction has a positive deterrent effect,<sup>4</sup> one can at least say that a sanction does *not* have a deterrent effect to the extent that police officers engage in conduct they believe to be prohibited.<sup>5</sup> To understand the deterrent effect of the exclusionary rule with respect to fourth amendment violations, it is thus essential to ask, first, about police officers' knowledge of the rules of search and seizure and, second, about the extent to which they engage in behavior they believe to be prohibited by those rules. We draw on research conducted in four northeastern police departments to provide answers to each of these questions.

Part I of this article reviews background matters bearing on our research—in particular, we discuss the Court's framework for analyzing exclusion as a deterrent safeguard, the research questions that need to be raised within that framework, and the research strategy we adopted in light of the Court's approach to exclusion. Part II analyzes our findings on police knowledge of the rules of search and seizure. Part III analyzes our findings on officers' willingness to obey the law. Part IV evaluates our findings in light of policy questions concerning the exclusionary rule. We consider whether the Court should retain the exclusionary rule or whether it should modify the rule by allowing for a "good faith" exception for officers' mistakes in carrying out searches and seizures. We conclude that the exclusionary rule is the least undesirable remedy for nonegregious violations of the fourth amendment and that a general good faith exception to the rule should not be adopted.

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4. In asking about deterrence, one is concerned with behavior that *would have occurred* but for the existence of a threatened sanction for engaging in it. To show that a threat has a deterrent effect, one must therefore demonstrate that the *nonoccurrence* of behavior is fairly attributable to a threatened sanction. It is by no means impossible to do this; control and experimental groups can, for example, be used to investigate the strength of a threatened sanction. It is often difficult, however, to demonstrate that sanctions such as those contained in penal law have a deterrent effect, for penal law presents few occasions in which important sanctions are *not* threatened. Cf. F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 249-53 (1973) (discussing difficulties in establishing causal relations between crime and punishment from nonexperimental research methods).

5. Crimes committed in a state of feverish emotion provide a good example of this. As criminologists have long noted, threatened sanctions seem to have a reduced deterrent effect on crimes such as homicide and assault when they are committed by emotionally charged individuals. See Andenaes, *Deterrence and Specific Offenses*, 38 U. CHI. L. REV. 537, 538-39 (1971).

## I. DETERRING ILLEGAL SEARCHES AND SEIZURES: SOME PRELIMINARY CONSIDERATIONS

To say that the purpose of the exclusionary rule is to deter fourth amendment violations is to provide only a general justification for the rule. Difficult questions arise about the nature of the rule's relationship to fourth amendment rights, and further questions arise about how to measure the rule's strength as a deterrent. In Part I, we first examine the Court's framework for analyzing exclusionary rule issues. We then review research questions concerning the exclusionary rule's efficacy as a deterrent. We conclude with an outline of the research strategy we followed in investigating the exclusionary rule's deterrent effect on the police.

### A. *The Deterrence Rationale for Exclusion*

In the long history of the exclusionary rule, the Court at one time or another has justified the rule as a requirement of the fourth *and* fifth amendments,<sup>6</sup> of the fourth amendment standing alone,<sup>7</sup> of judicial integrity,<sup>8</sup> and as a deterrent

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6. See *Gouled v. United States*, 255 U.S. 298, 303-04 (1921); *Boyd v. United States*, 116 U.S. 616, 633 (1886).

7. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *Weeks v. United States*, 232 U.S. 383, 391-92 (1914).

8. See *Elkins v. United States*, 364 U.S. 206, 222 (1960). The dissents of Justices Brandeis and Holmes in *Olmstead v. United States*, 277 U.S. 438 (1928), are probably the most famous early discussions of judicial integrity in the exclusionary rule context. Arguing for the exclusion of illegally seized wiretap evidence, Brandeis stated:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. 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 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. Against that pernicious doctrine this Court should resolutely set its face.

*Id.* at 485 (Brandeis, J., dissenting). Holmes agreed with Brandeis. See *id.* at 469-70 (Holmes, J., dissenting).

safeguard against police illegality.<sup>9</sup> Each of these justifications appears in *Mapp v. Ohio*,<sup>10</sup> where in 1961 the Court enforced the exclusionary rule against the states.<sup>11</sup> In his concurrence in *Mapp*, for example, Justice Black contended that the *fifth* amendment requires the exclusion of evidence obtained in violation of the *fourth* amendment.<sup>12</sup> Justice Clark's opinion for the Court in *Mapp* struck a note of cautious agreement with Black's contention.<sup>13</sup> Furthermore, Clark's opinion vigorously endorsed the arguments that exclusion is a requirement of the fourth amendment standing alone,<sup>14</sup> that it is required for the sake of judicial integrity,<sup>15</sup> and that it must be employed to deter illegal searches and seizures by the police.<sup>16</sup>

9. See *United States v. Leon*, 468 U.S. 897, 916 (1984); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

10. 367 U.S. 643, 646-50 (1961).

11. See *id.* at 655. Prior to *Mapp*, the Court had rejected the argument that the fourth amendment and the exclusionary rule are applicable to state courts by virtue of the fourteenth amendment due process clause. In *Twining v. New Jersey*, 211 U.S. 78 (1908), the Court rejected a defendant's argument that the fourth and fifth amendments are applicable to the states under the due process clause. *Id.* at 110-114. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held that the fourth amendment's "core"—its prohibition against arbitrary intrusions by state agents—is applicable to the states. *Id.* at 27-28. However, it also held that the exclusionary rule is not binding on them. *Id.* at 28-33.

12. 367 U.S. at 661-66 (Black, J., concurring).

13. Justice Clark stated:

We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty which [have] been secured . . . only after years of struggle . . ." *Bram v. United States*, 168 U.S. 532, 543-44 (1897). They express "supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy." *Feldman v. United States*, 322 U.S. 487, 489-490 (1944).

367 U.S. at 656-57 (footnote omitted).

14. Justice Clark stated that the *Mapp* Court was "holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . ." 367 U.S. at 657. It is by virtue of the fourteenth amendment due process clause that the *Mapp* Court ruled that the exclusionary rule is binding on state courts. *Id.* at 655. The key to this statement is thus Clark's conclusion that the exclusionary rule is an essential part of the fourth amendment.

15. *Id.* at 659. The term "imperative of judicial integrity" was first used in Justice Stewart's opinion for the Court in *Elkins v. United States*, 364 U.S. 206, 222 (1960). See also *supra* note 8.

16. Justice Clark stated:

Only last year the Court itself recognized that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty [contained in the fourth amendment] in the only effectively available way—by removing the incentive to disregard it."

*Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

In the decade or so following *Mapp*, the Court turned to deterrence alone as a justification for exclusion.<sup>17</sup> Commentators have criticized the Court's reasons for discarding other justifications;<sup>18</sup> in fact, one of us has recently contended that the Court is mistaken in viewing exclusion solely from a deterrence perspective.<sup>19</sup> The Court's role as final expositor of the Constitution<sup>20</sup> makes it essential, however, to consider exclusion in terms of a deterrence framework. We shall thus confine ourselves to that framework. Three points, we suggest, capture the core features of the Court's analysis of exclusion in the post-*Mapp* era.

1. *The Remedy of Exclusion Is Distinct from the Rights Guaranteed by the Fourth Amendment*—The foundational claim in the Court's analysis is that exclusion is not a right but instead is a remedy the judiciary has created in responding to violations of fourth amendment rights.<sup>21</sup> The fourth amendment recognizes a right to be free of unreasonable searches and seizures.<sup>22</sup> It also recognizes cognate rights to be subjected only to warrants that are based on probable

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17. The first step toward narrowing the justifications for exclusion was taken by Justice Clark himself in *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Linkletter*, the Court was confronted with the question of whether to make *Mapp* retroactive to state court convictions obtained prior to the *Mapp* decision. See *id.* at 619-20. In ruling against retroactivity, Clark concentrated on a deterrence rationale for the exclusionary rule, a rationale that has to do only with discouraging future illegality. See *id.* at 637.

During the 1970s and 1980s, the Court has concentrated on exclusion as a deterrent to police illegality. See *Illinois v. Krull*, 480 U.S. 340, 347-49 (1987); *United States v. Leon*, 468 U.S. 897, 906, 916-17 (1984); *United States v. Janis*, 428 U.S. 433, 447-59 (1976); *United States v. Peltier*, 422 U.S. 531, 542 (1975); *United States v. Calandra*, 414 U.S. 338, 347-48 (1974).

18. See, e.g., Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 627-45 (1983); White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1281-83 (1983).

19. See Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1241-54.

20. Under *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803), the Court is the final expositor of the meaning of the Constitution. See also *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

21. In *United States v. Calandra*, 414 U.S. 338 (1974), the Court stated that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348; see also *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Calandra*).

22. The first clause of the fourth amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

cause, specific in nature, and based on oath or affirmation.<sup>23</sup> Exclusion, the Court points out, is not within the menu of rights guaranteed by the fourth amendment.<sup>24</sup> Rather, the Court views exclusion as a remedy that is made available to defendants *after* the government has violated their fourth amendment rights.<sup>25</sup> According to the Court, exclusion is temporally and analytically distinct from fourth amendment rights themselves.<sup>26</sup>

2. *The Exclusionary Remedy Exists to Deter Future Wrongs, Not to Redress Past Ones*—It is possible to conceive of exclusion as a remedy for the government's violation of a criminal defendant's fourth amendment rights.<sup>27</sup> The Court, however, insists that "the exclusionary rule is neither intended nor able to 'cure the invasion of [a] defendant's rights which he has already suffered.'"<sup>28</sup> The Court therefore conceives of exclusion solely as a remedy that discourages *future* wrongs through its deterrent effect on the police.<sup>29</sup> Under this analysis, exclusion stands as a windfall benefit for a criminal defendant at trial. The intended beneficiary of exclusion is the

23. The second clause of the fourth amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U.S. CONST. amend. IV. One could read this clause independently of the amendment's first clause, in which case it would be interpreted as setting preconditions for *how* but not *when* to obtain a warrant. The Court, however, has consistently read the amendment's warrant clause in light of the reasonableness clause, thus requiring the government to obtain a warrant in order to demonstrate the reasonableness of an intrusion. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer . . .").

24. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) (stating that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . .").

25. "The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself . . ." *Id.* (quoting *Calandra*, 414 U.S. at 354).

26. *Id.* at 905-06. For a general analysis of the Court's current approach to exclusion, see Heffernan, *supra* note 19, at 1195-1206.

27. This line of reasoning classifies exclusion as part of an arsenal of curative remedies, including money damages and return of property, that are available to victims of fourth amendment wrongs. See Schroeder, *Restoring The Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 653-62 (1983).

28. *Leon*, 468 U.S. at 906 (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

29. This analysis of exclusion is consistent with the claim that it is a deterrent remedy. The function of deterrence is the prevention of future harm, not the rectification of past harm.

public at large, which is supposed to gain from the exclusionary rule by virtue of the disincentive it provides for police illegality.<sup>30</sup>

3. *The Exclusionary Remedy Is Not Required by the Constitution*—Points 1 and 2, above, are compatible with the claim that the fourth amendment *requires* the adoption of exclusion as a deterrent against police illegality.<sup>31</sup> Recent Supreme Court opinions concerning the exclusionary rule make it clear, however, that the Court does *not* think that the fourth amendment requires the adoption of exclusion as a deterrent safeguard. The Court, for example, has dispensed with exclusion of illegally seized evidence in grand jury proceedings.<sup>32</sup> Furthermore, it has dispensed with the exclusionary rule at trial for two types of “good faith” mistakes by the police: when officers act on seemingly valid, but in fact defective warrants;<sup>33</sup> and when they make warrantless intrusions on the basis of seemingly valid statutes later declared to be unconstitutional.<sup>34</sup> In these situations, the Court has reasoned that, on the one hand, it is unlikely that imposition of the exclusionary rule will be much of a deterrent, while, on the other hand, it is certain that evidence of guilt will be lost through the rule’s operation.<sup>35</sup> As the Court has put it, these are situations in which the exclusionary rule “cannot pay its way.”<sup>36</sup> The Court thus views exclusion not as a constitutional requirement but as a remedy whose value hinges on its effectiveness in deterring police illegality.

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30. See *United States v. Calandra*, 414 U.S. 338, 347-48 (1974) (suggesting that the public at large, rather than the defendant seeking suppression, is the intended beneficiary of the exclusionary rule).

31. The *Mapp* Court, for example, spoke of “[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies” besides the exclusionary rule. *Mapp v. Ohio*, 367 U.S. 643, 652 (1961). This language suggests that adequate protection of fourth amendment rights *requires* an exclusionary rule.

32. See *Calandra*, 414 U.S. at 349-52.

33. See *United States v. Leon*, 468 U.S. 897, 913 (1984).

34. See *Illinois v. Krull*, 480 U.S. 340, 349-50 (1987).

35. In *Leon*, for example, the Court concluded that “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” 468 U.S. at 922.

36. *Id.* at 908 n.6.



### B. Research Questions About Exclusion's Deterrent Effect

How can one determine exclusion's effectiveness as a deterrent? The best way to assess exclusion's deterrent strength would be to conduct a comparative study—that is, to compare the behavior of two groups of police officers, one of which has been subjected to the threat of suppression while the other has not. Unfortunately, meaningful comparative study is not possible. *Controlled* comparison is not possible because exclusion is employed in all jurisdictions.<sup>37</sup> *Retrospective* comparison, although possible, is not meaningful because records were not carefully kept on matters bearing on police searches and seizures in jurisdictions that did not use the exclusionary rule prior to *Mapp*.<sup>38</sup> And finally, *cross-national*

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37. If the Supreme Court were to dispense with exclusion altogether as a matter of federal constitutional law, then it might be possible to compare the behavior of officers in different departments because some state courts have held that exclusion is a requirement of their state constitutions. See, e.g., *State v. Novembrino*, 105 N.J. 95, 157, 519 A.2d 820, 856 (1987); *People v. Bigelow*, 66 N.Y.2d 417, 422, 488 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985).

38. Writing for the Court in *United States v. Janis*, 428 U.S. 433 (1976), Justice Blackmun stated that "[r]ecord-keeping before *Mapp* was spotty at best, a fact which . . . severely hampers before-and-after studies." *Id.* at 451-52. This assessment is a fair one, though it should be noted that many researchers have examined indices on a before-and-after basis in trying to measure exclusion's effect. Investigators have considered the following two factors—each of which has proven to be inconclusive:

(1) *Warrants*. One might view a post-*Mapp* increase in the issuance of warrants in jurisdictions that had not employed the exclusionary rule prior to *Mapp* as evidence that the rule prompted greater police concern with legality. Michael Murphy, a former New York City Police Commissioner, has stated that although police rarely used warrants in New York prior to *Mapp*, they obtained nearly 18,000 between 1961 and 1965. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941-42 (1966). In contrast, Bradley Canon reports that in Los Angeles police obtained only 207 warrants in 1968. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 709 n.91 (1973-74). Even if an increase in demand for warrants could be taken as evidence of greater police concern about compliance with the law, one would have to conclude, as did the author of a student note, that the "increase in warrants [in some jurisdictions] seems to [have been] conditioned on a variety of local factors that mediated the impact of *Mapp*." Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spotto Research* and *United States v. Calandra*, 69 NW. U.L. REV. 740, 759 (1974).

(2) *Arrests*. Investigators have also examined arrest statistics in before-and-after studies to assess the hypothesis that arrest rates might have declined in the post-*Mapp* era as officers became more concerned about compliance with the fourth amendment. In examining Cincinnati arrest statistics (Ohio—quite obviously—not having employed the exclusionary rule prior to *Mapp*), Dallin Oaks was unable to discern a downward trend in post-*Mapp* arrest rates that could be attributed to

comparison, although also possible, is not meaningful given the major differences between American and foreign police.<sup>39</sup>

This makes it necessary to think about exclusion's deterrent strength without resort to the comparison of groups that have and have not been subjected to the suppression threat. Researchers have pursued a number of different lines of inquiry in this context. Some, for example, have examined the response of criminal justice agencies to *Mapp's* imposition of the exclusionary rule—an organizational issue of considerable importance, but one that leaves open the question of what police officers actually do in the field.<sup>40</sup> Some have conducted intensive studies of small groups of officers; the results of these studies are suggestive but cannot be treated as more than that, given the small number of officers examined.<sup>41</sup>

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imposition of the exclusionary rule. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 689-91 (1970). Bradley Canon, on the other hand, found a different trend in the arrest statistics he examined for other cities. Canon, *supra*, at 704-06 (describing "dramatically sudden and truly spectacular" decreases in arrests in Baltimore, and "quite noticeable" decreases in Buffalo). Again, even if arrest trends were a valid criterion for determining whether the post-*Mapp* police showed greater concern about the fourth amendment, the empirical evidence is inconclusive on this point.

39. As Dallin Oaks has noted, Canadian police have a tendency to obey the rules [governing search and seizure], irrespective of sanctions. Toronto police officials, prosecutors and a judge all insisted that their police are greatly concerned about obeying the rules and very sensitive to and quick to be influenced by judicial criticism of their conduct. It is doubtful that comparable United States officials would similarly describe the attitudes of their police.

Oaks, *supra* note 38, at 706. Furthermore, as Oaks has pointed out, Canadian police are subject to the authority of prosecutors, so

if police arrest or search and seizure practices are offensive to a prosecutor, he has channels available to have them corrected. This is significantly different from the independent character of most United States prosecutors and police organizations, neither of which is in a position to bring any direct command influence on the other.

*Id.*

40. For a discussion of police agencies in particular, see Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 475-76 (1971). For a general discussion of criminal justice agencies see Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study, and the Implications*, 45 N.C.L. REV. 119 (1966), and Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283.

41. Studies of small groups of officers have reached conflicting conclusions about officers' attitudes toward the law and their actual compliance with it. Two participant-observer studies that have reached pessimistic conclusions are J. SKOLNICK, *JUSTICE WITHOUT TRIAL* (2d ed. 1975) and J. RUBINSTEIN, *CITY POLICE* (1973). Skolnick devoted his attention to detectives on the vice, burglary, robbery, and homicide squads of the two cities—"Westville" and "Eastville," as he called them—in which he conducted research. Skolnick, *supra*, at 23-27, 30-37. Rubinstein

Still other researchers have examined the percentage of suppression motions that are granted because of a judicial determination that the police acted illegally.<sup>42</sup> The primary impetus behind this last line of inquiry has been to assess one of the social costs imposed by the exclusionary rule.<sup>43</sup> On this point, the research has been helpful because it has established that motions to suppress are most commonly granted in drug and weapons cases because of search and seizure problems and that less than 3% of all cases are lost

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worked with various units of the Philadelphia Police Department. Rubinstein, *supra*, at xii. Both authors witnessed many instances of police illegality. See, e.g., Skolnick, *supra*, at ch. 7 and Rubinstein, *supra*, at ch. 6. Each ascribed officers' willingness to violate the rules of search and seizure to a set of values that, for the police, are more important than the values associated with the fourth amendment and each claimed that police superiors are willing to tolerate illegality—at least of a nonbrutal nature—as part of an efficient, general campaign against crime. See Skolnick, *supra*, at 238-39; Rubinstein, *supra*, at 384-89. Also, each stated that the officers he observed often viewed the courts in adversarial terms. See Skolnick, *supra*, at 233; Rubinstein, *supra*, at 369.

Other small-group studies have reached more optimistic conclusions. A student note authored by Myron W. Orfield, Jr. reported the results of a questionnaire and interviews with 26 Chicago narcotics officers. Note, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) (authored by Myron W. Orfield, Jr.). Orfield found little hostility to the exclusionary rule. See *id.* at 1051-52. A majority of the officers responding to Orfield's questionnaire stated that they generally learn why evidence was suppressed and that their time in court provided a valuable way of learning the law. See *id.* at 1037-40. Orfield also found that Chicago narcotics officers are subject to a rating system which, among other things, takes into account the number of times courts determine that they acted illegally. See *id.* at 1027-28.

A participant-observer study by Milton Loewenthal also found that officers accept the exclusionary rule as necessary if the fourth amendment is to have any meaning. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1981). Loewenthal did not examine the other factors considered by Orfield. His conclusions, though, are consistent with those of Orfield—in particular, that officers do not resent the exclusionary rule and that they do not view the courts as adversaries. See *id.* at 29-30.

42. See 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; Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585; Nardulli, *The Societal Costs of the Exclusionary Rule Revisited*, 1987 U. ILL. L. REV. 223 [hereinafter Nardulli II].

43. In *United States v. Leon*, 468 U.S. 897 (1984), the Court attributed the following social costs to the exclusionary rule: (i) some factually guilty defendants are not convicted, (ii) some factually guilty defendants receive more favorable plea bargains than they otherwise would, and (iii) indiscriminate application of the exclusionary rule may generate disrespect for the law. *Id.* at 907-08. The articles cited *supra* at note 42 deal primarily with the first of these costs, although they give some consideration to the second as well.

because of the exclusionary rule.<sup>44</sup> Such inquiry, however, provides a less than satisfactory basis for assessing exclusion's deterrent effect because it does not deal with intrusions that do not lead to criminal charges.<sup>45</sup>

In searching for another, more helpful way to study exclusion's effectiveness as a deterrent, it is useful to start with a general statement of how deterrence operates and then to identify research questions relevant to exclusion that are suggested by that statement. A deterrence strategy, we suggest, operates through the communication to individuals of a threat of unpleasant consequences if the individuals engage in one or more prohibited acts.<sup>46</sup> By this analysis, there is a cognitive component to deterrence: In the case of the fourth amendment, one must ask whether officers are able to identify what is prohibited under the rules of search and seizure.<sup>47</sup> Furthermore, our statement of how deterrence operates focuses attention on the relationship between a threatened sanction and individual conduct. Although many questions can be asked about the relationship between sanctions and conduct, perhaps the most telling one in a fourth amendment setting has to do with the frequency with which officers engage in conduct they believe to be illegal.<sup>48</sup>

A distinction implicit in Justice Frankfurter's analysis of the fourth amendment provides a useful way of thinking about the cognitive component of deterrence. In *Wolf v. Colorado*,<sup>49</sup> where in 1949 the Court first considered applying the exclusionary rule to the states, Frankfurter stated that the core concern of the fourth amendment is "[t]he security of

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44. See Davies, *supra* note 42, at 680; Nardulli II, *supra* note 42, at 234.

45. As Chief Justice Warren noted in *Terry v. Ohio*, 392 U.S. 1, 14 n.9 (1968), illegal intrusions can be carried out for harassment purposes. Illegal intrusions can also occur because of sheer mistake, as when police officers illegally detain dozens of people in a vain effort to find a perpetrator. In either case, the police would be highly unlikely to report such intrusions to prosecutors.

46. See generally F. ZIMRING & G. HAWKINS, *supra* note 4, at 70-74 (discussing deterrence).

47. Doubts about the ability of police officers to make assessments of legality that are routinely correct were raised even before *Mapp*. See Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 590 (1955). In the post-*Mapp* era, these doubts have also been voiced in dissenting opinions by Supreme Court justices. See e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 417 (1971) (Burger, C.J., dissenting); *Stone v. Powell*, 428 U.S. 465, 538-39 (1976) (White, J., dissenting).

48. The Court expressed its concern about officers' willingness to comply with the fourth amendment in *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

49. 338 U.S. 25 (1949).

one's privacy against arbitrary intrusion by the police."<sup>50</sup> If the fourth amendment were *solely* concerned with arbitrary intrusions, no serious problem of knowledge would arise with respect to deterrence. While officers would encounter some difficulty in determining the outer boundaries of a prohibition of arbitrary intrusions, they would have no problem remembering—or, in most instances, applying—so simple a prohibition on conduct.

It is the less clearly illegal intrusions, not the patently illegal intrusions, that are likely to present a cognitive barrier to deterrence. The distinction between two kinds of illegality—one involving arbitrary state action, the other involving wrongful but not arbitrary state action—is, as we suggested, implicit in Frankfurter's characterization of the core of the fourth amendment.<sup>51</sup> If one can say that, at its core, the fourth amendment prohibits arbitrary intrusions on protected interests, then one must also say that a body of law is arranged *around* the amendment's core that offers greater protection than a simple prohibition of arbitrary intrusions. The Court's fourth amendment jurisprudence creates a penumbra around the basic core prohibition of arbitrary intrusions. Most of the famous Supreme Court fourth amendment cases—*Weeks*,<sup>52</sup> *Mapp*,<sup>53</sup> and *Bivens*,<sup>54</sup> for example—have dealt with patently

50. *Id.* at 27.

51. In *Wolf*, Justice Frankfurter did not state whether he thought the intrusion at issue in the case involved arbitrary action by state officials. He did, however, discuss what he considered to be arbitrary action:

The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

*Id.* at 28. If the knock on the door is, as in Frankfurter's example, based *solely* on police authority, there can be no doubt about the arbitrariness of the intrusion that follows it. However, Frankfurter's example allows for a middle ground, one where an intrusion is not authorized by law but where it is at least supported by objective suspicion of wrongdoing. For example, an officer carrying out a warrantless intrusion into a home might have probable cause to believe there is evidence of a crime but might mistakenly believe that exigent circumstances justify entry without a warrant. In knocking on the door and then intruding, the officer cannot be said to be acting arbitrarily given the predicate of suspicion available to him. However, the officer's entry into the home is still illegal.

52. *Weeks v. United States*, 232 U.S. 383 (1914) (involving a warrantless entry into a home followed by inspection of the homedweller's bureau drawers).

53. *Mapp v. Ohio*, 367 U.S. 643 (1961) (involving a warrantless entry into a home followed by a struggle with the homedweller and extensive search of home's contents).

54. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (assessing allegation that federal officers entered home without warrant,

illegal police intrusions. Year in, year out, however, the great majority of Supreme Court opinions on the fourth amendment and most lower court fourth amendment cases as well do not involve patent illegality.<sup>55</sup> Rather, they center on questions having to do with the exact content of rules of search and seizure that define the outer limits of protection provided by the fourth amendment.<sup>56</sup>

When expressed this way, it becomes clear that the key question about the cognitive dimension of deterrence has to do with officers' knowledge of the fourth amendment's rules of search and seizure that provide protection beyond the amendment's core prohibition of arbitrary intrusions. In applying the rules of search and seizure, officers must know when they have met the constitutional prerequisites for initiating an intrusion and for escalating one.<sup>57</sup> They must be able to

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arrested head of household and manacled him in front of his family, and searched entire home).

55. See, for example, Justice Scalia's comments on the Court's fourth amendment docket:

We certainly take, on certiorari, a number of Fourth Amendment cases in which the question seems to me of no more general interest than whether, in *this* particular fact situation, pattern 3,445, the search and seizure was reasonable. It is my inclination—once we have taken the law as far as it can go, once there is no general principle that will make this particular search valid or invalid, once there is nothing left to be done but determine from the totality of the circumstances whether this search and seizure was “reasonable”—to leave that essentially factual determination to the lower courts. We should take one case now and then, perhaps, just to establish the margins of tolerable diversity. But beyond that, just as we tolerate a fair degree of diversity in what juries determine to be negligence, I think we can tolerate a fair degree of diversity in what courts determine to be reasonable seizures.

Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

56. The key twentieth century exclusionary rule cases made it possible for the Court to consider cases where fourth amendment issues were not so clear-cut. The exclusionary rule announced in *Weeks*, for example, paved the way for Supreme Court consideration of the issue of whether surreptitious entry by a government agent is permissible under the fourth amendment, *see Gouled v. United States*, 255 U.S. 298, 305 (1921); whether a search and seizure conducted by a private party is covered by the fourth amendment, *see Burdeau v. McDowell*, 256 U.S. 465, 474-75 (1921); and whether a warrant is required to search the passenger compartment of a car, *see Carroll v. United States*, 267 U.S. 132, 149, 153 (1925). The rule announced in *Mapp* paved the way for Supreme Court consideration of issues such as stop and frisk, *see Terry v. Ohio*, 392 U.S. 1, 16-20 (1968); warrantless arrests in the home, *see Payton v. New York*, 445 U.S. 573, 589-90 (1980); and warrantless searches of mobile motor vehicle homes, *see California v. Carney*, 471 U.S. 386, 390-94 (1985).

57. Investigative stops of citizens are governed by a reasonable suspicion standard. *Terry v. Ohio*, 392 U.S. 1, 20-22, 27 (1968). However, to justify lengthy detention of a person or his possessions, the government must be able to show probable cause. In *Terry*, the police officer's initial intrusion, which was justifiable under a reasonable suspicion standard, produced evidence that provided the probable

distinguish between the different degrees of protection afforded objects.<sup>58</sup> And they also must be able to determine when a warrant is required for an intrusion and when one is not.<sup>59</sup> None of these matters involves patent illegality. Although there is often an internal coherence to the rules of search and seizure, these rules are frequently not intuitively obvious but instead have to be mastered in the same way one masters any other detailed body of knowledge.<sup>60</sup> Thus, what needs to be investigated is the extent of police mastery of the rules of search and seizure; in particular, attention must be given to the factors, such as experience and training, that account for different levels of police knowledge of the law.

The other research question that should be asked about deterring fourth amendment violations has to do with the degree to which officers are prepared—despite the prospect of exclusion—to carry out intrusions they believe to be illegal. In *Mapp*, the Court not only stated that the purpose of the exclusionary rule is to deter police illegality, it also stated that exclusion achieves its deterrent effect by “‘compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard [that guaranty].’”<sup>61</sup> Exclusion, however, imposes only an indirect sanction on police officers.<sup>62</sup> It imposes its direct sanction on the

cause for a warrantless arrest. *See id.* at 27-31. For a case in which an officer's initial detention on the basis of reasonable suspicion was justifiable but where the evidence that established probable cause was obtained following the passage of a reasonable time for a brief intrusion, see *United States v. Place*, 462 U.S. 696, 707-11 (1983).

58. Homes, for example, receive differing protection depending on whether they are mobile homes or stationary. *Compare California v. Carney*, 471 U.S. 386 (1985) with *United States v. Johnson*, 333 U.S. 10 (1948).

59. Absent exigent circumstances or consent, a warrant must be used to arrest someone in his home, *Payton v. New York*, 445 U.S. 573, 586-90 (1980), or to search a home, *Johnson v. United States*, 333 U.S. 10, 13-15 (1948). *See also Illinois v. Rodriguez*, 110 S. Ct. 2793, 2797 (1990). By contrast, a warrant is not required to arrest an individual in a public place. *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

60. The fourth amendment offers varying degrees of protection (sometimes requiring only reasonable suspicion, sometimes requiring probable cause, and sometimes requiring probable cause backed by a warrant) for the different interests (privacy, property, and liberty) with which it is concerned. One cannot point to a principle or set of principles that accounts for all the rules the Court has established for searches and seizures.

61. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

62. Justice Jackson noted the indirectness of exclusion's sanction in his plurality opinion in *Irvine v. California*, 347 U.S. 128, 136-37 (1954). For a general discussion

state, rather than erring officers, so it is hard to see how exclusion, standing alone, would be likely to compel respect for the fourth amendment's guarantees. Because of their concern with exclusion's indirectness as a sanction, some members of the Court in the post-*Mapp* era have argued that exclusion cannot be expected to have the strength the *Mapp* Court attributed to it. In particular, they have contended that exclusion cannot be expected to function as a deterrent when intrusions are carried out with no intention of producing evidence at trial—when, for example, officers aim merely to harass an individual<sup>63</sup> or when their goal is to obtain information that will enable them to increase their clearance rate of unsolved cases.<sup>64</sup>

It is possible to expand on this skeptical view of exclusion's deterrent strength, for officers may carry out intrusions they believe to be illegal even when they wish to obtain evidence for use at trial. This may happen when officers are certain an intrusion is illegal but plan to commit perjury about the circumstances that prevailed at its inception.<sup>65</sup> A less bleak possibility involves near-certainty about illegality combined with a now-or-never set of circumstances for an intrusion. In this latter setting, an officer could be relatively sure about the illegality of an intrusion but might nonetheless go ahead with it rather than forego the possibility of obtaining the evidence. Given this set of facts, exclusion's indirectness as a sanction would be of critical importance because one would not expect an officer to risk a direct sanction—civil or criminal liability, for example, or departmental discipline—when she believes an

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of the significance of exclusion as an indirect sanction, see McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 669-74 (1972).

63. In *Terry v. Ohio*, 392 U.S. 1 (1968), Chief Justice Warren offered the following example of harassment that cannot be deterred by the exclusionary rule: The police sometimes accost women "in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them." *Id.* at 14 n.9.

64. See, e.g., *United States v. Janis*, 428 U.S. 433 (1976), where Justice Blackmun noted studies which argue that "police often view trial and conviction as a lesser aspect of law enforcement." *Id.* at 448 n.20 (citing research by Skolnick, *supra* note 41; Milner, *supra* note 40; and Oaks, *supra* note 38).

65. The possibility that a substantial percentage of police officers commit perjury in order to avoid suppression is discussed in Orfield, *The Exclusionary Rule in the Chicago Criminal Courts*, 35 U. CHI. L. S. REC. 14 (Spring 1989) and *Police Perjury: An Interview with Martin Garbus*, 8 CRIM. L. BULL. 363 (1972). See also Note, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87 (1968); Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).



intrusion to be illegal and is not prepared to commit perjury in testifying about it. If, however, an officer believes exclusion is the worst sanction that could be applied for a given intrusion, she might nonetheless proceed with the intrusion in the hope that her assessment of the law is mistaken.<sup>66</sup>

### C. Details of the Study

Our research addressed the issues just mentioned: officers' knowledge of constitutional rules of search and seizure and their willingness to adhere to their understanding of those rules. The research employed a questionnaire that was administered to officers in four midsized police departments located in the Northeast. In addition to the questionnaire, we conducted interviews with executives and selected members of each department. Comments made during the course of these interviews often proved to be helpful in interpreting the questionnaire's results. The following points highlight specific concerns that underlay our development and administration of the questionnaire.

1. *A Concern with Settings in Which Officers Act on Their Own*—Fourth amendment compliance issues are most salient, we believe, when officers must decide on their own whether to carry out an intrusion. We decided, therefore, to focus solely on *warrantless* police intrusions—that is, settings where officers cannot rely on a warrant's guidance but must instead rely on their own judgments of legality. The first, and most important, part of the questionnaire was based on six Supreme Court opinions dealing with warrantless intrusions by the police. Table 1 lists the cases used in the questionnaire. As the table makes clear, the cases we used cover a wide range of warrantless intrusions including a stop and frisk, the search of containers found in a car trunk, and intrusion into a home following a hot pursuit.

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66. In the course of discussing the issue of which fourth amendment rules should be held retroactive, the Court noted the possibility that officers may take "a let's-wait-until-it's-decided approach" when uncertain about the legality of an intrusion. *United States v. Johnson*, 457 U.S. 537, 561 (1982) (quoting *Desist v. United States*, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting)). This point is worth bearing in mind for all intrusions where officers are confronted only with exclusion's indirect sanction and are uncertain about the law.

TABLE 1  
CASES USED IN THE QUESTIONNAIRE

<u>Case Name</u>	<u>Margin</u>	<u>Issue</u>
1. Ybarra v. Illinois 444 U.S. 85 (1979)	6-3	warrantless search of an individual during the course of executing a search of premises; there was no basis for suspecting that the individual was armed at the time of the search
2. Warden v. Hayden 387 U.S. 294 (1967)	8-1	warrantless search of a home following hot pursuit of a robbery suspect to that home
3. Sibron v. New York 392 U.S. 40 (1968)	8-1	warrantless detention and search of a suspect following an eight-hour observation of him in the company of others thought to be drug dealers
4. United States v. Ross 456 U.S. 798 (1982)	6-3	warrantless search of containers found within an automobile trunk following the establishment of probable cause to search the entire vehicle
5. Hayes v. Florida 470 U.S. 811 (1985)	8-0	warrantless transportation of a suspect to the stationhouse and the fingerprinting of him on reasonable suspicion that he had committed a crime
6. California v. Carney 471 U.S. 386 (1985)	6-3	warrantless search (backed by probable cause) of a mobile motor vehicle home

In one department, the first case used had to do with the need for *Miranda* warnings:

Orozco v. Texas 394 U.S. 324 (1969)	7-2	interrogation of a suspect while in police custody at his home
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The cases were presented as scenarios in the questionnaire. Officers were not told that the scenarios were based on Supreme Court opinions. The language used to describe each scenario was the exact language that the Court used to describe the facts in each case. We changed only the names of the parties to the cases. After each scenario, we asked the following questions: whether the specific intrusion at issue in the Court's opinion for the case (an intrusion described in

behavioral terms, for example, "opening the trunk," "going underneath the suspect's outer clothing," etc.) seemed to be an effective way of combatting crime; whether the intrusion seemed reasonable; whether the officer reading the scenario would have carried out an intrusion in such a setting; why he would (or would not) have intruded; whether the officer reading the scenario believed the intrusion to be lawful; and, how certain the officer reading the scenario was about his assessment of the lawfulness of the intrusion. Thus, officers were asked about their evaluations of legality and about their willingness to intrude in certain settings. By examining their answers, we were able to assess officers' knowledge of the law (*i.e.*, whether they could correctly identify the legal status of an intrusion). Also, by comparing their answers about their perceptions of legality with their answers about whether they actually would carry out the intrusion, we were able to assess their willingness to obey the law.

In another part of the questionnaire, we presented officers with multiple choice questions about search and seizure law. This latter part of the questionnaire dealt only with knowledge of the law. Although the scenario section of the questionnaire reflected the officers' intuitive ability to identify the lawfulness of an intrusion in a given setting, the multiple choice section reflected their ability to select, from a choice of four or five options, the correct formulation of specific rules of search and seizure. Because some of the questions in the second part of the questionnaire dealt with issues involved in the scenarios, it was possible to see whether officers could identify the correct formulation of the legal rule for an intrusion they had reviewed in a scenario.

2. *A Concern with Settings in Which Exclusion Is the Sole Likely Penalty for Police Illegality*—Because we wished to assess *exclusion's* effect on police conduct, we selected warrantless intrusion scenarios that describe conduct unlikely to provoke other sanctions—in particular, criminal<sup>67</sup> or civil<sup>68</sup> liability, or departmental discipline<sup>69</sup>—following a finding of illegality. Sanctions of the kind just mentioned (*direct* sanctions, as

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67. For the officers we studied (all employees of municipal police forces), criminal liability was possible under the laws of the state in which they worked and also under 18 U.S.C. § 242 (1988).

68. For the officers we studied, civil liability was possible under the common law principles of the state in which they worked and also under 42 U.S.C. § 1983 (1988).

69. Each of the departments in which we conducted research had an internal disciplinary panel (*i.e.*, a panel without civilian members) that reviewed complaints against police officers. Sanctions open to the panels ranged from reprimand to termination of employment.

distinguished from exclusion's *indirect* sanction) are most likely when an intrusion causes grave harm and is patently illegal.<sup>70</sup> The likelihood of direct sanctions declines as each of these features of a fourth amendment violation decreases in urgency. Direct sanctions are thus least likely when an intrusion involves only modest harm and is not patently illegal.<sup>71</sup> The scenarios we used described intrusions in which citizens did not suffer substantial harm and the issue of legality was not clear-cut.<sup>72</sup>

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70. Of the three sanctions mentioned *supra* at notes 67-69—criminal and civil liability and departmental discipline—criminal liability and discipline from a non-civilian panel are likely only when exceedingly grave harm is inflicted by officers. Judge Newman has argued that “the criminal sanction will never have significance as a deterrent [because] [p]rosecutors . . . need to maintain close working relationships with law enforcement agencies, [and so] are disinclined to charge police officials with criminal conduct.” Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 449-50 (1978). Similarly, Professor Schwartz noted that a conflict of interest effectively disables the district attorney from prosecuting police: “It could hardly be otherwise in view of the daily cooperation essential between the police and prosecutor.” Schwartz, *Complaints Against the Police: Experience of the Community Rights Division of the Philadelphia District Attorney's Office*, 118 U. PA. L. REV. 1023, 1024 (1970). Professor Schwartz also observed that internal police investigation of police conduct tends to place an “[u]nusually [h]eavy [i]nitiative and [b]urden of [p]roof” on the complainant. *Id.* at 1028.

On the other hand, tort actions against the police—in particular, tort actions pursued in federal court under 42 U.S.C. § 1983—have a somewhat better chance of providing relief for those who have suffered substantially because of police misconduct. In his study of section 1983 litigation conducted in the Central District of California (which includes Los Angeles), Professor Eisenberg found two cases (out of 212 examined) in which plaintiffs received substantial damages. In one, a number of Chicano plaintiffs received a total of \$33,000 after bringing a lawsuit in which they alleged that Riverside police officers used unnecessary physical force (including the use of tear gas) while arresting them without probable cause. In the other, a plaintiff received \$250,000 in a suit alleging that Los Angeles homicide detectives falsely arrested him and concealed exculpatory evidence. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 529-30, nn.206-09 (1982).

71. Criminal liability and internal departmental discipline are particularly unlikely when officers carry out intrusions that involve modest harm and are not patently illegal, because of the close relationship between prosecutors and law enforcement agencies, and the heavy burden on complaining witnesses. *Supra* note 70.

Each of these factors—modest harm and nonpatent illegality—make civil liability unlikely as well. When the harm caused by an illegal intrusion is modest, the victim of such an intrusion cannot expect substantial damages, thus making suits unlikely. Moreover, in some instances where illegality is nonpatent, civil actions can be expected to be dismissed at the summary judgment stage given the qualified immunity defense allowed in federal civil rights cases. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986).

72. In two of the illegal intrusion scenarios (those based on *Ybarra v. Illinois*, 444 U.S. 85 (1979), and *Sibron v. New York*, 392 U.S. 40 (1968)), officers reached into

To make sure that we were dealing with settings in which exclusion alone looms as a likely penalty, we showed the scenarios to the chiefs of each of the departments in which we administered the questionnaire. We did not tell the chiefs which intrusions were illegal. They unanimously stated that they thought it was unlikely that officers in their departments would be subjected to direct sanctions for engaging in *any* of the intrusions.<sup>73</sup>

3. *A Concern with Avoiding Unusual Departments in the Study Sample*—Given the American commitment to local control of law enforcement, there is extraordinary diversity—in size, quality of training, command functions, etc.—among the nation's police departments. Because of this diversity, it does not make sense to think in terms of "representative" police departments. It is often wise, however, *not* to conduct research in certain types of departments. We sought to avoid the following types of departments: those that were particularly large or small, those under a court order concerning hiring or training, those in which officers or executives were under indictment or subject to public investigation for corruption or brutality, and those with a reputation for tension between officers and the citizenry.

The departments in which we administered the questionnaire requested anonymity. We can, however, report that each was located in either New England or one of the middle Atlantic states, that each had between 125 and 275 sworn officers, and that each served urban populations ranging from 40,000 to 100,000.<sup>74</sup> The departments had between 25 and

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suspects' pockets and inspected the contents of what they discovered. In the third (based on *Hayes v. Florida*, 470 U.S. 811 (1985)), they arrested someone without probable cause. None of these intrusions can be said to involve excessive force or a gross violation of rights protected by the fourth amendment. Furthermore, none of the intrusions can be characterized as patently illegal, for while officers did not have enough suspicion to warrant doing what they did, they at least had some particularized suspicion that supported their conduct.

73. After examining the scenarios, one of the chiefs remarked that they involved "doing your job" intrusions. Another said, "this is what we're paid to do." Executives interviewed in each of the departments said they knew of no criminal or civil cases concerning the type of intrusions reported in the scenarios. Executives in each department also said they knew of no disciplinary action that had been undertaken with respect to the type of intrusions reported in the scenarios.

74. There are several reasons why we selected midsized departments. First, oral administration of the questionnaire, which we considered essential, could not have been conducted for a random sample of officers in a large department. Second, because a random sample of officers was not possible under conditions we considered essential, the alternative was to administer the questionnaire to as many officers as

45 officers per 10,000 persons in the community. Nonwhites comprised 20 to 50% of each city's population. Crime rates for the four cities were comparable, ranging from about 5500 to 6500 index crimes per 100,000 persons in the community. All four cities had relatively little population change in the years preceding administration of the questionnaire. Poverty rates in the four cities ranged from 10 to 25%. Per capita income varied from about \$10,000 to \$20,000 per year.<sup>75</sup>

Five hundred and forty-seven officers participated in the survey, representing about 70% of all the officers in the four departments. In each department, we administered the questionnaire during in-service training sessions in classroom settings. Either a member of the research team or a training officer for the department read the instrument aloud while the respondents read along and completed the questionnaire.<sup>76</sup>

In order to assess the extent of police knowledge relative to that of laypersons and lawyers, we surveyed two other groups. First, to estimate what laypersons know about search and seizure issues, we administered the questionnaire to college students at the start of an introductory course in criminal justice. Individuals with criminal justice experience were excluded. Second, to establish an upper ceiling for the knowledge of search and seizure rules an officer can reasonably be expected to have, we distributed the questionnaire to prosecutors located in one county in a middle Atlantic state and to public defenders located in one county in a different state in the same region. About two-thirds of the lawyers completed and returned the questionnaires.

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possible in a department. Third, we wanted to conduct research in several departments. For logistical reasons we were limited in the number of times we could administer the questionnaire (the largest department required ten separate sessions), so it was necessary to confine our work to midsized departments.

75. Demographic data are taken from U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, *Statistical Abstract of the United States* (1989). Crime and police data are from U.S. DEPT OF JUSTICE, FED. BUREAU OF INVESTIGATION, *Uniform Crime Reports for the United States* (1989).

76. Oral administration of the questionnaire was both logistically and methodologically preferable. As the questionnaire was read aloud, officers followed along silently and answered each item simultaneously while the oral reader paused. This minimized any potential effects of variable reading aptitude, and ensured a higher completion rate of questionnaire items. It also eliminated any incentive to rush through the instrument to go on break and the distractions of some officers finishing before others.

## II. POLICE KNOWLEDGE OF THE RULES OF SEARCH AND SEIZURE

In order to find out about police knowledge of the rules of search and seizure, we asked officers, in the questions following each scenario, whether they considered the intrusion reported in the scenario lawful or unlawful. We then asked, in a separate section, which of several options was the correct formulation of a rule of search and seizure. These approaches—the first contextual, the second abstract—offer two complementary ways of studying knowledge of the law; each must be taken into account in thinking about police knowledge of the law. We shall discuss responses to the scenarios first; after that, we shall turn to responses to the questions on the proper formulation of the rules of search and seizure.

TABLE 2

### CORRECT IDENTIFICATION OF THE LEGALITY OF INTRUSIONS IN SIX SEARCH AND SEIZURE SCENARIOS

<u>Supreme Court Case</u>	<u>Percentage of Correct Responses</u>		
	<u>Police</u>	<u>Lawyers</u>	<u>Laypersons</u>
Ybarra v. Illinois, 444 U.S. 85 (1979)	57	93	41
Warden v. Hayden, 387 U.S. 294 (1967)	55	70	55
Sibron v. New York, 392 U.S. 40 (1968)	54	87	67
United States v. Ross, 456 U.S. 798 (1982)	52	57	70
Hayes v. Florida, 470 U.S. 811 (1985)	78	90	33
California v. Carney, 471 U.S. 386 (1985)	39	43	42
Mean scenarios correct ( <i>n</i> ) <sup>a</sup>	3.4 (463-547)	4.4 (30)	2.9 (58)

<sup>a</sup> The number of officers (*n*) responding to each scenario varies from 463-547. The Ybarra scenario was presented to three of the four departments. The *n* for the other five scenarios varies due to missing data.

Police officers as a group performed slightly better than chance<sup>77</sup> in assessing the lawfulness of the intrusions described in the scenarios (see Table 2). In only one of the six scenarios (drawn from *Hayes v. Florida*<sup>78</sup>) did a substantial majority of the police correctly evaluate the legality of the intrusion. In four cases, they did little better than chance; in the sixth case (drawn from *California v. Carney*<sup>79</sup>) a substantial majority thought the intrusion illegal when it was legal. As a group, responding police officers did considerably better than responding laypersons, with a mean of 3.4 correct cases or 57% compared with the laypersons' 2.9 cases, or 48%.<sup>80</sup> In contrast, the officers were outperformed by the lawyers, for whom the mean number of correct responses was 4.4 (73%).

A similar pattern appears for responses to general questions about the rules of search and seizure, as shown by Table 3. A maximum score of eight was possible for these questions. Because each question presented four or five alternative answers, there was a 20% to 25% chance of selecting the correct answer by chance. Each group exceeded the chance rate of response, police officers by 1.8 correct responses and lawyers by 2.5. The rank order scores, it will be noted, are similar to those in the scenarios.

Table 3 also contains a combined knowledge score, which was derived by adding the legal rules score with a weighted score for the scenarios. The scenario scores were multiplied by a factor of 1.33 in order to weight them equally with the rules scores.<sup>81</sup> This table also presents a correspondence score, which reflects the extent of agreement in a respondent's answers to questions asked following the scenarios and those posed concerning the general rules. Four scenario questions had an analogue in the general rules questions; for example, a scenario about the proper scope of a car search had an

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77. For the incident scenarios, for example, which could only be answered legal or illegal, one would expect to earn a score of 50% by merely guessing the correct answers. Similarly, in multiple choice items with four items each, one is likely to get a score of 25% on average simply by guessing.

78. 470 U.S. 811 (1985).

79. 471 U.S. 386 (1985).

80. Not only was their mean score somewhat higher, but a majority of officers answered five of the six scenarios correctly whereas the majority of laypersons answered only three of the six scenarios correctly.

81. The scores were combined to provide a more reliable measure of knowledge because the separate scores provided by the scenario and multiple choice sections were comprised of only six and eight items respectively.



analogue in the general rules questions. On only one issue—involving the predicate required for sustained detention of a suspect after a brief investigative stop—did more than half the officers and lawyers answer both kinds of questions correctly. Confidence about knowledge of the law is warranted when both kinds of questions are answered correctly; less confidence is warranted when only one kind is answered correctly.

TABLE 3  
SCORES ON KNOWLEDGE OF SEARCH AND SEIZURE LAW  
FOR POLICE, LAWYERS, AND LAYPERSONS<sup>a</sup>

<u>Dependent Variable</u>	<u>Lawyers</u>	<u>Police</u>	<u>Laypersons</u>
Mean scenarios correct (maximum score = 6)	4.4 (0.9) <sup>b</sup>	3.4 (1.2)	2.9 (1.2)
Mean general search and seizure legal rules correct (maximum score = 8)	4.5 (1.5)	3.8 (1.5)	3.0 (1.2)
Combined knowledge score (scenarios + rules) (maximum score = 16) <sup>c</sup>	10.3 (2.3)	8.3 (2.4)	7.0 (2.2)
Correspondence score (both related rule and scenario correct: maximum score = 4)	1.7 (0.9)	0.9 (0.7)	0.6 (0.6)
(n)	(30)	(460)	(58)

<sup>a</sup> Analysis of variance across the three groups for each of the four scores revealed that the differences in means scores were statistically significant ( $p < .0001$ ). Paired comparisons, using Scheffe's test, revealed significant differences ( $p < .05$ ) in the mean scores for all pairwise comparisons (e.g., lawyers compared to police).

<sup>b</sup> Standard deviations are in parentheses.

<sup>c</sup> Combined and weighted mean score of scenarios plus legal rule items. Because the maximum score was six for scenarios and eight for legal rules, the scenarios are weighted in computing the combined score: Combined score = (1.33 x scenarios correct) + legal rules correct. Discrepancies between entries in the table and figures arrived at by substituting scores into the formula result from rounding.

So far, we have considered responding police officers as a homogeneous group. When their responses to the questionnaire are examined with reference to identifying characteristics of the officers such as assignments, education, and in-service training, one discovers that some police sub-groups approach the lawyers' level of knowledge.

TABLE 4  
 KNOWLEDGE OF SEARCH AND SEIZURE LAW  
 AS A FUNCTION OF POLICE CHARACTERISTICS

		<u>Mean Scores</u>		
<u>Officer Characteristics</u>	<u>n<sup>a</sup></u>	<u>Case Scenarios</u>	<u>Legal Rules</u>	<u>Combined Knowledge Score<sup>b</sup></u>
<u>Current Assignment<sup>c</sup></u>				
Patrol	239	3.3	3.5	7.9
Plain clothes investigation	53	3.5	3.9	8.5
Other plain clothes	66	3.6	4.0	8.8
Supervisor	85	3.6	4.5	9.4
<u>Years in police work</u>				
1-2	36	3.5	3.2	7.9
3-5	58	3.3	3.8	8.2
6-10	112	3.5	4.1	8.8
11+	337	3.4	3.8	8.4
<u>Arrests in past 6 months</u>				
0	104	3.3	3.7	8.1
1	52	3.2	3.2	7.5
2	54	3.4	3.6	8.1
3	32	3.4	3.7	8.2
4	26	3.6	4.1	8.8
5+	175	3.6	4.2	8.9
<u>Suppression hearings in past 6 months</u>				
0	353	3.4	3.9	8.5
1	45	3.4	3.6	8.0
2+	45	3.4	3.9	8.3
<u>Exposure to law suits</u>				
none	401	3.4	3.8	8.4
possible	32	3.4	3.9	8.4
actual	10	3.6	3.8	8.6
<u>Attendance at college</u>				
no	195	3.2	3.6	7.9
yes	248	3.6	4.0	8.8
<u>Extent of training in criminal procedure</u>				
basic	200	3.2	3.5	7.8
moderate	155	3.4	3.9	8.5
extensive	88	3.8	4.6	9.6
Grand mean score		3.4	3.8	8.3
MAXIMUM SCORE POSSIBLE		6	8	16

<sup>a</sup> Includes officers from three departments who considered the same set of six scenarios with no missing data.

<sup>b</sup> Combined score = (1.33 x scenarios correct) + legal rules correct. (See note <sup>c</sup> in Table 3).

<sup>c</sup> Plain clothes investigation = anti-crime officers and detectives. Other plain clothes = community relations and other assignments.

As is shown in Table 4, an officer's exposure to lawsuits or suppression hearings did not effect her mean score on case scenarios, legal rules, or the combined score. In contrast, some of the other variables did significantly improve knowledge scores. For instance, officers in nonpatrol assignments demonstrated greater knowledge of the law. This finding is not surprising because nonpatrol officers make more arrests than do patrol officers.<sup>82</sup> Also, as one might expect, officers with at least some college education demonstrated greater knowledge of the law than officers who have not attended college. College-educated officers are more likely to be both motivated and selected to pursue extra training than officers who have not gone beyond high school. Furthermore, college is likely to help officers develop the analytic skills needed to understand the rules of search and seizure.

TABLE 5  
KNOWLEDGE OF SEARCH AND SEIZURE LAW  
AS A FUNCTION OF EXTENT OF TRAINING IN CRIMINAL PROCEDURE

Extent of Professional Training in Criminal Procedure						
Dependent Variable	None	Basic Police Academy	Police Special Training		Law School	Spearman Correlation <sup>b</sup>
			Some	Extensive		
Incident scenarios	2.9 <sup>a</sup>	3.2	3.4	3.8	4.4	.27
Legal rules score	3.0	3.4	3.9	4.6	4.5	.32
Combined score	6.9	7.7	8.5	9.6	10.3	.38
Correspondence score	0.6	0.7	1.0	1.4	1.7	.31
(n)	(58)	(274)	(178)	(95)	(30)	(635)

<sup>a</sup> Entries in the table are mean scores for each of the dependent variables. Slight differences in the means reported above and in Table 4 are a result of missing data and different *n*'s.

<sup>b</sup> Spearman's correlation ( $\rho$ ) measures the extent of association between two ranked variables. The score can run from 0.0 for no association to 1.0 for perfect association. The correlations shown above reflect the association between level of training and knowledge scores. All correlations are statistically significant ( $p < .05$ ).

82. The percentages by assignment for officers who made five or more arrests in the preceding six months are as follows: patrol, 24%; plain clothes investigators, 63%; other plain clothes officers, 69%; supervisors, 43%.

TABLE 6  
 KNOWLEDGE OF SEARCH AND SEIZURE LAW  
 AS A FUNCTION OF POLICE CHARACTERISTICS  
 USING MULTIPLE REGRESSION ANALYSIS<sup>a</sup>

Dependent Variable: Total Search and Seizure Knowledge Score	
Predictor variables	Regression Coefficient <sup>b</sup>
In-Service criminal procedure training:	
Extensive	1.33 <sup>d</sup>
Moderate	0.40
Some college attendance	0.59 <sup>c</sup>
Assignment:	
Supervisor	0.92 <sup>c</sup>
Plain clothes investigation	0.47
Other plain clothes	0.01
Number of arrests in past 6 months	0.17 <sup>c</sup>
Years of service	0.08
Suppression hearings in past 6 months	-0.23
Exposure to law suits:	
Possible	-0.02
Actual	-0.02
Constant	6.90
$R^2 = .15$ ( $F = 6.7$ , $p = .0001$ ) ( $n = 443$ )	

<sup>a</sup> For a brief explanation of multiple regression, see note 84.

<sup>b</sup> Amount each unit increase in the predictor variable contributes to predicted knowledge score. Coefficients without superscripts are not statistically significant.

<sup>c</sup>  $p < .05$  (probability that coefficient is not zero).

<sup>d</sup>  $p < .001$  (probability that coefficient is not zero).

The most significant relationship was that between in-service training and knowledge of the law. As has often been noted, *Mapp* led to an expansion in police training programs<sup>83</sup>—an

83. See, e.g., Murphy, *supra* note 38, at 941; Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 28, 31.

expansion that may have influenced police attitudes toward the law as well as knowledge of it. With *Mapp* now thirty years in the past, it is important to note that the *amount* of in-service training in search and seizure law was the most significant of the background characteristics influencing police knowledge of the law (see Table 6). With extensive training (defined as four or more law courses beyond basic academy instruction), officers acquire a degree of knowledge that approaches that of lawyers (see Table 5). Table 6 indicates that in-service training makes a greater contribution than any of the other variables contributing to knowledge of the law.<sup>84</sup> In this respect, at least, the trend that began with *Mapp* has been a beneficial one; in-service training in criminal procedure has been critical in enhancing police knowledge of the rules of search and seizure.

Helpful as these background factors are in explaining which officers are likely to be best informed, they pale in comparison to the fact that even the most knowledgeable officers and lawyers make a substantial number of mistakes in dealing with the rules of search and seizure. The implications of this fact for the Supreme Court's strategy of deterrence are

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84. We examined the relationship between officers' knowledge scores and the various predictor variables by conducting a multiple regression analysis. Multiple regression is an elaboration of simple linear regression that attempts to predict the value of one variable from a set of other predictor variables (the "independent variables"). It provides an estimate of how much each predictor variable contributes to the value of the variable being predicted (the "dependent variable"). In Table 6, the dependent variable is the combined knowledge score of officers. The estimated contribution for a given predictor variable is reflected by its regression coefficient. The regression coefficient reflects the unique contribution of that variable holding the other variables constant. Each coefficient is tested for statistical significance. If a coefficient is nonsignificant, the variable to which it corresponds is assumed to be unrelated to the dependent variable. In Table 6, the variables which have statistically significant regression coefficients are extensive training, assignment as a supervisor, college attendance, and number of arrests. The regression coefficients of these variables can be interpreted as estimates of the number of points on the 16-point search and seizure knowledge scale that they contribute to the knowledge score. Thus, officers with extensive training are predicted to score 1.3 points higher on the knowledge scale than officers with only basic academy training. As is indicated by Table 6, no other officer characteristic contributes as many points to the predicted knowledge score. The constant (6.9) of the regression model effectively represents the predicted knowledge score of officers who have none of the characteristics of the variables included in the model. Thus, for example, a patrol officer who has only basic academy training, has not attended college and has made no arrests in the past six months would have a predicted knowledge score of 6.9. An officer in a supervisory assignment, with five or more arrests in the past six months, some college attendance, and extensive criminal procedure training would have a predicted score of 10.5, about the actual score for lawyers.

straightforward. *Simply put, the findings indicate that, even if all police officers were disposed to adhere to the rules of search and seizure, there would nonetheless be substantial deviation from those rules as they are presently constituted because of police mistakes about what they require.* Deterrence works efficiently only when the subjects of deterrence are relatively certain about what is expected of them. The rules of search and seizure, however, are sufficiently vague that even the best-informed officers are routinely mistaken about what they may and may not do. It is important to note that we examined search and seizure rules which the Supreme Court has authoritatively established. Moreover, the rules bore on exactly the type of activity—the warrantless intrusion—that is central to police work. The fact that even well-trained officers were so frequently unable to identify and apply those rules indicates that, as currently formulated, the complexity of the law imposes a substantial limitation on the possibility of deterring police illegality.

Would different formulations of the law enhance deterrence? On the one hand, there is reason to believe that simplified rules would enhance the possibility of deterrence. On the other hand, it seems unlikely that the fourth amendment rules could be simplified enough to enhance deterrence. Consider first the evidence that rule simplification would enhance deterrence. In one department, we devoted a scenario to the fact pattern in *Orozco v. Texas*,<sup>85</sup> a police interrogation case that was decided three years after *Miranda v. Arizona*.<sup>86</sup> Although responses in this department to the *fourth amendment* scenarios averaged a 53% correct rate, 99% of the responses to the *Orozco* scenario were correct. Furthermore, we included a question in the general rules questions about the content of the *Miranda* warnings, and 98% of the officers were able to identify the required warnings. As Table 7 makes clear, these are dramatically higher scores than the average ones for the rules of search and seizure. We believe that the difference can be explained by comparing *Miranda's* bright-line rules with the more complex rules established by the fourth amendment. Officers are called upon to apply a comprehensive, easy-to-understand body of rules when conducting interrogations governed by the fifth amendment.

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85. 394 U.S. 324 (1969).

86. 384 U.S. 436 (1966).

The possibility of deterrence is thus not seriously compromised by the *Miranda* rules. If equally simple rules governed search and seizure, the possibility of deterrence would be substantially enhanced.

TABLE 7

COMPARISON OF POLICE KNOWLEDGE OF  
FIFTH AMENDMENT VERSUS FOURTH AMENDMENT LAW

	Percentage of Correct Responses
Fourth amendment scenarios	53
Fifth amendment scenario	99
Fourth amendment legal rules	38
Fifth amendment legal rules	98
	(n = 79) <sup>a</sup>

<sup>a</sup> The fifth amendment scenario was administered to just one of the four departments in survey.

In *Wolf v. Colorado*,<sup>87</sup> Justice Frankfurter stated that the core concern of the fourth amendment is to protect individuals against *arbitrary* intrusions by the police.<sup>88</sup> It seems likely that most officers already understand this point, and it seems likely as well that deterrence would be facilitated if they had only to consider an arbitrariness threshold when carrying out intrusions. Frankfurter did not mean to suggest, however, that arbitrariness is the sole threshold with which the fourth amendment is concerned. He was suggesting only that the *minimum* degree of protection provided by the amendment is defined by an arbitrariness standard. In most instances, as Frankfurter would have conceded, constitutional rules of search and seizure offer protection that *exceeds* the minimum offered by a prohibition on arbitrary intrusions.<sup>89</sup> What is

87. 338 U.S. 25 (1949).

88. *Id.* at 27.

89. Compare Justice Frankfurter's remarks in *Wolf* with his support for the conclusion the Court reached one year earlier in *Johnson v. United States*, 333 U.S. 10 (1948). In *Wolf*, Justice Frankfurter stated that the fourth amendment's "core" concern is "the security of one's privacy against arbitrary intrusion by the police."

more, it is because the rules of search and seizure offer *variable* protection—on some occasions requiring reasonable suspicion prior to an intrusion,<sup>90</sup> on some occasions probable cause,<sup>91</sup> and on still other occasions probable cause backed by a warrant<sup>92</sup>—that severe difficulties would be encountered in settling on a single, comprehensive threshold for all fourth amendment intrusions. Indeed, police work would become easier if a single standard were adopted. But in employing a single threshold the judiciary would have to disregard critical divides of everyday life, such as the distinction between sidewalks and private dwellings,<sup>93</sup> or the distinction between clothing and internal bodily organs.<sup>94</sup> The Court's fourth

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338 U.S. at 27. The example he gave of an arbitrary intrusion was "the knock at the door . . . without authority of law but solely on the authority of the police." *Id.* at 28. In *Johnson*, the Court held that, under the fourth amendment, even when officers have probable cause to believe criminal activity is taking place in a dwelling, they must, absent exigent circumstances, obtain a warrant to enter the dwelling. 333 U.S. at 14-15. The *Johnson* Court conceded that the officers in the case may have had probable cause to believe a crime was occurring. *See id.* at 13. Justice Frankfurter and the other members of the *Johnson* majority thus could not have considered the intrusion arbitrary. They nonetheless classified the officers' conduct as unconstitutional because they believed that, in the absence of exigent circumstances, the fourth amendment requires a warrant for searching a dwelling.

90. Reasonable suspicion is required for brief interference with fourth amendment liberty and property interests. *See, e.g.,* *United States v. Place*, 462 U.S. 696, 702 (1983) (stating that it is appropriate to apply the reasonable suspicion standard to a limited warrantless seizure of personal luggage). Reasonable suspicion can also justify police interference with privacy interests when the interference is undertaken for purposes of self-protection. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

91. Probable cause is required for sustained interference with liberty and property interests. *See United States v. Place*, 462 U.S. 696, 709-10 (1983). When the police have carried out an arrest on the basis of probable cause, they may interfere with the privacy interest an arrestee has in the contents of her pockets and the area immediately around her person even when they do not have reason to fear for their own safety. *See United States v. Robinson*, 414 U.S. 218, 224-37 (1973).

92. Absent exigent circumstances or consent, a warrant is required to search a home. *Johnson v. United States*, 333 U.S. 10, 13-15 (1948). Absent such circumstances, a warrant is also required to arrest someone in his home. *See Payton v. New York*, 445 U.S. 573, 586 (1980) (stating that "seizures inside a home without a warrant are presumptively unreasonable"). *See generally Illinois v. Rodriguez*, 110 S. Ct. 2793, 2797 (1990).

93. *Compare United States v. Watson*, 423 U.S. 411, 423-24 (1976) (holding that a warrantless arrest of an individual in a public place is permissible) with *Payton v. New York*, 445 U.S. 573, 590 (1980) (holding that a warrantless arrest of an individual in his home is impermissible in the absence of exigent circumstances or consent).

94. *Compare Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that inspection of the interior of a suspect's clothing is permissible when the suspect has been stopped on the basis of reasonable suspicion and there was reasonable basis for the officer to fear for his safety) with *Winston v. Lee*, 470 U.S. 753, 759 (1985) (holding that surgical intrusion into a suspect's body for a bullet is impermissible despite the existence of



amendment decisions have been keyed to the different privacy, liberty, and property expectations that surround matters such as those just mentioned. As long as the Court remains committed to capturing the different expectations associated with various objects and activities, it will not be possible to establish a single threshold for all fourth amendment intrusions.

It could be argued that while the Court cannot adopt a single-threshold strategy for the entire fourth amendment, it should at least simplify the rules governing intrusions on certain *types* of objects. Under this approach, the Court would create limited, as distinguished from comprehensive, bright-line rules<sup>95</sup>—rules that rely on a single threshold for *one type of intrusion*, thus simplifying police work within a carefully defined range of action. The key question to ask about such limited bright-line rulemaking is whether it would enhance the possibility of deterrence. It might be suggested that even modest rule-simplification would facilitate deterrence, for one could claim that officers are likely to grasp simplified rules bearing on one type of intrusion governed by the fourth amendment as readily as they do simplified rules that deal comprehensively with interrogation governed by the fifth amendment. Alternatively, it might be suggested that limited rule-simplification would not increase the possibility of deterrence, for one could claim that as long as multiple thresholds continue to govern intrusions, it is unlikely officers will hear about—or comprehend if they are actually apprised of—a limited simplification of rules.<sup>96</sup>

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probable cause to believe that the bullet was fired at the suspect in self-defense during the course of an attempted robbery).

95. The Court has created comprehensive bright-line rules for the interrogation of suspects who are in custodial detention. *Miranda v. Arizona*, 384 U.S. 436, 476-79 (1966). It has also established a comprehensive bright-line rule prohibiting police interrogation of an indicted defendant if he requests the assistance of counsel. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). The Court has indicated that these bright-line rules offer *more* protection than is constitutionally required. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (discussing the *Miranda* rule); *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (same); *Michigan v. Harvey*, 110 S. Ct. 1176, 1179-80 (1990) (discussing the *Jackson* rule).

Our concern is not with the question of whether bright-line rules provide protection that exceeds constitutional requirements but rather with the question of whether they facilitate law enforcement. For a general discussion of the cognitive purpose underlying the creation of bright-line rules, see Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 232-34 (1984).

96. The statement in the alternative is necessary because it is not always clear whether officers have simply not encountered a new Supreme Court rule or whether they have encountered the rule but have been unable to place it within the terrain of search and seizure law. Executives in each of the departments we studied assured

Our findings offer support for the latter hypothesis. Perhaps the most notable attempt by the Court at bright-line rulemaking under the fourth amendment has dealt with searches of movable vehicles. In order to investigate whether the police are less likely to be mistaken about the legality of intrusions when limited bright-line rules are involved, we drew two of our six scenarios from movable vehicle cases—*United States v. Ross*<sup>97</sup> and *California v. Carney*.<sup>98</sup> In *Ross*, the Court held that when there is probable cause to search a car, police officers not only do not need a warrant to search the car, they also do not need a warrant to inspect the contents of movable containers found in the course of their search.<sup>99</sup> In *Carney*, decided three years later, the Court extended the “automobile exception”<sup>100</sup> to movable mobile homes, holding that when the police have probable cause to search such homes, they may do so without a warrant.<sup>101</sup> The bright-line rule emerging from these cases—that warrantless searches of movable vehicles and containers found in them are permissible—does not, however, seem to have been widely grasped by officers. As Table 2 indicates, the officers’ performance on the *Ross* scenario was poorer than their average overall performance. Their responses to the *Carney* scenario are even more revealing. On this scenario the officers were *most* frequently mistaken; in all, more than 60% of their responses to *Carney* were mistaken.

Compared with the results for the *Miranda* rules, the *Ross* and *Carney* data make it clear that limited rule-simplification does not enhance the possibility of deterrence. *Miranda* provides bright-line rules that deal comprehensively with interrogation. Although some exceptions to *Miranda*’s rules have developed over the years,<sup>102</sup> police officers can be

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us that their officers were given handouts describing new Supreme Court rulings pertaining to police work. We were not, however, able to find such handouts in two of the six departments. More importantly, it is quite possible that even if all the officers participating in the study were given handouts describing recent Supreme Court opinions, some did not read them. Thus, it seems likely that some officers simply did not know of developments in the law while others read about those developments but were unable to grasp their significance.

97. 456 U.S. 798 (1982).

98. 471 U.S. 386 (1985).

99. 456 U.S. at 817-24.

100. See *Carroll v. United States*, 267 U.S. 132, 153 (1925).

101. *Carney*, 471 U.S. at 390-94.

102. See *Illinois v. Perkins*, 110 S. Ct. 2394, 2397-99 (1990) (holding that a statement made in the absence of *Miranda* warnings is admissible on direct examination when obtained by a government informant during a conversation with an inmate

confident that in mastering its rules, they have mastered directives for the great majority of issues arising in custodial interrogation. In contrast, because it is clear that no such comprehensive rules can be developed in search and seizure settings, the bright-line rules carved out by the Court have not attracted officers' attention. Fourth amendment law remains complex for the officers despite the occasional bright-line rules found within it. For example, with respect to searches of movable containers, the Court generally requires a warrant for freestanding containers (such as luggage carried on a train),<sup>103</sup> so an officer can master *Ross's* rules only by understanding that there are different thresholds for opening luggage placed in a car as opposed to luggage carried on a train or plane. With respect to searches of homes, the Court also generally requires a warrant,<sup>104</sup> so an officer can master *Carney* only by distinguishing between *mobile* motor homes and other types of homes. If one multiplies the points just made by the total number of objects and activities covered by the fourth amendment, one can understand why the glow from bright-line rules is not a strong one.<sup>105</sup> While police officers

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about a crime for which he had not been incarcerated); *New York v. Quarles*, 467 U.S. 649, 655-57 (1984) (holding that a statement made in the absence of *Miranda* warnings is admissible on direct examination when the government can show that special circumstances required the officer to ask questions relating to public safety before administering *Miranda* warnings). See also *Oregon v. Elstad*, 470 U.S. 298, 304-09 (1985) (holding that a statement made after administration of *Miranda* warnings is admissible on direct examination despite the fact that officers had initially obtained the same statement without providing *Miranda* warnings and had failed, when administering the warnings, to caution the suspect that the statement he had initially made could not be used against him on direct examination).

103. See *United States v. Chadwick*, 433 U.S. 1, 13-16 (1977).

104. See *Johnson v. United States*, 333 U.S. 10, 17 (1948).

105. In fact, at the time we administered the questionnaire, the rules of search and seizure were even more complex than we have suggested in the text. At that time, different standards governed the opening of luggage *initially discovered* during the search of a car that the police had probable cause to search as opposed to luggage first seen *outside* of a car and later observed to be placed within it. Compare *United States v. Ross*, 456 U.S. 798 (1982) (holding that a warrantless search of an automobile could include search of containers found within the car when the search was supported by probable cause) with *Arkansas v. Sanders*, 442 U.S. 753 (1979) (holding that a warrantless search of a suitcase found within an automobile was unconstitutional when the police had probable cause to search the suitcase before it was placed in the car). The Court eliminated this distinction in *California v. Acevedo*, 111 S. Ct. 1982 (1991) (noting that "the existence of the dual regimes for automobile searches that uncover containers has proved . . . confusing," 111 S. Ct. at 1991, and concluding "that it is better to adopt one clear-cut rule." *Id.*) Our research, in any event, was concerned with a cruder distinction—between freestanding luggage and luggage initially discovered in a car believed to be involved in a crime. Even *this* distinction eluded the majority of officers we surveyed.

actually do grasp the directives emerging from comprehensive rules of the kind found in *Miranda*, limited bright-line rules placed within a larger body of complex rules make little difference to them.

Modest simplification of the rules of search and seizure—the only kind of simplification possible, given the varying expectations of privacy, liberty, and property associated with the fourth amendment—cannot be expected, then, to enhance the possibility of deterring illegal intrusions. Courts must confront, therefore, the stark fact that even when officers are extensively trained and also disposed to adhere to the law, they still will make a substantial number of errors about the legality of intrusions because they do not know what the law requires of them. In our research, extensively trained officers were mistaken about 30% of the time (see Table 13). It is possible that if we had employed different scenarios, this figure would have been somewhat lower. It seems safe to say, however, that given the inescapable complexity of the rules of search and seizure, there is an *uneliminable* 20 to 30% margin of error among even well-trained officers as to the legality of intrusions governed by those rules. This sobering point must be taken into account in thinking about the deterrence of police illegality.

### III. POLICE WILLINGNESS TO COMPLY WITH THE RULES OF SEARCH AND SEIZURE

The paradigmatic violation of the fourth amendment is a knowing one. The data just presented make it clear, however, that many violations are likely to be unwitting in nature. Whether the focus is on knowing or unwitting violations, one must be concerned with police willingness to comply with the law. Deliberate violations evince a clear-cut unwillingness to comply with the law. In contrast, unwitting violations are ambiguous on this point. When an officer unwittingly violates the law, it is possible she would do otherwise if apprised of the fourth amendment's mandates. Alternatively, it is possible that her interest in carrying out an intrusion has influenced her assessment of legality, in which case she might persist in her conduct even if made aware of the law's requirements. We begin our appraisal of police willingness to comply with the law by examining the rate at which officers indicated they would violate the law in the three search and seizure scenarios

in which the intrusion was illegal. Next, we examine officers' statements about which intrusions they would undertake in light of their beliefs about the legality of those intrusions.

TABLE 8  
PERCENT OF OFFICERS WHO REPORT THEY WOULD INTRUDE  
IN CASES WHERE SEARCH OR SEIZURE IS ILLEGAL

<u>Cases where intrusion is illegal</u>	<u>% officers reporting they would intrude</u>	<u>n</u>
Ybarra v. Illinois, 444 U.S. 85 (1979)	66	(455) <sup>a</sup>
Sibron v. New York, 392 U.S. 40 (1968)	61	(538) <sup>b</sup>
Hayes v. Florida, 470 U.S. 811 (1985)	23	(543)

<sup>a</sup> This scenario was presented in three of the four departments surveyed.

<sup>b</sup> *n*'s on the *Sibron* and *Hayes* scenarios vary due to missing data.

TABLE 9  
CONFORMITY VERSUS VIOLATION OF LAW AS A FUNCTION OF  
OFFICER BELIEF OF LEGALITY WHEN INTRUSION IS ACTUALLY ILLEGAL

<u>Nature of response</u>	<u>Ybarra</u>	<u>Sibron</u>	<u>Hayes</u>	<u>Combined Total</u>
Knowing conformity to the law	34 <sup>a</sup>	36	75	49
Knowing violation of the law	24	19	4	15
Unwitting conformity to the law	1	3	2	2
Unwitting violation of the law	<u>41</u>	<u>42</u>	<u>19</u>	<u>34</u>
	100	100	100	100
(n)	(444) <sup>b</sup>	(533) <sup>c</sup>	(540)	(1517)

<sup>a</sup> Entries in the table are percentages.

<sup>b</sup> This scenario was presented in three of the four departments surveyed.

<sup>c</sup> *n*'s on the *Sibron* and *Hayes* scenarios vary due to missing data.

The questionnaire included three scenarios that dealt with intrusions the Court declared illegal. Combining the results in these three scenarios, officers indicated in 49% of their

responses that they would intrude ("violation-responses") and in 51% that they would not. Thus almost exactly half the time officers indicated they would engage in behavior violative of the law. Table 8 reveals that the percentage of violation-responses was well above 50% in the *Ybarra* and *Sibron* scenarios, the two scenarios in which officers had to decide whether they could examine the contents of a suspect's pockets. The average number of violation-responses for the three scenarios is reduced to the 50% level only because of the low number of such responses to the *Hayes* scenario. Here, officers had to decide whether they could bring in a suspect and have him fingerprinted when there was only reasonable suspicion to detain him. Perhaps because of the seriousness of this kind of intrusion, the officers registered far fewer violation-responses to it than in *Ybarra* or *Sibron* intrusions.

The introductory remarks in this section described two alternative cognitive states with respect to police violations of fourth amendment law—deliberate and unwitting. These states of mind are also applicable to acts conforming to the law. Thus in any setting where intrusion is prohibited, four kinds of responses are possible: knowing conformity to the law, unwitting conformity, knowing violation of the law, and unwitting violation. Table 9 indicates that most of the conforming responses to the scenarios involved *knowing* conformity to the law. Only a small percentage of responses involved unwitting conformity; that is, on only a few occasions did officers state that they believed it was legal to intrude in a given setting but that they would not do so. In contrast, there were a substantial number of knowing and unwitting violation-responses. The officers gave a particularly high percentage of knowing violation-responses to the *Ybarra* scenario; it is only because of the low percentage of knowing violation-responses to *Hayes* that the total percentage of knowing violation-responses is deflated.

The data in Table 9 suggest a three-panel picture of officers' willingness to comply with the law. Nearly half the responses manifested acceptance of the law. Officers providing these knowing conformity-responses correctly noted that intrusion was prohibited in a given setting *and* indicated they would not intrude in that setting. Thus, these officers indicated they

would act in just the way they were supposed to, given the supremacy of law.

A substantial minority of responses, however, manifested a direct challenge to the rule of law. Knowing violation-responses comprised 15% of the total. Here, officers noted that intrusion was prohibited in a given setting, but stated that they would nonetheless intrude in that setting. The fact that nearly a sixth of all responses indicated a deliberate disregard of the law must be a matter of concern. Finally, an even more substantial percentage of responses—the unwitting violation-responses, comprising about a third of the total—reflected an ambiguous relationship to the rule of law. As we noted earlier, an officer who unwittingly violates the law might in fact conform to it if told that what she believed to be legal was in fact illegal. Alternatively, such an officer might be primarily interested in carrying out an intrusion, in which case she might not change her behavior even when apprised of the law's requirements.

In search and seizure settings, then, the rule of constitutional law and the Constitution are directly challenged by intrusions in which officers deliberately violate the law. The exclusionary rule was designed to make such challenges a thing of the past. The *Mapp* Court spoke of exclusion as “‘compel[ing] respect for the constitutional guaranty’” contained in the fourth amendment,<sup>106</sup> thus implying that exclusion would stand as so powerful a threat to police officers that it would ensure their adherence to the rule of law. Our research indicates that exclusion's effect is milder than this. Exclusion, we suggest, provides officers with a reminder of the importance of the constitutionality of the intrusions they undertake. Moreover, it may provide an incentive *for officers who already care about legality* to learn about the law and thereby reduce their rate of illegal intrusions. Exclusion does not, however, compel officer adherence to the law. We shall develop these points by examining, first, officers' willingness to comply with what they believe to be required by law and, second, training's effect in promoting compliance with the actual requirements of law.

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106. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

In order to understand rates of compliance with what the law *actually* requires, it is helpful to consider the degree to which officers are willing to refrain from carrying out intrusions they *believe* to be prohibited by law.

TABLE 10

INTRUSIONS OFFICERS REPORT THEY WOULD MAKE  
WHILE BELIEVING INTRUSION IS ILLEGAL FOR SIX SCENARIOS

Number of cases in which officer reports <u>he would intrude</u>	% of <u>Officers</u>
0	53
1	31
2	12
3	3
4	1
5	0
6	0
	<u>100</u>
	(n = 493) <sup>a</sup>

<sup>a</sup> Includes officers who responded to the intrusion item for all six scenarios.

If the exclusionary rule compelled respect for the law, officers responding to the questionnaire would always—or at least almost always—have indicated they would not intrude in settings where they believed the intrusion to be illegal. Table 10 reveals that this is far from the case. About 53% of the responding officers showed unequivocal respect for the law by *always* indicating that they would refrain from intruding in settings where they considered the intrusion illegal. However, about the same percentage of officers evidenced equivocal respect for the law by indicating that sometimes they were prepared to intrude in settings where they considered the intrusion illegal. We emphasize that these figures deal only with a dispositional issue: whether officers are willing to honor what they *believe* to be legal prohibitions. Even when officers are willing to refrain from intruding in settings where they consider this illegal, they may nonetheless *unwittingly*



violate the law by carrying out an intrusion. The data in Table 10 have no bearing on this latter point. What they do establish, though, is that even when exclusion is present as a threat for illegal conduct, a substantial percentage of officers are prepared to act in violation of what they think the Constitution requires.

Two factors help account for the data just presented on responding officers' willingness to depart from the law. The first factor pertains to the nature of the scenarios used in the questionnaire. As we have already suggested, the likelihood of sanctions *other than* exclusion—in particular, civil and criminal liability and internal departmental discipline—is lowest when illegal intrusions are not patently arbitrary and do not produce serious harm.<sup>107</sup> Executives within the departments in which we conducted research agreed with this claim; furthermore, they agreed that because the scenarios used in this study did not involve arbitrary or seriously harmful intrusions, these intrusions would trigger only exclusion—following a judicial determination that the intrusions were illegal—as a sanction. As one executive stated, our scenarios dealt with “doing your job” intrusions.<sup>108</sup> In his opinion, officers do not have to fear personal legal liability for such intrusions. Moreover, while he recognized that some officers *deliberately* violate the law in “doing your job” intrusions, he said he was reluctant to invoke internal discipline against deliberate violators who do not act in a clearly arbitrary fashion and do not cause substantial harm.

The second factor pertains to the indirect nature of the sanction that exclusion imposes on police officers. Exclusion's sanction is imposed on the state, not on erring officers. If, as was the case in the scenarios, there is a low likelihood that an officer will face a direct sanction for an illegal intrusion, one can readily understand why an officer may decide to go ahead with an intrusion she considers illegal. An officer may do so for “now-or-never” reasons: it might be unlikely, for instance,

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107. See *supra* notes 70-73 and accompanying text.

108. In interviews Professor Heffernan conducted during the course of this research, executives in each department were asked whether they thought it likely that an officer engaging in an intrusion reported in any of the scenarios would be subjected to legal or departmental sanctions if a court were to determine that the intrusion was illegal. The comment on “doing your job” intrusions was made by the chief of one of the departments in the study. See *supra* note 73.

that material which is available during an encounter will be available again. Alternatively, an officer might carry out an intrusion for a more disturbing reason—to harass a suspect, for example, or to obtain evidence with the expectation of committing perjury about the circumstances in which it was acquired. These and other reasons can prompt a decision to intrude despite an officer's belief that the intrusion is unconstitutional.

Indeed, exclusion poses so weak a threat to officers that one must conclude that the more interesting figure in Table 10 has to do with the consistent *unwillingness* of some officers, rather than the occasional willingness of others, to depart from the Constitution's requirements. About 53% of the officers, it will be recalled, showed unequivocal respect for the law by never indicating that they would intrude in a setting where they believed it illegal to do so. Because we were careful not to ask officers directly whether they would intrude when they considered the intrusion illegal (the data in Table 10 are based on a *comparison* of answers to two questions rather than a single, direct question about willingness to comply with the law), we cannot offer a firm explanation for the substantial percentage of officers showing unequivocal respect for the law. It is plausible, however, that while exclusion does not compel respect for the law, it nonetheless enhances police compliance with the law. Exclusion provides officers with a day-to-day reminder of the importance of adherence to the law. Whenever an officer carries out an intrusion, he can expect questions from a prosecutor when the case reaches the intake stage, and questions from a defense attorney if it is forwarded for trial. Such questions generate considerable pressure to comply with the law. Many officers, it is clear, are prepared to ignore this pressure and give priority to extra-legal considerations in carrying out intrusions. Many others, however, appear to respond favorably to exclusion's reminder of the importance of legality.

Given the frequency with which officers are mistaken about the law, it is important to note that the public does not always benefit more from the conduct of officers who are unequivocal in their respect for the rule of law than from that of equivocal officers.

TABLE 11

ILLEGAL INTRUSIONS NOT COMMITTED AND LEGAL INTRUSIONS  
FOREGONE AS A FUNCTION OF OFFICER SUPPORT OF THE LAW

Officer support of law: <sup>b</sup>	Cases Where Intrusion Is Illegal							
	Ybarra <sup>a</sup>		Sibron		Hayes		Combined Total	
	Equiv	Uneqv	Equiv	Uneqv	Equiv	Uneqv	Equiv	Uneqv
Knowing illegal intrusions	49 <sup>c</sup>	—	40	—	9	—	30	—
Unwitting illegal intrusions	33	50	33	50	15	20	26	37
Total illegal intrusions	82	50	73	50	24	20	56	37
Illegal intrusions uncommitted	18	50	27	50	76	80	44	63
(n) <sup>d</sup>	100	100	100	100	100	100	100	100
	(217)	(228)	(248)	(286)	(251)	(292)	(716)	(806)

  

Officer support of law: <sup>b</sup>	Cases Where Intrusion Is Legal							
	Hayden		Ross		Carney		Combined Total	
	Equiv	Uneqv	Equiv	Uneqv	Equiv	Uneqv	Equiv	Uneqv
Knowing legal intrusions	50	58	44	57	34	40	43	52
Unwitting legal intrusions	22	—	22	—	8	—	17	—
Total legal intrusions	72	58	66	57	42	40	60	52
Legal intrusions foregone	28	42	34	43	58	60	40	48
(n) <sup>d</sup>	100	100	100	100	100	100	100	100
	(251)	(289)	(250)	(292)	(250)	(290)	(751)	(871)

<sup>a</sup> This scenario was presented to three of the four departments surveyed.

<sup>b</sup> Equiv = equivocal (will intrude believing it to be illegal)

Uneqv = unequivocal (will not intrude believing it is illegal)

<sup>c</sup> Entries in the table are percentages.

<sup>d</sup> n's vary due to missing data.

In fact, in examining the relationship between officers' commitment to the rule of law and the frequency of illegal intrusions, two different trends emerge. On the one hand, as the upper portion of Table 11 demonstrates, in comparison to equivocal officers, unequivocal officers are less frequently prepared to carry out illegal intrusions. By definition, unequivocal officers only carry out illegal intrusions unwittingly. Table 11 indicates that unequivocal officers are more likely to carry out unwitting illegal intrusions than equivocal officers. However, when one also considers deliberate illegal intrusions by equivocal officers, then the frequency of illegal intrusions by equivocal officers becomes greater than the frequency for unequivocal officers.

The lower portion of Table 11, on the other hand, points to a loss the public suffers when officers are unequivocally committed to the rule of law. Ideally, one would like officers never to carry out illegal intrusions and to carry out all legal intrusions. The frequency with which officers are mistaken about the law makes this ideal a distant reality. What is more, because officers can be mistaken about intrusions that are actually *legal* as well as those that are actually *illegal*, one frequently encounters instances in which officers fail to carry out legal intrusions. The lower portion of Table 11 deals with the phenomenon of the foregone legal intrusion. As is made clear by the line for intrusions in which officers knowingly conform to the law, unequivocal officers make more such intrusions than equivocal officers. The other lines in the lower portion of Table 11, however, show that the total percentage of legal intrusions is higher for equivocal than for unequivocal officers because the former are prepared to carry out intrusions they believe to be illegal while the latter are not. *Equivocal officers, it is clear, often intrude for the wrong reason.* In contrast, unequivocal officers—officers committed to the rule of law—often fail to intrude because they *mistakenly* believe intrusion to be illegal.

TABLE 12  
OFFICER WILLINGNESS TO VIOLATE THE LAW  
AS A FUNCTION OF EXTENT OF TRAINING IN CRIMINAL PROCEDURE

Officer orientation to violation of the law	Extent of Training in Criminal Procedure			Total
	Basic	Moderate	Extensive	
Equivocal support for the law	45 <sup>a</sup>	50	48	47
Unequivocal support for the law	<u>55</u>	<u>50</u>	<u>52</u>	<u>53</u>
(n)	100 (273)	100 (177)	100 (95)	100 (545)

[Chi-square = 1.6 df = 2 p = .45]<sup>b</sup>

<sup>a</sup> The entries in the table are percentages.

<sup>b</sup> The Chi-square test measures how likely the overall distribution of scores is due to pure chance. Thus, there is a probability of .45 that the above result could have happened by chance. This means that there is no difference in extent of support of the law based on training.

Does training increase police disposition to comply with the law? As we have already noted, training has a significant, positive influence on officers' *knowledge* of the law. Table 12 demonstrates, however, that we can not say the same thing about training's effect on officers' *willingness to comply with what they believe the law requires*. The data in Table 12 reveal that officers do not become more committed to the rule of law as a result of increased training. Instead, commitment to the rule of law appears to be formed independently of training.

TABLE 13

TYPE OF OUTCOME IN SCENARIOS AS A FUNCTION OF EXTENT OF  
TRAINING IN CRIMINAL PROCEDURE AND SUPPORT OF THE LAW

Officers Who Are Equivocal in Their Support of the Law			
Nature of response	Extent of Training		
	Basic	Moderate	Extensive
Knowing conformity to the law	41 <sup>a</sup>	37	39
Knowing violation of the law	34	36	44
Unwitting conformity to the law	2	1	0
Unwitting violation of the law	23	27	28
	100	100	100
(n)	(119)	(88)	(46)
Total scenarios	(311)	(256)	(134)

  

Officers Who Are Unequivocal in Their Support of the Law			
Nature of response	Extent of Training		
	Basic	Moderate	Extensive
Knowing conformity to the law	52	64	72
Knowing violation of the law	—	—	—
Unwitting conformity to the law	3	1	0
Unwitting violation of the law	44	35	28
	100	100	100
(n)	(150)	(89)	(48)
Total scenarios	(420)	(248)	(141)

<sup>a</sup> The entries in the table are percentages.

Although training does not play a major role in shaping officers' disposition to comply with the law, it does at least play an important role in reducing *actual* violations of the law among officers who are already disposed to honor its prohibitions. This point is critical, given the large number of

unwitting violations that officers commit. As noted earlier, 15% of the responses to the illegal intrusion scenarios were of the knowing violation type (see Table 9). More than twice as many responses, however—34% in all—were of the unwitting violation type. Given the points just made about training's lack of influence on disposition to comply with the law, it should come as no surprise that at higher levels of training there was no reduction in responses involving *deliberate* violations of the law. As Table 13 demonstrates, increased training was not even linked to a reduction of *unwitting* violations among officers who showed an equivocal commitment to the rule of law. Among unequivocal officers, however, training was clearly connected to a reduction in the rate of unwitting violation-responses. This group stands out for the simple reason that its increased knowledge of the law was *translated directly* into a lower rate of violation-responses. With extensive training, unequivocal officers showed nearly the same score for correct intrusions—about 70%—that was encountered for all extensively trained officers when knowledge of the law was at issue. For unequivocal officers, then, the ambiguity inherent in the unwitting violation-response is resolved in favor of fewer violations of the law. Increased training leads to increased knowledge of the law; furthermore, given an unequivocal commitment to adherence to the law, knowledge of the law insures behavioral conformity to its requirements.

#### IV. DISCUSSION:

##### EXCLUSION'S IMPACT ON POLICE COMPLIANCE WITH THE LAW

Our results suggest that the possibility of deterring illegal searches and seizures is more limited than the Court and many commentators have supposed. Our data also indicate that exclusion does not stand as a strong deterrent against police illegality. In this section, we shall develop the implications of each of these points, and, in doing so, provide an assessment of the contribution exclusion can make to the reduction of police illegality.

A. *A Cognitive Limit on the Possibility  
of Deterring Violations of the Rules of Search and Seizure*

Deterrence, we have argued, operates through the communication to an individual of a threat of unpleasant consequences if the individual engages in a prohibited act. As we noted at the outset, it is likely that police officers understand that certain obvious acts—the arbitrary invasion of a home, for example, or the execution of an arbitrary arrest—are banned under the fourth amendment. An officer has not mastered the fourth amendment sufficiently if she is merely certain it prohibits these acts. Fourth amendment law is defined not only by a core principle that prohibits arbitrary intrusions but also by a set of specific rules of search and seizure that offer protection which *exceeds* the protection afforded by the core principle. In conducting our research, we assumed that officers are acquainted with the prohibition of arbitrary intrusions; therefore, we focused our investigation on the extent of the officers' knowledge of the specific rules of search and seizure.

Our research indicates that more than 30 years after *Mapp* applied the exclusionary rule to the states, officers are frequently uncertain of what they may and may not do when specific rules of search and seizure govern their conduct. Moreover, our research indicates that there is probably an uneliminable margin of error in police officers' knowledge of specific rules. We found that not only extensively trained officers, but defense lawyers and prosecutors as well, were mistaken about a quarter of the time with respect to the legality of intrusions governed by specific rules of search and seizure. Furthermore, we found that officers were no more likely to grasp bright-line search and seizure rules—rules that presumably simplify the law and so increase its accessibility—than other rules. The fourth amendment permits only limited rule-simplification; however, limited rule-simplification, we discovered, does not enhance police understanding of the law.<sup>109</sup>

Two implications of the uneliminable margin of error deserve consideration. In the first place, it is important to note the irony underlying the exclusionary rule's contribution

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109. See *supra* notes 95-105 and accompanying text.

to fourth amendment complexity. The Court, of course, has stated that the primary purpose of the exclusionary rule is to deter illegal searches and seizures.<sup>110</sup> We believe, however, that the litigation incentives provided by exclusion have *frustrated* deterrence. By providing defendants with a strong inducement to litigate the legality by which evidence against them was obtained, the exclusionary rule has led to a vast increase in the complexity of the rules of search and seizure and has thereby contributed to officers' difficulty in determining what the law permits.<sup>111</sup> In the absence of exclusion, rules of search and seizure would be articulated from time to time through mechanisms such as tort litigation and applications for injunctions.<sup>112</sup> Exclusion, however, provides a strong incentive to litigate the legality of an intrusion whenever a defendant can reduce or completely avoid criminal liability by having tainted evidence excluded. Thus, exclusion makes it necessary for the courts to consider the content of the rules of search and seizure far more frequently than they otherwise would. Officers in turn are supposed to know the search and seizure decisions that have been reached by the intermediate state appellate courts for their jurisdictions, by their highest state appellate courts, by the lower federal courts for their jurisdictions, and by the United States Supreme Court. We have focused only on rules announced by the last of these courts. Our results point toward a cognitive limit to deterrence even for rules announced by the Supreme Court. Undoubtedly, a more substantial limit would be encountered for rules announced by lower courts.

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110. See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

111. See Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395, 412 (1989) (stating that the exclusionary rule has resulted in "arcane and often hair-splitting intricacies [in] search and seizure law"). But see Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 557 (1990) ("The exclusionary rule did not make the law complicated and difficult. . . . The rule only made a difficult and complex body of law relevant. . . . [One should not confuse] the content of the law of search and seizure with the remedy if that body of law is violated.").

112. For example, the current rule governing police use of deadly force against a fleeing felon was articulated through tort litigation. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (stating, in a section 1983 action, that "[a] police officer may not seize an unarmed, dangerous suspect by shooting him dead."). As for injunctions, a suspect's application for an injunction prompted a ruling by the Court prohibiting surgical intrusion into a suspect's body even though there was probable cause to believe that the bullet lodged in the suspect's body would provide evidence of the suspect's involvement in a crime. See *Winston v. Lee*, 470 U.S. 753, 766 (1985).



The second point has to do with the implications of a cognitive limit for *any* type of deterrence strategy courts might employ. With the complex body of rules of search and seizure now in place, officers' mistaken beliefs about the law are bound to frustrate the aims of any deterrence strategy. Even if the exclusionary rule were abolished overnight, the cognitive limit to deterrence that we have described would not disappear. Whatever the state of the law in the days before *Mapp* might have been, the body of law confronting officers now is formidably large.<sup>113</sup> Assuming that courts did not wish this body of law to be merely hortatory, then any effort to develop a strategy for discouraging police illegality must come to terms with the fact that even extensively trained officers are likely to be mistaken about the law in a substantial minority of instances.

### *B. Exclusion as a Weak Deterrent*

The data presented above also make it clear that exclusion offers only a weak deterrent safeguard against police illegality. Given the fact that the exclusionary rule is imposed directly on the state rather than on erring officers, one would expect to find that officers frequently are prepared not to give primacy to their assessments of legality in carrying out intrusions. Our research findings bear this point out.

If exclusion were a strong deterrent—if, to draw on a claim advanced by the *Mapp* Court, it “compel[led] respect” for the law<sup>114</sup>—few officers would indicate that they are willing to carry out intrusions they believe to be illegal. In fact, as we noted in the previous section, about half the officers responding to our questionnaire indicated that they were prepared in at least one of the six scenarios to carry out an intrusion they considered illegal. An ironic benefit of this is that officers showing an equivocal commitment to the rule of law are less likely than officers showing an unequivocal commitment to indicate that they would forego an opportunity for an intrusion

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113. The four volumes of Wayne LaFave's treatise on the fourth amendment attest to this. See generally W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987). Most of the legal rules LaFave discusses in the treatise were generated by means of exclusionary litigation. Were the exclusionary rule to be abolished, the rules discussed by LaFave would continue to be binding.

114. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

that in fact is *legal*. Equivocal officers, on the other hand, are more prepared to engage in intrusions that in fact are *illegal*; in this respect, they highlight particularly well exclusion's weakness as a deterrent.

One should not conclude, however, that exclusion makes no contribution to the discouragement of police illegality. Although exclusion's sanction is directly imposed on the state, officers cannot disregard it altogether, in part because they can expect to be questioned by prosecutors and defense lawyers about their conduct and in part because it is hard to be wholly indifferent to the prospect of harming a case through the suppression of evidence. The large percentage of equivocal officers makes it clear that these factors actually are discounted by a substantial percentage of the police. It seems plausible to conclude, though, that the factors associated with exclusion had some effect in producing the equally large percentage of officers in the survey who showed an unequivocal commitment to the rule of law. It is arguable, of course, that even without exclusion the same percentage of officers might have indicated that they would have refrained from carrying out intrusions they believed to be illegal. The more convincing analysis, however, is that exclusion contributed in some measure to the size of the unequivocal group through its provision of institutional factors that remind officers of the importance of legality in their encounters with citizens. We suggest that exclusion stands as a weak, yet significant, deterrent against illegality. Its effect on the police hinges on the institutional processes they can expect to confront when they carry out intrusions that lead to prosecution. Exposure to these institutional processes may be less unpleasant than other types of experience; however, anticipation of the institutional processes associated with exclusion can have some effect in shaping behavior.

*C. Exclusion's Weakness as a Strength:  
The Role of Direct and Indirect Sanctions  
in Deterring Illegal Searches and Seizures*

What bearing do these points have on the debate about retaining the exclusionary rule? Critics of the rule<sup>115</sup> might

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115. See, e.g., Grano, *supra* note 111; OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 2, REPORT TO THE ATTORNEY GENERAL ON THE SEARCH AND SEIZURE EXCLUSIONARY RULE (1986),

view our findings as providing further reason—over and above the cost of exclusion—for abolishing it. We think, however, that when one takes into account the frequency with which officers are mistaken about the law, exclusion's weakness must be counted as a strength. To understand why exclusion should be viewed in this way, one must consider the role direct and indirect sanctions can play in deterring fourth amendment violations. We shall note initially the role these sanctions currently play in deterring police illegality; then we shall discuss the role each *ought* to play.

Consider first the circumstances in which there is currently some likelihood that an officer making an illegal intrusion will be subjected to direct sanctions as well as the indirect sanction of exclusion. Whenever an officer acts in a patently illegal fashion and brings about serious harm in doing so—when an officer brutalizes a suspect, for example, or when he ransacks a home in the absence of probable cause for entering it—there is some likelihood he will be subjected to direct sanctions for his conduct. We use the term “some likelihood” here because direct sanctions are not always imposed even when officers act egregiously.<sup>116</sup> There are a number of reasons why a direct sanction may not be applied: prosecutors are sometimes reluctant to proceed against officers for fear of straining relations with police departments;<sup>117</sup> juries are sometimes disinclined to convict those they view as trustworthy;<sup>118</sup> police review boards tend to see matters from an officer's

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reprinted in 22 U. MICH. J.L. REF. 573 (1989); S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977); Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 16.

116. The Christopher Commission's report on the Los Angeles Police Department provides an example of this. According to a story in *The Wall Street Journal*:

The report shows a particularly damning pattern of acceptance, and even encouragement, of officers who violate the rules governing excessive force. One officer who had seven complaints against him that had been sustained—as well as numerous others that hadn't been—was described in his performance evaluation this way: “His contacts with the public are always professional and positive and his attitude with the citizens is of one of concern.”

Jefferson & Nazario, *Report on Los Angeles Police Department Finds Racism, Suggests Changes, Gates's Resignation*, Wall St. J., July 10, 1991, at A12, col. 1.

117. For discussion of why criminal sanctions are sometimes not imposed even when officers cause substantial harm while acting in a patently illegal fashion, see Judge Newman's comments, *supra* note 70.

118. See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1387 (1983).

perspective;<sup>119</sup> and so on. Exclusion, on the other hand, is a quite likely sanction in settings where officers act in a gravely wrongful manner.<sup>120</sup> Exclusion is of course not imposed when an intrusion does not lead to trial. But when it does lead to trial, exclusion provides a relatively certain backstop deterrent against the most serious types of police illegality.

In contrast, the likelihood of direct sanctions decreases as illegality becomes less patent and harm less serious. With respect to the patentness of illegality, officers often are able to benefit from qualified immunity in legal proceedings<sup>121</sup> and from a reluctance within departments to impose internal discipline on officers who have not acted in a clearly illegal fashion.<sup>122</sup> With respect to the seriousness of harm, it is likely that victims of illegal intrusions will be less inclined to complain about the treatment they have received, the more modest the harm done to them.<sup>123</sup> At the low point of both variables, then—nonpatent illegality and modest harm—the likelihood of direct sanctions is negligible.<sup>124</sup> A community

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119. See Schwartz, *supra* note 70, at 1027-28.

120. It is true that judicial decision making at suppression hearings can also be infected by pro-police bias. However, two factors make it less likely that this bias will be present in an exclusionary setting than in one where direct sanctions are at stake. First, the indirect status of the exclusionary sanction offers judges an impersonal way of responding to police misconduct. And second, because judges are frequently called on to determine what happened in a police intrusion, they are less inclined than juries to give credence to police accounts of the facts. For discussion of this latter point see Note, *supra* note 41, at 1049.

121. See *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987) (describing the qualified immunity provided to "government officials performing discretionary functions" as long as they do not violate rights that are "clearly established").

122. See *supra* note 73.

123. Under the rule established in *Carey v. Piphus*, 435 U.S. 247, 257-59 (1978), compensation for actual harm provides the starting point for determining damages in section 1983 litigation. As long as damages are limited to compensation for harm done, modest fourth amendment wrongs—a brief illegal street stop, for example, or the illegal inspection of the contents of a person's pockets—are unlikely to produce substantial damage awards. The victims of such wrongs will thus have little incentive to seek redress for the harm done them.

124. In his Harlan Fiske Stone Lecture at Columbia Law School, Justice Stewart commented:

Taken together, the currently available alternatives to the exclusionary rule . . . punish and perhaps deter the grossest of violations [of the fourth amendment], as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.

Stewart, *supra* note 118, at 1388-89.

can suffer significant cumulative damage when its citizens are routinely subjected to intrusions involving nonpatent illegality and modest harm.<sup>125</sup> As matters stand, though, direct sanctions are unlikely for such intrusions; exclusion is the sole sanction officers can expect.

Should a mechanism be devised—as a substitute for the exclusionary rule—that would impose direct sanctions on officers for all violations of the fourth amendment? In particular, should a policy of direct deterrence be pursued even for violations of the rules of search and seizure that produce only modest harm? The transaction costs associated with such a policy are daunting because due process requires that nonprobationary officers be provided with an opportunity to counter charges against them when the charges could lead to imposition of a serious direct sanction.<sup>126</sup> However, our data on police knowledge of the law provide a telling argument against such a policy wholly apart from the issue of transaction costs. Our results indicate that a substantial proportion of police violations of the rules of search and seizure are unwitting in nature, so a direct sanction for violations of these rules would have the effect of triggering doubts about intrusions that are actually legal and thus would increase the number of foregone legal intrusions. Even with substantial training, our results suggest that police officers are likely to be mistaken about a quarter of the time about the legality of intrusions where specific rules of search and seizure are involved. If a direct sanction policy were instituted for all intrusions, officers might routinely refrain from intruding when they were uncertain about the legality of doing so. Vigorous law enforcement would be inhibited; uncertainty would be resolved in favor of inaction.

It is the heavy-handedness of direct sanctions, then, that makes them inappropriate as deterrents against violations of specific rules of search and seizure that cause modest harm. On the other hand, if there were not even an indirect sanction for such violations, officers would have no reminder of the importance of legality in most instances where specific rules

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125. For an analysis of the harm done to a Manhattan neighborhood by routine police illegality, see P. CHEVIGNY, *POLICE POWER: POLICE ABUSES IN NEW YORK CITY* (1969).

126. *Cf. Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.").

of search and seizure are involved. As we have noted, routine police indifference to the rules of search and seizure can have a serious effect on the quality of life in a community.<sup>127</sup> If no indirect sanction were employed to discourage police illegality, such indifference could be expected in most instances where intrusions are governed by specific rules of search and seizure. These rules, which are essential to the maintenance of individual dignity, in large measure would be ignored.

Does this mean, then, that the exclusionary rule stands as the appropriate indirect sanction for police violations of the rules of search and seizure? Critics of exclusion such as former Chief Justice Burger have conceded the low likelihood, if not the undesirability, of imposing direct sanctions on officers through the legal process.<sup>128</sup> However, Burger has not treated this as a reason for retaining exclusion, for he has argued that a cause of action against the government for monetary damages—in other words, a *financial* indirect sanction—would be preferable to exclusion.<sup>129</sup> Burger's argument for a cause of action against the government is based partly on the claim that society pays too high a price for exclusion,<sup>130</sup> a claim that is open to challenge in light of recent research showing that only a small percentage of prosecutions fail because of the exclusionary rule.<sup>131</sup> Wholly apart from this, though, one can criticize Burger's proposal on deterrence grounds. If substantial damages were assessed against the government even for intrusions that cause modest harm, the likely result would be a major increase in foregone legal intrusions because officers would be made to understand that they should not take risks with the government's financial security when they are uncertain about the law. On the other hand, if only nominal damages were available for intrusions causing modest harm, victims of illegal intrusions would be unlikely to sue; officers in turn would come to view the occasional claims brought by victims as one of the costs (borne by their employer) of doing business.

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127. See *supra* note 125.

128. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 421-22 (1971) (Burger, C.J., dissenting).

129. See *id.* at 422-23.

130. See *id.* at 413.

131. See *supra* notes 42-44 and accompanying text.

A further difficulty with using a financial sanction as an indirect deterrent relates to the differing ability and willingness of governmental bodies to pay damage awards. A prosperous suburb would have greater resources with which to pay a substantial damage award than would a city with poor residents, thus making the leaders of the suburb more likely to entertain the possibility of buying themselves out of illegal intrusions. Furthermore, even where government bodies have an equal ability to pay, there might be different willingness to bear the cost of illegal intrusions, so one government might adopt a policy that allows for substantial illegality while another might not.

In contrast, exclusion is not subject to these kinds of difficulties because its sanction involves a nonfinancial aspect of government. Exclusion's focus on evidence of guilt has an equalizing effect on governments; the disability it imposes is similar for governments that are prosperous and those that are not. Moreover, exclusion is an instructive deterrent in a way that a monetary cause of action cannot be, for exclusion's sanction relates to the purpose that underlies most illegal intrusions: obtaining evidence of guilt. Because it is wise—given the routine nature of police error about the rules of search and seizure—not to sanction officers directly for modest harm they bring about through violation of those rules, it is particularly important to use an indirect sanction that focuses attention on the purpose that usually prompts illegal intrusions. A cause of action for damages against the government would focus officers' attention on issues of financial cost—on whether governments could afford the cost of a determination that they had acted illegally. Exclusion's focus on an issue essential to criminal justice serves as the proper reminder to officers of the importance of complying with the law.

#### *D. Exclusion and "Good Faith" Mistakes*

One further point should be considered: the possibility of creating an across-the-board "good faith" exception to the exclusionary rule. As we noted in the introductory section, the Court has already allowed for some exceptions to the exclusionary rule when the police make "good faith" mistakes

in carrying out searches and seizures.<sup>132</sup> In the 1984 case of *United States v. Leon*,<sup>133</sup> the Court created an exception to the exclusionary rule for evidence obtained through a seemingly valid warrant that courts later determine to be defective.<sup>134</sup> Three years later, in *Illinois v. Krull*,<sup>135</sup> the Court expanded this exclusionary rule exception to allow for the admission of evidence obtained through a warrantless intrusion based on seemingly constitutional statutes.<sup>136</sup> Furthermore, in cases decided at about the same time as *Leon* and *Krull*, the Court also held that officers are entitled to a similar defense in monetary damage actions alleging fourth amendment violations.<sup>137</sup> Clearly, a key question that is likely to confront the Court is whether to create an exception to the exclusionary rule that, like the defense in civil actions, covers *all* warrantless intrusions by the police.<sup>138</sup> In considering this issue, we first note the meaning the Court attaches to the term "good faith mistake"; next we review the question of whether to allow for an across-the-board "good faith" exception in light of the findings that already have been discussed here.

References to "good faith" mistakes are so frequent that it made sense to begin discussion of a possible change in the exclusionary rule by invoking this term. The Court, however, although occasionally referring on its own to a "good faith exception,"<sup>139</sup> has always been careful to emphasize that it is concerned in this context not with the subjective issue of whether an officer believed her conduct to be lawful but with the objective issue of whether the officer acted reasonably.<sup>140</sup> The distinction is an important one, for it makes clear that courts cannot allow the admission of evidence merely because officers testify that they thought they were acting properly.

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132. See *supra* notes 33-36 and accompanying text.

133. 468 U.S. 897 (1984).

134. *Id.* at 926.

135. 480 U.S. 340 (1987).

136. *Id.* at 356-61.

137. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (holding that an officer is entitled to qualified immunity where it was objectively reasonable for an officer to conclude that a search was supported by probable cause or exigent circumstances); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (recognizing the *Malley* holding).

138. *Anderson v. Creighton*, 483 U.S. 635 (1987), did not distinguish between warrantless and warrant-based intrusions with respect to the issue of qualified immunity in civil actions.

139. See, e.g., *United States v. Leon*, 468 U.S. 897, 913 n.11 (1984).

140. See, e.g., *id.* at 919-20 n.20.



Nevertheless, one can still employ a provisional definition of objective reasonableness that focuses on officers' actual awareness of the law. Because the exclusionary rule is designed, among other things, to encourage police training in fourth amendment law,<sup>141</sup> one can say that, at the very least, an illegal intrusion is not "objectively reasonable" if a majority of *extensively trained* officers are aware that it is illegal. This stands only as a provisional definition of the objectively reasonable, for some might insist that officer training is not sufficiently detailed to warrant reliance on even the range of knowledge possessed by extensively trained officers. As a provisional definition it is quite useful, though, because it emphasizes the incentive exclusion provides for increased training while focusing attention on those who have been so trained.

With this provisional definition as a backdrop, the argument for extending the "good faith" exception appears weak for three reasons. In the first place, in none of the scenarios we used in the questionnaire were extensively trained officers mistaken more often than not about the law. A substantial majority of *all* the officers surveyed were mistaken about the legality of the intrusion in *Carney*; the majority of *extensively trained* officers, on the other hand, were correct about the intrusion in this and all the other scenarios. Our scenarios did not, of course, cover the entire range of settings in which officers must decide whether an intrusion is legal. Given the results we obtained, however, we conclude that the burden of proof as to the possibility of knowledge of the law should be borne by those who argue that officers cannot reasonably be expected to identify the intrusions governed by the fourth amendment. *Our results show that training counts:* even when a majority of officers with low training are unable to identify the unlawfulness of an intrusion, officers with extensive training are able to do so.

A second difficulty with the argument for an extension of the "good faith" exception is that a significant minority of officers

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141. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("The purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'") (citation omitted). Assuming that the Court intends the natural consequences of its acts, then it surely intended to encourage police training in the law of the fourth amendment. A direct consequence of the *Mapp* decision was massive officer training. *Kamisar*, *supra* note 111, at 559.

are willing to violate the law knowingly. The Court's (quite proper) insistence on using an objective standard for exceptions to the exclusionary rule makes it possible for officers to understand they are violating the law, yet secure admissible evidence because of the objective reasonableness of their conduct. The likelihood of such knowing violations is very slim in the two settings where the exclusionary exception has already been created; few officers are likely to be able to tell that a facially valid warrant is defective,<sup>142</sup> and fewer still are likely to be able to discern the unconstitutionality of a seemingly proper statute.<sup>143</sup> Our findings indicate, however, that a non-negligible minority of illegal intrusions by officers in general—about 15%—are deliberate in nature. Moreover, if one focuses on knowing violations of the law by extensively trained officers, the rate increases to 20%. Addition of a subjective dimension to the exclusionary exception (in which case officers would have to be asked at suppression hearings whether they were aware of the illegality of their intrusions) would be counterproductive because officers would realize that admission of awareness of illegality could expose them to criminal and civil liability.<sup>144</sup> Thus, given the Court's sole

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142. To be able to do so, officers would have to be acquainted with the formalities of warrant law, *see, e.g.* *Massachusetts v. Sheppard*, 468 U.S. 981, 989-90 (1984) (discussing warrant formality issues), and would also have to be able to determine when probable cause is present and when it is not, *see, e.g., Leon*, 468 U.S. at 900.

143. The difficulty an officer confronts in assessing the constitutionality of a statute authorizing a warrantless intrusion is illustrated by the Court's decisions on this matter during the 1986 term. In *Illinois v. Krull*, 480 U.S. 340 (1987), the Court held that, although the Illinois Supreme Court had concluded that a statute authorizing warrantless inspection of automobile junkyards violated the fourth amendment, *id.* at 345-46, it was objectively reasonable for an officer to believe—prior to judicial determination of the matter—that the statute was constitutional, *id.* at 356-60. Three months later, in *New York v. Burger*, 482 U.S. 691 (1987), the Court held that a New York statute that was similar in many respects to the statute at issue in *Krull* was in fact constitutional. *Id.* at 708-18. The similarity between the statutes was noted by the Illinois Supreme Court when it considered *Krull* on remand from the Supreme Court. *People v. Krull*, 126 Ill. 2d 235, 246-47, 534 N.E.2d 125, 130 (1989). Whether the Illinois statute in fact conformed to the test the Court employed three months later in *Burger* is an open question.

144. In *Leon*, the Court stated that, in a suppression hearing, a trial court is to limit itself "to the objectively ascertainable question [of] whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U.S. at 922 n.23. *Leon* thus makes it improper for a trial court conducting a suppression hearing to inquire into the cognitive state of an officer at the time he carried out an intrusion. *Id.*

Were an officer to be asked at a suppression hearing whether he knew at the time of his intrusion that it was illegal, he could probably resist answering on fifth amendment grounds because a positive answer would provide the foundation for a

emphasis on objective reasonableness, expansion of the "good faith" exception to all warrantless intrusions would lead in a significant minority of cases to admission of evidence obtained through deliberate violation of the law.

Finally, it should be noted that an extension of the "good faith" exception concedes defeat on a point where no concession is necessary. As we have suggested, the concession that must be made where the rules of search and seizure are involved is that there is an uneliminable margin of error as to the legality of warrantless intrusions. We have noted, though, that there does not appear to be any single type of intrusion in which extensively trained officers are more likely than not to be mistaken about the law. And one can add to this the fact that with extensive training, officers display knowledge of fourth amendment law that is roughly the same as that of prosecutors and defense lawyers. Establishment of a "good faith" exception would reduce the incentive for departments to offer, and for officers to undertake, extensive training in the law. Such training is critical to bringing officers toward compliance with the law. Assuming that the Court wishes to avoid the problem of foregone legal intrusions associated with direct sanctions, while maintaining its commitment to protecting the dignitary interests implicated by the rules of search and seizure, it can do so only by rejecting adoption of a general extension of the "good faith" exception.

## V. CONCLUSION

Deterrence operates through the communication to an individual of a threat of unpleasant consequences if the individual engages in a prohibited act. In using this definition of deterrence we have drawn on our findings about the police

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criminal prosecution. *See, e.g.*, 18 U.S.C. § 242 (1988) (establishing criminal liability for willful deprivations of constitutional rights by those acting under color of law). Furthermore, a positive answer would expose an officer to civil liability under 42 U.S.C. § 1983 (1988), despite the objective reasonableness test employed in qualified immunity defenses. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). Even if it were constitutionally permissible, then, to ask an officer at a suppression hearing whether he knew his intrusion to be illegal, it would be counterproductive to do so because an officer who had known his intrusion to be illegal when carrying it out would be unlikely to respond truthfully to such a question.

to point to one limitation on deterring illegal searches and seizures that would be encountered by any device employed to discourage illegal intrusions and to point to another limitation that is peculiar to the exclusionary rule. The general limitation is police officers' inability to identify what the law prohibits. Our findings indicate that even extensively trained officers (as well as prosecutors and defense lawyers) are mistaken about a quarter of the time about the lawfulness of intrusions governed by specific rules of search and seizure. The exclusionary rule's limitation is its indirect effect on police officers. Given its weak deterrent effect, it is not surprising that about half the officers we surveyed indicated they would carry out an intrusion they believed to be illegal in at least one of the scenarios described in our questionnaire.

The policy implications of these findings, we have suggested, should be reviewed from two perspectives—by thinking about the findings' significance for the exclusionary rule in general and about their significance for an across-the-board "good faith" exception to the exclusionary rule. As for the first point, we have argued that exclusion's weakness is in fact one of its strengths; although direct sanctions are needed to discourage deliberate police illegality, the complexity of the rules of search and seizure makes it appropriate for only exclusion to be used to promote adherence to those rules. As for the latter point, our findings provide strong reasons for not adopting a general "good faith" exception to the exclusionary rule. In the first place, our findings indicate that once officers receive extensive training in the law, they are correct more often than they are mistaken even on questions involving specific rules of search and seizure. Second, assuming the Court's current test of objective reasonableness would be employed in assessing the admissibility of evidence under a general exception to the exclusionary rule, the admission of evidence would be secured in a significant minority of cases through deliberate police illegality. And third, given the success training has had in improving officers' knowledge of the law, there is no reason to concede defeat as far as the rules of search and seizure are concerned. The answer instead is for the courts to continue to employ incentives that encourage the expansion of police training programs.

