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## Evidentiary Rulings as Police Reform

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# Evidentiary Rulings as Police Reform

SETH STOUGHTON\*

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## I. INTRODUCTION

How can law be a mechanism for police reform? The most familiar answer, for legal scholars who work on the regulation of law enforcement, is as a deterrent: the law sets some limit on police behavior and imposes some sanction for violations. Two examples that fit neatly within the deterrence model are civil suits brought under 42 U.S.C. § 1983, which provides a cause of action for constitutional torts by state officials acting under the color of law, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>1</sup> which provides the federal analog. The exclusionary rule, which judges invoke to suppress illegally obtained evidence, is authorized, at least in its modern incarnation, only because of its ability to deter police officers from engaging in constitutional misconduct.<sup>2</sup> Both civil liability and the exclusionary rule are tremendously important, and both have been the object of penetrating academic analyses and critiques penned by any number of courts and commentators. But neither they nor the deterrent model more generally

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\* Assistant Professor, University of South Carolina Law School. I am indebted to Seth Davis; Sharon Jacobs; Erik Lilliquist; Colin Miller; Susannah Barton Tobin; as well as my co-panelists at the *University of Miami Law Review's Leading from Below* Symposium, Judge John Gleeson and Judge Kathleen William; and the many participants of the 2014 CrimFest Conference who offered incisive questions and helpful comments. I am thankful for the research assistance of Meghan Cleary and Neha Jaganathan and for the editing work of the *University of Miami Law Review*. As always, I am deeply grateful for the support of Alisa Stoughton.

1. 403 U.S. 388, 413 (1971).

2. Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 875–76 (2014).

are the only methods through which the law can affect police behaviors.<sup>3</sup>

Building on prior work in which I explored laws that have an incidental regulatory effect on police practices and officer behavior,<sup>4</sup> this article discusses the potential for evidentiary considerations to change both police training and agency culture. The underlying concept grew out of a symposium, titled *Leading from Below*, hosted by the *University of Miami Law Review* in February 2014, which explored the real-world influence of district court judges' authority and discretion. In my portion of the event, I framed my comments as an attempt to identify the intersection of trial court judges and police officers. Officers provide information to, and in, court. They offer their observations and conclusions in support of arrest and search warrant applications. They are witnesses in suppression hearings, probation and parole hearings, and depositions. And, of course, they testify in the civil and criminal cases that go to trial. They are, in short, subject to evidentiary rulings.

Can evidentiary considerations play a role in reforming police behavior? In this article, I offer an optimistic, though not unqualified, conclusion: yes. In Part II, I demonstrate how evidentiary considerations have shaped not just police behavior but also the culture of policing itself. Cultural change is a critical component of meaningful police reform; one who seeks to change some aspect of policing must take into account the role of culture in shaping the objectionable behavior. For example, two much-discussed aspects of modern policing—the adoption of vehicle-based patrol as a replacement for foot patrol and the transition of police departments from social service organizations to dedicated crime-fighting agencies<sup>5</sup>—are resistant to modification because they are the result of changes to the very culture of law enforcement. But police culture is neither independently organic nor develops in a vacuum. The

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3. In recent years, scholars interested in police reform have gone well beyond expanding on the deterrent model, turning instead to other forms of legal regulation, such as structural reform litigation. See Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 351 (2011); Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 3 (2009).

4. Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2181 (2014).

5. In the 1870s, for example, the then-twenty year old Boston Police Department had established soup kitchens and homeless shelters and was providing shoes and medicine to the poor. DONNA M. WELLS, BOSTON POLICE DEPARTMENT 12 (2003). This model of policing would be anathema to many officers and police administrators today, who have no interest in diluting their occupational self-perception by becoming “social workers with guns.” HANDBOOK OF GLOBAL LEGAL POLICY 403 (Stuart S. Nagel ed., 2000); Michael E. Buerger, *Policing and Research: Two Cultures Separated by an Almost-Common Language*, 11 POLICE PRAC. & RES.: INT’L J. 135, 136 (2010) (“For all that police officers claim that ‘We are not social workers with guns,’ they are.”).

development of a police culture depends, in large part, on external factors including the legal rules in which the culture develops.<sup>6</sup> Here, I focus on three examples of how the culture and practices of law enforcement have been shaped by different evidentiary considerations. The warnings required by *Miranda v. Arizona*,<sup>7</sup> first loudly denounced by politicians and police administrators alike, have become a symbol of police professionalism, even for the minority of law enforcement administrators who would get rid of the warnings altogether. Similarly, the perceived need to maintain an unbroken chain of custody for evidence has led police agencies to take great pride and to invest millions of dollars in state-of-the-art property storage and evidence tracking facilities. Finally, the popular enthusiasm for forensic investigations has changed the police culture, which has seen the previously unknown and often unappreciated “crime scene technicians,” responsible for collecting and, to some extent, analyzing evidence, morph into highly professional “forensic scientists.”

In Part III, I explore the possibility of using evidentiary rulings to further advance reform, focusing on the use of officers’ opinion testimony. Police testimony often straddles the line between lay and expert testimony. Officers routinely testify not just to their personal observations, but also to offer conclusions that they base on their training and experience. Police officers testify on a range of topics that include indicators of suspicion and criminality, police practices, and community norms. They identify neighborhoods as high-crime areas, recognize hand-to-hand drug transactions, describe when deadly force is an appropriate response, articulate the modus operandi of narcotics traffickers, explain why a particular set of circumstances aroused reasonable suspicion, and translate coded language recorded in a wiretapped phone call—and that is just the start.

Each of these examples, and any number of others, requires specialized knowledge, experience, or training. Unfortunately, under the existing evidentiary framework, police officer testimony is frequently admitted in a way that blurs the already muddy line that separates lay and expert testimony, leading to three distinct problems. First, an officer may provide what is undeniably lay testimony, but using language that indicates a particular expertise. Dressing a lay opinion in the robes of expertise risks artificially altering the fact-finder’s determination of credibility, presenting the officer as more knowledgeable, and thus more credible, than the rules of evidence would suggest or permit. Second, an officer may offer, or a prosecutor may solicit, expert testimony dressed

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6. Stoughton, *supra* note 4, at 2181.

7. 384 U.S. 436, 477 (1966).

in the guise of a lay opinion. Here, the error is in allowing evidence that has not gone through the reliability screening that the rules governing expert testimony require, effectively risking the admission of a “bad” expert opinion. Finally, and most importantly for the ultimate thesis of this article, an officer’s statements, even when he speaks as an expert, may lack the reliability that expert testimony is supposed to demonstrate. An expert’s opinion is often based on information that is not, and which could not be, admitted into evidence; therefore, the rules of evidence require expert testimony to be *especially* reliable. But police training, unlike scientific or academic training, is often informal, based on anecdotes and the collective knowledge of the law enforcement community rather than on any particular methodology or approach to analysis. Because they have not been put through the rigor that we expect in other disciplines, an officer’s expert conclusions and opinions may lack the foundation upon which their authority should be built. I argue in Part III that an evidentiary framework that requires a more searching analysis of the reliability of officer opinion testimony could lead to a change in police training that could, in turn, change police culture for the better.

In Part IV, I address several theoretical and practical concerns that limit the potential of evidentiary considerations to serve as a mechanism for police reform. I conclude that, while the impact of evidentiary considerations is neither certain nor the appropriate way to address all aspects of policing, it can be a useful addition to the broader conversation about police reform.

## II. EVIDENCE AND POLICE PRACTICES

This section offers three examples in support of my thesis that policing can be responsive to evidentiary developments: *Miranda* warnings, authentication and chain of custody requirements, and forensic investigation techniques. These are certainly not the only examples of how evidentiary rulings affect policing, but they are intentionally chosen for their diversity. From a formal constitutional requirement handed down from the Supreme Court of the United States to a non-constitutional evidentiary determination that is only rarely implicated beyond the trial courts to the pressures of popular enthusiasm for a particular investigatory tactic, these examples illustrate how evidentiary considerations have shaped both police practices and the professional culture of law enforcement.

### A. *Miranda Warnings and Police Interrogation*

In 1966, the Supreme Court issued the most widely recognized criminal procedure opinion in United States history: *Miranda v. Ari-*

*zona*.<sup>8</sup> A five-justice majority held that officers must provide a warning before questioning any individual who “is taken into custody or otherwise deprived of his freedom . . . in any significant way.”<sup>9</sup> The ruling was intended to create “procedural safeguards” that would shield the Fifth Amendment privilege against self-incrimination.<sup>10</sup> Grounded implicitly in constitutional rights, *Miranda* was subject to sharp academic and popular debate.<sup>11</sup> A *Columbia Law Review* article published shortly after *Miranda* was decided refers to “the image[s] of indignant burglars demanding to be warned of their rights and provided with an attorney [that] have found their way into public concern, political speeches, and the cartoons of popular periodicals.”<sup>12</sup> On the one hand were concerns, reflected in Justice Clark’s dissent, that imposing such stringent requirements “at the nerve center of crime detection may well kill the patient” by substantially burdening law enforcement operations and aiding criminals.<sup>13</sup> On the other hand was the belief that the *Miranda* warnings were inadequate as a protective mechanism, largely because the Court neither provided meaningful definitions for critical concepts, such as “custody” and “waiver,” nor took into account police gamesmanship that some scholars and practitioners thought inevitable.<sup>14</sup> The Court later clarified many of the questions that it had left open in *Miranda*,<sup>15</sup> and more modern critiques have focused on the effect of *Miranda* on the criminal justice system,<sup>16</sup> the high rate at which suspects

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8. *Id.* As the Supreme Court itself recognized, “*Miranda* has become embedded in routine police practices to the point where the warnings have become part of our national culture.” *Dickerson v. United States*, 530 U.S. 428, 430 (2000). See also Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 259 & n.1 (1996).

9. *Miranda*, 384 U.S. at 478.

10. *Id.*

11. See, e.g., Sheldon H. Elsen & Arthur Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 645 (1967); Thomas S. Schrock et al., *Interrogational Rights: Reflections on Miranda v. Arizona*, 52 S. CAL. L. REV. 1 (1978).

12. Elsen & Rosett, *supra* note 11, at 645.

13. *Miranda*, 384 U.S. at 500; Leo, *supra* note 8, at 260.

14. Elsen & Rosett, *supra* note 11, at 660–64.

15. See *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (holding that traffic stops are not custodial for *Miranda* purposes); *Stansbury v. California*, 511 U.S. 318, 326–27 (1994) (holding that officer intent is irrelevant to the custody determination); *Rhode Island v. Innis*, 446 U.S. 291, 301–04 (1980) (holding that *Miranda* warnings are required before police engage in behavior that they should know is reasonably likely to elicit incriminating information); *Illinois v. Perkins*, 496 U.S. 292, 294 (1990) (holding that *Miranda* does not apply when the suspect is unaware that he is speaking to a police officer).

16. Perhaps the most notable debate about *Miranda* was between Stephen Schulhofer, who argued that *Miranda* had no measurable impact on conviction rates, and Paul Cassell and Richard Fowles, who conclude that *Miranda* imposes significant social costs. See Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).

waive their rights,<sup>17</sup> the gradual erosion of the doctrine,<sup>18</sup> and the use of police tactics that reduce the value of the *Miranda* protections.<sup>19</sup>

As it played out, *Miranda* contributed to police reform in both obvious and subtle ways. The most obvious, of course, is the reading of the *Miranda* warnings themselves. Today, police departments typically provide plastic or laminated “Miranda Warning” cards that officers can carry with them and read from. Many police departments “recommend or require that . . . [the warnings] be read verbatim from the printed card.”<sup>20</sup> And many officers do just that, ensuring that the *Miranda* requirements are satisfied,<sup>21</sup> even though the Supreme Court has held that a precise recitation of the warnings using exactly the language from the *Miranda* opinion is not necessary.<sup>22</sup> The cards, commercially available from popular police supply retailers,<sup>23</sup> are typically broken into two sections. The majority of the card contains the *Miranda* warning itself, often listed as five enumerated statements, while the bottom of the card is a waiver section that prompts officers to ask whether the suspect understands his rights and whether he is willing to speak to officers. For illustrative purposes, I have included the image that accompanies the listing of a \$4 plastic “Miranda Card” sold by Streicher’s, one of the most popular police supply retailers.<sup>24</sup>

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17. Schulhofer, *supra* note 16, at 550 (“Suspects under interrogation are routinely asked to ‘waive’ their Fifth Amendment privilege and many do so.”).

18. *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 16–25 (2010) (examining the “gradual overruling” of *Miranda*).

19. *See, e.g.*, Leo, *supra* note 8 (describing a variety of tactics used in police interrogations including “qualifying the suspect,” by determining their “suggestibility, deference, and cooperativeness,” and “conning the suspect” into eliciting a confession through “confidence games”); Jan Hoffman, *Police Tactics Chipping Away at Suspects’ Rights*, N.Y. TIMES (Mar. 29, 1998), <http://www.nytimes.com/1998/03/29/nyregion/police-tactics-chipping-away-at-suspects-rights.html>.

20. CHARLES R. SWANSON ET AL., CRIMINAL INVESTIGATION 181–82 (7th ed. 2000).

21. KAREN MATISON HESS ET AL., POLICE OPERATIONS: THEORY AND PRACTICE 61 (6th ed. 2014).

22. *Duckworth v. Eagan*, 492 U.S. 195, 201–03 (1989) (holding that a misstatement of the *Miranda* warnings does not render those warnings inadequate nor are any subsequent statements made by the defendant rendered inadmissible so long as an effectively equivalent warning was given).

23. *Miranda Card*, STREICHER’S, <http://www.policehq.com/Products/KC-1> (last visited Oct. 29, 2014); *Miranda Warning Card*, HANDCUFF WAREHOUSE, <http://www.handcuffwarehouse.com/Miranda-Warning-Card.html> (last visited Oct. 29, 2014); *Geiger Miranda Warning Card*, CHIEF, <http://www.chiefsupply.com/geiger-miranda-warning-card.html> (last visited Oct. 29, 2014).

24. *Miranda Card*, *supra* note 23.

## MIRANDA WARNING

1. YOU HAVE THE RIGHT TO REMAIN SILENT.
2. ANYTHING YOU SAY CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW.
3. YOU HAVE THE RIGHT TO TALK TO A LAWYER AND HAVE HIM PRESENT WITH YOU WHILE YOU ARE BEING QUESTIONED.
4. IF YOU CANNOT AFFORD TO HIRE A LAWYER, ONE WILL BE APPOINTED TO REPRESENT YOU BEFORE ANY QUESTIONING, IF YOU WISH.
5. YOU CAN DECIDE AT ANY TIME TO EXERCISE THESE RIGHTS AND NOT ANSWER ANY QUESTIONS OR MAKE ANY STATEMENTS.

## WAIVER

DO YOU UNDERSTAND EACH OF THESE RIGHTS  
I HAVE EXPLAINED TO YOU?

HAVING THESE RIGHTS IN MIND,  
DO YOU WISH TO TALK TO US NOW?

In addition to cards, officers can get the *Miranda* warning pre-printed on pocket notebooks,<sup>25</sup> via smart phone apps that can provide the warnings in different languages,<sup>26</sup> and on interview forms that the recipient of the warning can sign as acknowledgement that he received and understood the warnings.

The laminated or plastic cards that officers can carry around and read from are emblematic of *Miranda*'s most obvious effect: changing police procedures. The more important effect, though, is also the more subtle one: the alteration of police *attitudes*. When *Miranda* was decided, the law enforcement community and hard-on-crime politicians viewed it as a devastating blow that would hamper police operations and endanger public safety.

[P]olice officials complained indignantly that *Miranda* would handcuff their investigative abilities and significantly damage law enforcement. Politicians linked *Miranda* to rising crime rates, as Congress attempted legislation to invalidate *Miranda* in the 1968 Omnibus Crime Control Act . . . , [while] Richard Nixon declared *Miranda* to be a victory of the "crime forces" over the "peace forces."<sup>27</sup>

25. *Rite in the Rain All Weather Field Interview Notebook, Yellow*, GALLS, <http://www.galls.com/rite-in-the-rain-all-weather-field-interview-notebook-yellow?PMSRCE=9235001&SESSIONID=000000082440610> (last visited Oct. 29, 2014).

26. POLICE iPHONE APPS, <http://www.policeiphoneapps.com/> (last visited Oct. 29, 2014). This translation feature could be an important tool. See *United States v. Botello-Rosales*, 728 F.3d 865, 867 (9th Cir. 2013) (overturning a conviction because of a police officer's flawed translation of *Miranda* warnings into Spanish).

27. Leo, *supra* note 8, at 260.



Attitudes have changed significantly in the nearly half-century since *Miranda* was decided. Surveys of police administrators suggest that most now believe that the *Miranda* warning requirement does not impose any meaningful burden on officers.<sup>28</sup> Perhaps more tellingly, most police executives do not believe that officers would change their interrogation practices even if *Miranda* was overruled.<sup>29</sup> In fact, a majority of police executives view the *Miranda* warnings favorably and support their continued use without regard for whether they are legally required.<sup>30</sup> This view is not universal, of course—the localized nature of law enforcement precludes referring accurately to “the police” as if there were some monolithic entity with consistent views—and some police executives certainly favor repudiating the warning requirement.<sup>31</sup> At least so long as *Miranda* remains in effect, however, police executives “almost universal[ly] disagree[ ]” with attempts to deliberately evade the warning requirement.<sup>32</sup> In short, even police administrators who would prefer to abandon the *Miranda* warning requirement demand that their officers comply with the rule until the Supreme Court tells them otherwise.

For police, the warning requirement serves as a source of legitimacy in two ways. First, it is instructive, providing a “best practices” approach that most police administrators believe officers could and would continue to follow even in the absence of a constitutional requirement. In this way, the *Miranda* decision has changed police attitudes about what constitutes professional policing in the context of interrogation. Second, it serves as a conduct rule that tells officers how they must act; police officers and executives—even those who disagree vehemently with the underlying justifications for the warning—read the *Miranda* warnings precisely because they are supposed to.<sup>33</sup> I have writ-

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28. Brian K. Payne et al., *Police Chiefs' and Students' Attitudes About the Miranda Warnings*, 34 J. CRIM. JUST. 653, 657–59 (2006). Regardless of police executives' perceptions, whether *Miranda* hinders police practices by increasing the rate at which suspects invoke their rights—decreasing the rates at which they confess—remains a point of dispute in academic debates about the practical effects of the *Miranda* decision. Compare Cassell & Fowles, *supra* note 16, with Schulhofer, *supra* note 16.

29. Payne et al., *supra* note 28, at 657 (showing that approximately sixty percent of police chiefs either disagreed or strongly disagreed with the statement: “Abolishing the *Miranda* warnings will change the way police officers do [things]”).

30. Victoria M. Time & Brian K. Payne, *Police Chiefs' Perceptions About Miranda: An Analysis of Survey Data*, 30 J. CRIM. JUST. 77, 84 (2002); Brian K. Payne & Victoria M. Time, *Support for Miranda Among Police Chiefs: A Qualitative Examination*, 25 AM. J. CRIM. JUST. 65, 74 (2000) [hereinafter *Support for Miranda*].

31. *Support for Miranda*, *supra* note 30, at 69–70.

32. Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 912 (2007) (concluding that “police officials do not condone the outright flouting of *Miranda*'s warnings requirement”).

33. See, e.g., Richard A. Leo, *Police Interrogation and Social Control*, 3 SOC. & LEGAL

ten elsewhere about the deontological approach that police take with respect to clear legal rules;<sup>34</sup> as the *Miranda* warning requirement demonstrates, this commitment to doing things the “right” way, even when it is distasteful, is indicative of police professionalism.

### B. *Evidence Impoundment, Storage, and Tracking*

An evidentiary rule need not be grounded in the Constitution to affect police practices. The evidentiary requirement that may have the most systemic impact on police operations is also one that goes largely unmentioned in many evidence casebooks: the authentication or identification requirement. To introduce evidence, the party seeking admission must “produce evidence sufficient to support a finding that the item is what the proponent claims it is.”<sup>35</sup> In the context of criminal cases, prosecutors must establish that the inculpatory evidence they want to have admitted is what they claim it is (identifying a broken glass tube as a crack pipe, for example), that it is relevant to the defendant’s trial (explaining that it was *the defendant’s* crack pipe), and that it is in substantially the same condition as when it was seized (describing that the crack cocaine residue was present at the time of arrest). “When the evidence is not readily identifiable and is susceptible to tampering or contamination . . . the government must show a ‘chain of custody’ . . . with sufficient completeness to render it improbable that the original item has been exchanged with another or been contaminated or tampered with.”<sup>36</sup>

Police officers serve as authenticators. The typical scenario, one that plays out in courtrooms all over the country every day, involves a prosecutor asking an officer if he recognizes a particular piece of evidence. The officer indicates that he does—for example, “That is the baggie of white powder that I retrieved from the glove box of the defendant’s vehicle.” Further, the officer often explains *how* he is able to identify a piece of evidence that he may not have thought about, let alone seen, in the months since he arrested the defendant. The inability to identify a piece of evidence—or, separately, the failure to establish that a piece of evidence has probably not been tampered with in the period between the original seizure and the request for admission—may

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STUD. 93, 114–16 (1994). That officers can manipulate the situation or use deception and psychological ploys during interrogations does not change that perception; rather than cutting against *Miranda*’s professionalizing effect, those devices are permitted within the rule itself. The professionalizing effect of *Miranda* was not entirely unanticipated, even shortly after the Supreme Court issued the decision. See NEAL A. MILNER, *THE COURT AND LOCAL LAW ENFORCEMENT: THE IMPACT OF MIRANDA* 203–04 (1971).

34. Stoughton, *supra* note 2, at 882 n.222.

35. FED. R. EVID. 901(a).

36. *United States v. Thomas*, 749 F.3d 1302, 1310 (10th Cir. 2014) (internal quotation marks omitted).

result in the exclusion of evidence.<sup>37</sup>

Most police departments have taken significant pains to structure their operations to ensure that a complete chain of custody exists for each individual piece of evidence impounded by officers. Chain of custody records track each step a piece of evidence makes, from the time an officer seizes it until it is admitted in court, but the procedures that police agencies use to preserve the chain of custody for different pieces of evidence can be more labyrinthine than any simple description suggests. Departmental policies and procedures about impounding and tracking evidence can fill lengthy tomes; the New York Police Department's Patrol Guide 218, the policy that governs seizure and processing of evidence, covers 135 pages—more than eight percent of the 1,609 pages of what is intended to be a comprehensive policy manual for patrol officers.<sup>38</sup> These internal operating policies must incorporate state laws that govern the disposal of property<sup>39</sup> and mandatory record retention periods,<sup>40</sup> and they are often supplemented with printed manuals that instruct officers to package, store, and handle different pieces of evidence in different ways.

Consider an entirely mundane scenario: a police officer arrests a suspected drug dealer and seizes a small amount of marijuana, a few baggies of cocaine, two rolls of cash, and a firearm. The seized items must be documented, of course, but department policy may require that they be recorded on separate forms, as each may take a very different path from the scene of the arrest to the courtroom. The cocaine must be weighed and will be packaged in a tamper-evident plastic bag, which is either heat-sealed or closed with evidence tape. That plastic bag can be stored in any secure evidence locker. The marijuana, on the other hand, will be weighed and packaged in a paper bag to avoid degradation, such as mold and decomposition, and the paper bag will be sealed with evidence tape. Because the paper bag does not do much to contain the pungent smell of marijuana, the police department may use a ventilated—or,

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37. See generally Edward J. Imwinkelried, *The Identification of Original, Real Evidence*, 61 MIL. L. REV. 145 (1973) (describing the importance of properly identifying real evidence and establishing a chain of custody for that evidence). The chain of custody requirement was once much more stringent than it is today; the chain of custody need not be perfect for modern courts. Today, so long as the chain of evidence is sufficiently complete, defects and gaps affect “the weight of the evidence rather than its admissibility.” *Thomas*, 749 F.3d at 1310; see also Paul C. Giannelli, *Chain of Custody and the Handling of Real Evidence*, 20 AM. CRIM. L. REV. 527, 527–28 (1983).

38. See generally NEW YORK POLICE DEP'T, PATROL GUIDE (effective Jan. 1, 2000).

39. See, e.g., FLA. STAT. § 705.105 (2014).

40. State “open records” laws often set minimum retention periods for public records, including the records used to track evidence. Thus, even after a piece of evidence is introduced in court, destroyed, auctioned off, or returned to its owner, the law enforcement agency must maintain records relating to its custody of that evidence for some statutory period.

in rare cases, a refrigerated—storage locker. At some point, both narcotics will be sent to a crime laboratory for chemical analysis, and any amount of the drug not used up in the analysis will be returned to evidence storage.

After being unloaded, the firearm will be fastened into a cardboard or plastic box with plastic self-gripping cable ties (better known as zip ties) and the box sealed with tamper-evident tape before being put into a “high liability” section of the storage facility. Unless ballistic testing is required, the only analysis that the firearm will undergo is a check, using the serial number, to determine whether it is stolen. Cash presents its own problems; to prevent damning allegations of theft or corruption, the seized cash will be counted independently by multiple officers—perhaps by both an officer and a supervisor, depending on the amount—who each sign an evidence receipt. The two rolls of cash will be counted and recorded separately,<sup>41</sup> and they may be subjected to a dog sniff or even chemical analysis to support a forfeiture action. Each time any one of the pieces of evidence changes hands—from the seizing officer to the evidence technician to the driver who takes it to the lab to the series of lab analysts who process it to the driver who brings it back to the police department to the evidence technician who puts it back into storage to the officer who brings it to court—the transfer must be documented on an evidence receipt to preserve the chain of custody.<sup>42</sup>

The burdens in this system, which is described here in only the most cursory fashion, are not insignificant—far from it. Each individual officer must be trained to handle and impound many different kinds of evidence. Large departments hire dedicated evidence technicians and invest in digital inventory-management style tracking systems to deal with the complexity of impounding and storing thousands or even millions of items simultaneously. Evidence must be securely stored, and the storage facility must be both large enough to accommodate large items, such as bicycles and household appliances, and diverse enough to handle evidence with a variety of storage requirements, from biological material that must be kept refrigerated to marijuana that should be ventilated to vehicles that need to be kept indoors. Many smaller departments, individually lacking evidence storage capacity, will make arrangements with neighboring agencies to use their facilities.<sup>43</sup> In toto, police agencies

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41. Having money in different pockets is a common, if crude, accounting device that street-level drug dealers are known to use to separate accounts receivable (the dealer’s money) and accounts payable (money owed to the dealer’s supplier). *See* *United States v. Johnson*, 944 F.2d 396, 401 (1991); *Paul v. Carey*, No. 05-cv-03460, 2007 WL 735769, at \*1 (N.D. Cal. 2007).

42. THOMAS J. GARDNER & TERRY M. ANDERSON, *CRIMINAL EVIDENCE: PRINCIPLES AND CASES* 439–40 (8th ed. 2013).

43. For example, several law enforcement agencies in southern Illinois use the storage

invest a substantial amount of human and financial capital in systems that were developed largely to satisfy the authentication requirement.<sup>44</sup>

Police departments have spent millions of dollars modernizing their property and evidence systems,<sup>45</sup> and they advertise their efforts as a way of demonstrating their commitment to professional law enforcement.<sup>46</sup> Many agencies, from massive agencies like the New York Police Department<sup>47</sup> and the Los Angeles Police Department<sup>48</sup> to the much smaller University of Arizona Police Department,<sup>49</sup> include a description of their property and evidence storage and tracking function on their websites. More formally, the Commission on Accreditation for Law Enforcement Agencies, an independent accrediting body, includes “Property and Evidence Control” as a component of its review of police

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facilities at the Gallatin County Sheriff’s Office. Unfortunately, this allowed then-sheriff Raymond R. Martin to purloin the narcotics stored there to supply his own drug distribution ring. *United States v. Martin*, 692 F.3d 760, 762 (7th Cir. 2012); Jim Suhr, *Appeals Court Upholds Raymond Martin’s Life Term*, DAILY REG. (Feb. 10, 2014, 6:17 PM), <http://www.dailyregister.com/article/20140210/NEWS/140219857>.

44. Most impounded property is evidence that will be used in criminal cases. *See Property Clerk Division*, N.Y. POLICE DEP’T, [http://www.nyc.gov/html/nypd/html/property\\_clerk/property\\_clerk.shtml](http://www.nyc.gov/html/nypd/html/property_clerk/property_clerk.shtml) (last visited Oct. 29, 2014) (stating that about two-thirds of all impounded property is evidence in criminal cases); *Evidence Property Room*, COLUM. POLICE DEP’T, <http://www.columbiapd.net/evidence.html> (last visited Oct. 29, 2014) (stating that “the majority of property managed by the Property unit is evidence required for criminal cases”). But I would be remiss if I did not mention additional justifications for a comprehensive property storage and tracking system. For non-evidentiary property—including lost-and-found property that is to be returned to the owner, items that will be auctioned off, or contraband that will be destroyed because no owner could be identified or it is no longer needed for a criminal case—maintaining a chain of custody allows an agency to both deter and detect employee misconduct. Further, quite apart from the authentication requirement in criminal cases, a well-run system for tracking seized property can prevent embarrassing mistakes like misplacing or inadvertently destroying particular pieces of evidence. *See 21 Years After Wrongful Conviction—and After 12 Years Fighting for Access to Evidence—DNA Proves Alan Newton’s Innocence*, INNOCENCE PROJECT (June 6, 2006), [http://www.innocenceproject.org/Content/21\\_Years\\_After\\_Wrongful\\_Conviction\\_\\_And\\_After\\_12\\_Years\\_Fighting\\_for\\_Access\\_to\\_Evidence\\_\\_DNA\\_Proves\\_Alان\\_Newtons\\_Innocence.php](http://www.innocenceproject.org/Content/21_Years_After_Wrongful_Conviction__And_After_12_Years_Fighting_for_Access_to_Evidence__DNA_Proves_Alان_Newtons_Innocence.php); *see also* Elizabeth A. Bawden, *Here Today, Gone Tomorrow—Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value*, 48 CLEV. ST. L. REV. 335, 336 (2000).

45. John Marzulli & Allison Gendar, *Despite Budget Crunch, Cops Hope for \$25M for Evidence Tracking Program*, N.Y. DAILY NEWS (Mar. 18, 2008, 11:25 PM), <http://www.nydailynews.com/news/crime/budget-crunch-cops-hope-25m-evidence-tracking-program-article-1.286553>.

46. *See, e.g.*, Sheldon Gardner, *Beach Police Getting New Evidence Room*, ST. AUGUSTINE RECORDER (Dec. 28, 2013, 1:08 AM), <http://staugustine.com/news/local-news/2013-12-27/beach-police-getting-new-evidence-room>.

47. *Property Clerk Division*, *supra* note 44.

48. *Property Division*, L.A. POLICE DEP’T, [http://www.lapdonline.org/inside\\_the\\_lapd/content\\_basic\\_view/6414](http://www.lapdonline.org/inside_the_lapd/content_basic_view/6414) (last visited Oct. 29, 2014).

49. *Property and Evidence*, U. ARIZ. POLICE DEP’T, <http://uapd.arizona.edu/divisions/operations-support/property-evidence> (last visited Oct. 29, 2014).

agencies.<sup>50</sup> On an individual level, the International Association for Property and Evidence serves as a membership association for sworn and civilian law enforcement personnel “directly assigned to the property/evidence function.”<sup>51</sup>

Through the adoption of the authentication requirement, the judiciary has affected how law enforcement agencies design their facilities, train their officers, and display their professionalism.

### C. *Forensic Evidence and Crime Laboratories*

Much has been written about the “CSI Effect”: how popular media’s portrayals of the forensic sciences changes public perceptions about criminal investigations and how those changing perceptions affect the criminal justice system.<sup>52</sup> In academic and popular media, the term “CSI Effect” has evolved to mean at least three different things. In its most common usage, the phrase refers to the effect on jurors of having been exposed to fictional dramas that focus on solving crimes entirely or primarily through forensic evidence.<sup>53</sup> The accompanying thesis is that television shows, movies, and books will change (and have changed) jurors’ perceptions about the type of evidence that a prosecutor *can* introduce in any given case, which leads jurors to expect prosecutors to carry their burden in real-life cases by introducing forensic evidence that carries the imprimatur of scientific rigor. Jurors, so the thesis goes, will be less likely to convict in the absence of such evidence.<sup>54</sup> Further, they may be willing to accept forensic evidence at face value, putting their

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50. *CALEA Standards for Law Enforcement Agencies*, CALEA, <http://www.calea.org/content/standards-titles> (last visited Oct. 29, 2014); see also Joseph T. Latta & William P. Kiley, *Property and Evidence Control—The Hidden (and Ticking) Time Bomb*, CALEA (June 2007), <http://www.calea.org/calea-update-magazine/issue-94/property-and-evidence-control-hidden-and-ticking-time-bomb>.

51. *IAPE Membership Requirements*, INT’L ASS’N FOR PROP. & EVIDENCE, <http://www.iape.org/memRequire.html> (last visited Oct. 29, 2014).

52. See DENNIS J. STEVENS, *MEDIA AND CRIMINAL JUSTICE: THE CSI EFFECT* (2011); Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1336 (2009); N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public’s Expectations About Real Forensic Science*, 47 JURIMETRICS 357, 357 (2007); Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the ‘CSI Effect’ Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 334–36 (2006); *The “CSI Effect,”* ECONOMIST, APR. 22, 2010, available at <http://www.economist.com/node/15949089/print>.

53. CHRISTOPHER J. FERGUSON, *ADOLESCENTS, CRIME, AND THE MEDIA* 69–78 (2013) (analyzing the various phenomena of the “influence of science-driven law-enforcement shows,” commonly dubbed the *CSI* effect, on career choices, juror expectations in criminal cases, and the increased sophistication of new criminals who learned “countermeasures to investigative techniques” by watching science-driven crime dramas).

54. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1056–63 (2006); Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006).

faith in the fingerprint analysis or DNA evidence that they have seen used in popular media. If true, this version of the *CSI* Effect has important ramifications for prosecutors, defense attorneys, and judges.<sup>55</sup> The second meaning of the *CSI* Effect, which is most relevant to colleges and universities around the country, refers to the potential increase in the number of students who, having been exposed to fictional accounts of forensics, become interested in careers in forensics or law enforcement.<sup>56</sup> The law enforcement community is more likely to use the phrase “*CSI* Effect” in a third way, to describe a distinctly different phenomenon: the potential for fictional portrayals of forensic crime solving to educate criminals about ways to preclude or frustrate actual investigations.<sup>57</sup> These standard usages tend to be used by insiders (scholars, judges, university administrators, prosecutors, and police) to describe the effects on outsiders (jurors, students, and criminal offenders), but that tendency may mask the impact that the *CSI* Effect has had on the criminal justice system itself.

There are a host of controversies and complications with forensic evidence. The validity of the conclusions reached by various forensic disciplines have been called into question.<sup>58</sup> The organization of crime laboratories as part of a police agency, which remains the dominant model for administering a crime lab, may result in conflicts of interest when employees self-identify as law enforcement agents rather than as independent and impartial analysts.<sup>59</sup> And there is always the possibility that analysts will fabricate the results of analysis, either because they are attempting to cut away at a backlog of cases or because they are seeking to advance what they view as a law enforcement interest.<sup>60</sup> Regardless

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55. Simon A. Cole & Rachel Dioso-Villa, *Should Judges Worry About the “CSI Effect”?*, 47 CT. REV. J. AM. JUDGES ASS’N 20, 24 (2011); Katie L. Dysart, *Managing the CSI Effect in Jurors*, A.B.A. TRIAL EVIDENCE (May 28, 2012), <http://apps.americanbar.org/litigation/committees/trialevidence/articles/winterspring2012-0512-csi-effect-jurors.html>.

56. FERGUSON, *supra* note 53, at 70–72.

57. *Id.* at 76–78; Julian Borger, *Hit TV Crime Show Helps Criminals Cover Their Tracks*, GUARDIAN (Feb. 8, 2006), <http://www.theguardian.com/media/2006/feb/08/usnews.broadcasting>.

58. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) [hereinafter CONVICTING THE INNOCENT]; DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 24–37 (2012) (describing the fallibility of some typical forensic analysis including fingerprint analysis, ballistics, and forensic dentistry); NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 184–89 (2009), available at [http://www.nap.edu/openbook.php?record\\_id=12589&page=142](http://www.nap.edu/openbook.php?record_id=12589&page=142); Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 6 (2009).

59. SANDRA GUERRA THOMPSON, COPS IN LAB COATS: CURBING WRONGFUL CONVICTIONS THROUGH INDEPENDENT FORENSIC LABORATORIES (forthcoming Carolina Academic Press 2014); NAT’L RESEARCH COUNCIL, *supra* note 58, at 184.

60. Late last year, the now-infamous chemist Annie Dookhan, who worked in a state-run laboratory in Massachusetts, pleaded guilty to falsifying results of drug analysis, potentially

of its many pitfalls, however, forensic evidence is both broadly admissible<sup>61</sup> and popularly accessible.

As the public became more aware of and keenly interested in forensic science, police departments have begun to trumpet their commitment to scientific evidence-gathering and analysis.<sup>62</sup> It is a rare day when some police department or another does *not* issue a press release touting the successful use of forensics as a crime solving technique<sup>63</sup> or stressing their commitment to using technology to investigate future crimes<sup>64</sup> or cold cases.<sup>65</sup> And while the definition of the word “science” in the context of forensics is foreign to professionals within the scientific community,<sup>66</sup> both public opinion and judicial rulings have prompted law enforcement agencies to invest heavily in the trappings of scientific legitimacy.

In 2002, the first year for which the Bureau of Justice Statistics has data, there were 351 publicly-funded crime laboratories nationwide, and their collective operating budgets totaled more than \$750 million.<sup>67</sup> That year, the laboratories were asked to handle 2.7 million new requests for analysis.<sup>68</sup> By 2009, the number of laboratories had grown to more than 400 and their combined operating budgets had more than doubled to a total of over \$1.6 billion.<sup>69</sup> The increase was necessary to accommodate the 4.1 million requests for analysis they faced that year,<sup>70</sup> and law enforcement agencies continue to push for more. Many state and

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affecting tens of thousands of criminal cases. The laboratory, like many others, was operating with a substantial backlog. Eugenie Samuel Reich, *Boston Scandal Exposes Backlog*, 409 NATURE 153 (2012), available at <http://www.nature.com/news/boston-scandal-exposes-backlog-1.1156>.

61. See Erica Beecher-Monas, *Blinded by Science: How Judges Avoid the Science in Scientific Evidence*, 71 TEMP. L. REV. 55, 56 (1998).

62. HARRIS, *supra* note 58, at 2.

63. See, e.g., Greg Gross, *Police: DNA Links 2005 Burglary to Maryland Man*, YORK DISPATCH.COM (July 8, 2014, 6:32 PM), [http://www.yorkdispatch.com/news/ci\\_26110197/police-dna-links-2005-burglary-maryland-man](http://www.yorkdispatch.com/news/ci_26110197/police-dna-links-2005-burglary-maryland-man); David Gurliacci, *Report: Police Say DNA Results Helped Nab Robber of Vernon Bank*, VERNON PATCH (July 8, 2014, 1:25 PM), <http://vernon.patch.com/groups/police-and-fire/p/report-police-say-dna-results-helped-nab-robber-of-vernon-bank>.

64. Andrea Sinclair, *New Statewide DNA Lab Helps Colorado Springs Police Focus on Property Crimes*, GAZETTE (June 23, 2014, 7:40 AM), <http://gazette.com/new-statewide-dna-lab-helps-colorado-springs-police-focus-on-property-crimes/article/1521876>.

65. See, e.g., Chris Raia, *Police Find DNA Possibly Connected to Unsolved Murder*, WPRI EYEWITNESS NEWS (July 9, 2014, 5:31 AM), <http://wpri.com/2014/07/09/police-find-dna-possibly-connected-to-unsolved-murder/>.

66. See HARRIS, *supra* note 58, at 20–24; TERRENCE F. KIELY, FORENSIC EVIDENCE: SCIENCE AND THE CRIMINAL LAW 1–2 (2d ed. 2006).

67. JOSEPH L. PETERSON & MATTHEW J. HICKMAN, U.S. DEP’T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2002, at 1 (2005).

68. *Id.*

69. MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2009, at 1, 10 (2012).

70. *Id.*



regional crime labs have become so backlogged with requests for analysis that they now only accept requests relating to violent felonies. Police agencies have responded by lobbying for new publicly-funded crime laboratory facilities<sup>71</sup> or by contracting with private labs to perform analysis for non-violent crimes.<sup>72</sup> Further, individual agencies continue to call for the addition of laboratory capabilities. Some departments have invested in forensics by continually expanding the range of services that their in-house laboratory can provide.<sup>73</sup> Others have changed the way that they talk about evidence collection and analysis. On more than a few occasions, the then-chief of the municipal police department where I served as an officer referred to our crime scene technicians—hired to photograph and collect evidence at high-stakes crime scenes—as “forensic scientists,” leading several of them to jokingly wonder what had happened to the additional pay and education that the more prestigious title implied.

The enthusiasm to produce useful and admissible, not to mention popular, evidence is nothing new. According to the National Law Enforcement Museum, the anthropometric method of identifying criminals by measuring different parts of their bodies, developed by Paris police officer Alphonse Bertillion in the 1870s, was quickly adopted by police departments around the world and remained in use until it was supplanted by fingerprint identification—also championed by Bertillion—in the early 1900s.<sup>74</sup> Today, almost 150 years later, we see police departments continuing to take evidentiary considerations into

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71. Sinclair, *supra* note 64.

72. Joe Gamm, *LabCorp to Process Greensboro Police DNA Requests*, NEWS & RECORD (June 23, 2014, 5:00 AM), [http://www.news-record.com/news/article\\_844f5dd2-fa71-11e3-8012-0017a43b2370.html](http://www.news-record.com/news/article_844f5dd2-fa71-11e3-8012-0017a43b2370.html).

73. See, e.g., *Crime Lab*, RICHLAND COUNTY SHERIFF'S DEP'T, <http://www.rcsd.net/inv/crimelab.htm> (last visited Sept. 14, 2014) (describing the 2002 addition of a drug analysis unit and a fire debris analysis unit, the 2003 addition of a firearms/tool marks unit, and the 2004 addition of a DNA unit). In addition to what one might consider the “standard tools” of forensic analysis—DNA, fingerprints, ballistics, bite-mark identification, tool mark identification, and blood spatter analysis, to name a few—other scientific fields have been plumbed for potentially useful contributions, including forensic agronomy (the analysis of plants and seeds) and forensic entomology (the analysis of insects). See also M. LEE GOFF, *A FLY FOR THE PROSECUTION: HOW INSECT EVIDENCE HELPS SOLVE CRIMES* (2000); Emily Fredrix, *Forensic Agronomy Merges Two Worlds*, CASPER STAR TRIB. (Sept. 7, 2005, 12:00 AM), [http://trib.com/news/state-and-regional/forensic-agronomy-merges-two-worlds/article\\_68dcbe36-1089-5a26-b228-7ab000991a22.html](http://trib.com/news/state-and-regional/forensic-agronomy-merges-two-worlds/article_68dcbe36-1089-5a26-b228-7ab000991a22.html).

74. *Bertillon System of Criminal Identification*, NAT'L L. ENFORCEMENT MUSEUM, <http://www.nleomf.org/museum/news/newsletters/online-insider/november-2011/bertillon-system-criminal-identification.html> (last visited Sept. 3, 2014). Ironically, the fingerprints originally published by Bertillon as examples of his 16-point identification system were later revealed to be forgeries. Clifford G. Miller, *Pointing the Finger*, L. SOC'Y, <http://www.lawsociety.org.uk/communities/advocacy/articles/pointing-the-finger/> (last visited Oct. 26, 2014) (quoting R. v. Buckley, [1999] EWCA (Crim) 1191 (Eng.)).

account as they adapt their policies and procedures to capitalize on judicial rulings and public perception.

### III. EXPERIENCE, EXPERTISE, AND ERROR

In this Part, I use the rules surrounding lay and expert opinion testimony to explore the continued potential of evidentiary rulings to change police training in a way that could lead to meaningful reforms of police culture. The use of witnesses with specialized knowledge to assist the court is an ancient practice, going back at least as far as the Roman courts, where a judge could summon an *artis periti* (skilled expert) to provide information about scientific phenomena or the details of various trades and professions.<sup>75</sup> As the inquisitorial system, which preferred jurors with personal knowledge of the matters under dispute, shifted to the more familiar adversarial model, “the testimony of witnesses and real evidence [rather than personal knowledge] became the sole source of factual data upon which a verdict could be rendered.”<sup>76</sup> The role of witnesses evolved as courts developed the opinion rule, which barred witnesses from offering information about which they lacked first-hand knowledge.<sup>77</sup> Inevitably, courts soon developed exceptions to the opinion rule, including the admissibility of expert opinions.<sup>78</sup> There is no clear record of the first dispute over an expert’s qualifications or conclusions, but a cynic might estimate that it occurred contemporaneously or even a few seconds before the first expert was allowed to offer testimony. It is no exaggeration to say that the questions that surround expert testimony have been a constant source of frustration for judges and scholars alike.<sup>79</sup>

In modern times, the Supreme Court has largely left it to trial court judges to resolve tough questions, establishing them as evidentiary gatekeepers responsible for separating the wheat from the chaff. To fulfill that gatekeeping role in the context of opinion testimony, judges base their admissibility rulings on the answers to two questions: First, will the

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75. Percy Edwards, *Chemical Experts—A Trio of Important Factors in the Detection of Crime*, 42 CENT. L.J. 323, 323 (1896); Malcolm E. Lafargue, *The Value of Expert Testimony*, 12 LOY. L.J. 31, 31 (1931).

76. Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 415 (1952).

77. *Id.*

78. *Id.* at 416–17.

79. See, e.g., J. SNOWDEN BELL, *THE USE AND ABUSE OF EXPERT TESTIMONY* 6–7 (1879); Ladd, *supra* note 76; Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 581–84 (1986); Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901–1902); Jack B. Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473 (1986); Gordon Courtenay Hamilton, *Expert Testimony* (1895) (unpublished thesis, Cornell Law School), available at [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1045&context=historical\\_theses](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1045&context=historical_theses).

witness be offering lay or expert testimony? Second, if the witness is providing expert testimony, is it relevant and sufficiently reliable to admit? Both questions have been at the heart of any number of spirited debates between courts and scholars, and for good reason: there is a substantial amount of uncertainty for judges to muddle through before answering either question.<sup>80</sup> In this section, I discuss each of those two questions as they relate to police testimony, identifying areas of concern and the potential for evidentiary rulings to improve police practices.

### A. *The Lay/Expert Testimony Distinction*

To distinguish between lay and expert opinion testimony, judges first look to the Federal Rules of Evidence. Prior to the 2000 amendments, Rule 701, which governs lay opinions, permitted some overlap between lay opinion and expert opinion testimony. According to the Advisory Committee Notes, the amendments to Rule 701 were intended “to eliminate the risk that the reliability requirements [that govern expert testimony] will be evaded through the simple expedient of proffering an expert in lay witness clothing.”<sup>81</sup> Such an evasion would avoid the expert witness disclosure requirements found in both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure,<sup>82</sup> as well as a measured determination that the proffered expert testimony is sufficiently reliable. Today, a lay witness may provide an opinion that is “rationally based” on his own perceptions when that opinion is “helpful” to clarify the witness’ testimony or to resolve a factual question.<sup>83</sup> For example, a bouncer at a nightclub who described a patron’s clenched fists and narrowed eyes would be permitted to offer his lay opinion that the patron was angry. Knowledgeable lay witnesses are also allowed to offer their opinions about “an endless number of items that cannot be described factually in words apart from inferences.”<sup>84</sup> As the Advisory Committee Notes contemplate, a business owner could testify about the projected profits of his enterprise without being qualified as an expert because of his “particularized”—note, *not* “specialized”—knowledge.<sup>85</sup> However, a lay witness is not permitted to offer any opinions that are based in “scientific, technical, or other specialized knowledge,” which

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80. See *United States v. Colón Osorio*, 360 F.3d 48, 52–53 (1st Cir. 2004) (noting that “[t]he line between expert testimony . . . and lay opinion testimony . . . is not easy to draw”). See also 1 KENNETH S. BROUN ET AL., *McCORMICK ON EVIDENCE* § 11, at 59 (6th ed. 2006).

81. FED. R. EVID. 701 advisory committee notes to the 2000 amendments.

82. *Id.*

83. FED. R. EVID. 701(a)–(b).

84. FED. R. EVID. 701 advisory committee notes to the 2000 amendments.

85. *Id.*

are subject to Rule 702.<sup>86</sup>

Rule 702, in turn, permits “[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education” to offer testimony, including opinion testimony, if the expert’s specialized knowledge will “help the trier of fact to understand the evidence or to determine a fact in issue.”<sup>87</sup> To be admissible, such testimony must be based on “sufficient facts or data” and “reliable principles and methods” that are “reliably applied . . . to the facts of the case.”<sup>88</sup> Unlike lay opinions, which “‘result[ ] from a process of reasoning familiar in everyday life,’” expert testimony “‘results from a process of reasoning which can be mastered only by specialists in the field.’”<sup>89</sup> In extreme cases, including many that involve scientific expertise, the difference between “reasoning familiar in everyday life” and “reasoning which can be mastered only by specialists” is fairly stark. In the example of the nightclub bouncer, the witness relied on familiar, everyday reasoning to deduce that a patron was angry by looking at the expression on his face and his clenched fists. An astrophysicist, in contrast, uses the latter type of reasoning to deduce the chemical composition of an alien planet’s environment by measuring the way light behaves as it moves through that planet’s atmosphere.<sup>90</sup>

Not all examples are so clear, however, and the grey area between the bouncer and the astrophysicist includes a great deal of police testimony. Courts have often struggled to draw definitive lines between lay and expert police opinion testimony. In part, this is because, perhaps more than any other single witness, individual police officers often provide both lay and opinion testimony.<sup>91</sup> This struggle, however, is also a result of the nature of police testimony itself. In addition to testifying as a fact witness providing information based on their own perceptions, officers commonly offer a wide range of professional opinions: why a particular action, such as the well-known “furtive movement” that so often defies exact description, was suspicious or threatening;<sup>92</sup> the tools

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86. FED. R. EVID. 701(c).

87. FED. R. EVID. 702(a).

88. FED. R. EVID. 702(b)–(d).

89. FED. R. EVID. 701 advisory committee notes to the 2000 amendments (quoting and adopting the reasoning of *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992)).

90. Josh Chamot, Nat’l Sci. Found., *Exploring the Makeup of Extrasolar Planets*, LIVE SCI. (Mar. 27, 2013, 11:52 AM), <http://www.livescience.com/28218-planet-exploration-studying-chemicals-light-nsf-ria.html>.

91. The Advisory Committee Notes specifically contemplate that possibility, using the example of officers who could offer a lay opinion that a suspect was acting suspiciously but who would have had to be experts to testify about code words relating to the narcotics trade. FED. R. EVID. 701 advisory committee notes to the 2000 amendments (discussing *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997)).

92. *See, e.g., United States v. Moorefield*, 111 F.3d 10, 13 (3d Cir. 1997) (allowing officer

and *modus operandi* of narcotics trafficking, murder,<sup>93</sup> child molestation,<sup>94</sup> and various other criminal endeavors; the position held by any given individual in a criminal enterprise;<sup>95</sup> the quantity of drugs consistent with personal use as opposed to narcotics trafficking;<sup>96</sup> the indicators that someone is engaged in counter-surveillance;<sup>97</sup> whether someone is under the influence of alcohol or narcotics;<sup>98</sup> the translation of “street jargon” and code words;<sup>99</sup> the relative speeds and positions of vehicles leading up to a crash as well as the causes of a car crash;<sup>100</sup> whether they or other officers used a reasonable amount of force in a particular situation;<sup>101</sup> the relative safety of different police weapons;<sup>102</sup> the distance at which one vehicle can safely follow another;<sup>103</sup> whether a firearm moved through interstate commerce;<sup>104</sup> and so on. And courts

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testimony that based on the officer’s experience as well as his observations of the suspect’s behavior, he believed the suspect was attempting to conceal something).

93. *United States v. Walker*, 665 F.3d 212, 230 (1st Cir. 2011) (admitting an FBI agent’s testimony that a bag with a knife, gloves, and duct tape was a “murder kit”).

94. *United States v. Raymond*, 700 F. Supp. 2d 142, 149 (D. Me. 2010) (considering the proposed testimony of a 30-year FBI veteran as to the behavior patterns and characteristics of child molesters, which would be based primarily on his experiences in previous cases).

95. *United States v. Garcia*, 413 F.3d 201, 211–12 (2d Cir. 2005) (describing a scenario in which an officer’s testimony about the roles individual participants played in a criminal transaction might be admissible).

96. *United States v. Boissoneault*, 926 F.2d 230, 232–33 (2d Cir. 1991) (“[W]e have repeatedly upheld the use of expert testimony by government agents to describe the characteristics and operating methods of narcotics dealers.”).

97. *United States v. Garza-Hernandez*, 623 F.2d 496, 497 (7th Cir. 1980) (finding that DEA officers’ observations of a suspect’s behavior, including suspect’s driving in a “circuitous manner,” was sufficient to establish probable cause when, “[f]rom their training and expertise, the agents knew that this type of driving was intended to reveal whether [suspect] was being followed [because] the agents had often observed this type of driving by those engaged in illegal drug trade”).

98. *Hall v. Cnty. of Nemaha, Neb.*, 509 F. Supp. 2d 821, 825 (D. Ne. 2007) (“[I]t was [the officer’s] belief, based on his training and experience, that Hall’s wide eyes, fidgety hand movements, nervous foot tapping, and sweating all indicated that he was under the influence of a narcotic.”).

99. *United States v. Santiago*, 560 F.3d 62, 66–67 (1st Cir. 2009) (admitting the “code word interpretations” of an officer who had “heard and used the coded language in his undercover drug buys relating to the investigation”).

100. *Swink v. Colcord*, 239 F.2d 518, 520 (10th Cir. 1956) (allowing highway patrolman testimony regarding the point of impact and relative speeds of two vehicles involved in a collision).

101. *Smith v. McGee*, No. 2:06-cv-00181, 2007 WL 4191725, at \*3 (S.D. Miss. Nov. 21, 2007) (concluding that officer actions “were reasonable under the circumstances” given officer testimony that “‘based on [their] training and experience only necessary force was used to subdue the inmates who were both combative and refused to respond to [their] request to stop fighting’”).

102. *Pierre v. Gruler*, No. 3:06-cv-00045, 2009 WL 383352, at \*3 (M.D. Fla. Feb. 16, 2009) (allowing officer testimony that “based on [his] training and experience, the taser is a safe alternative to going ‘hands on’ or using a weapon that can cause substantially more damage”).

103. *United States v. Worthon*, 520 F.3d 1173, 1176 (10th Cir. 2008) (admitting officer testimony that “a safe following distance, in his training and experience, was two seconds”).

104. *United States v. Robinson*, 205 F. App’x 415, 416–17 (6th Cir. 2006) (using a special

have come to different conclusions about how to categorize police opinion testimony. In the First Circuit, for example, a police officer may offer lay testimony about whether a particular quantity of narcotics is consistent with trafficking as opposed to personal use and about the tools and methods of drug traffickers, although such testimony is often (but not always) considered expert testimony in other circuits.<sup>105</sup>

Confusion about whether an officer's opinion is lay testimony or expert testimony is problematic for at least two reasons. First, an officer may offer a lay opinion that is dressed in the language of expertise, artificially inflating the gravitas of his own testimony by grounding his opinion in his "training and experience," a phrase that has become almost comically common not just in criminal trials, but also in police training materials themselves.<sup>106</sup> For example, officers have referred to their training and experience when testifying that a "'long-necked, glass bottle'" is consistent with a container used to hold alcohol;<sup>107</sup> that droopy, red eyes are a "common sign of alcohol or drug impairment";<sup>108</sup> that gunfire at 1:00 A.M. is often "associated with criminal activity";<sup>109</sup> that having a suspect kneel rather than stand "takes away most of their mobility";<sup>110</sup> and so on. These are silly examples, and intentionally so—the point is that, with the addition of a simple, formulaic phrase, completely mundane observations are draped in the robes of specialized knowledge and trained reasoning.

For officers, there are both instrumental and cultural reasons to ground their testimony, particularly opinion testimony, in their training and experience. Officers are aware, of course, of the ultimate consequences of the proceeding in which they testify. It would be laughable to suggest that they were entirely blind to the conviction at stake in a criminal trial or the money damages at stake in constitutional torts cases. All

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agent's knowledge of a gun manufacturer's current and previous locations to prove the origin of a gun and thus the "interstate commerce nexus element of the charge").

105. See *United States v. Valdivia*, 680 F.3d 33, 50–51 (1st Cir. 2012).

106. See, e.g., STEVE ALBRECHT, *TACTICAL PERFECTION FOR STREET COPS: SURVIVAL TACTICS FOR FIELD CONTACTS, DANGEROUS CALLS, AND SPECIAL ARRESTS* 73–74 (2009) ("The courts have given law-enforcement officers the leeway to make stops based on their ability to assess the person's potential for criminal activity. You have a wide variety of reasons to make a stop, including your training and experience, [sic] and your intimate knowledge of the crimes and crooks in your work area and nearby communities.").

107. *United States v. Ewing*, No. 13-40005-JAR, 2013 WL 4082717, at \*1 (D. Kan. Aug. 13, 2013).

108. *United States v. Boyd*, No. 5:09-cr-06008, 2010 WL 3842015, at \*3 (W.D. Mo. Aug. 27, 2010).

109. *United States v. Stokes*, No. 02-40116-01-SAC, 2002 WL 31928488, at \*3 (D. Kan. Dec. 30, 2002).

110. *Chatman v. Buller*, No. 6:12-cv-00182, 2013 WL 632355, at \*5 (E.D. Okla. Feb. 20, 2013).

other things being equal, officers prefer for arrestees to go to jail<sup>111</sup> and to avoid civil liability both for themselves and for other officers. Testifying based on their training and experience advances those goals. Judges, after all, are “generally obliged to accord deference and even great respect to an officer’s training and experience.”<sup>112</sup> For example, courts have, “with a regularity bordering on the echolalic, endorsed the concept that a law enforcement officer’s training and experience may yield insights that support a probable cause determination.”<sup>113</sup> Similarly, courts make reasonable suspicion determinations by filtering the facts “through the lens of the [officer’s] training and experience.”<sup>114</sup> And for juries, such phrasing adds an element of believability to the testimony. This may be particularly true if jurors perceive that police officers, unlike many other expert witnesses, are not “hired guns,” and so their testimony may be viewed as more credible than that of a paid, professional witness.<sup>115</sup>

But more powerful than the instrumental reasons are the cultural reasons that officers use such phrasing. Officers may not know very much about the nuances of evidence law, but they receive formal training in how to testify.<sup>116</sup> That training typically emphasizes being an effective, professional witness.<sup>117</sup> By grounding opinions in training and experience, officers bolster that image. Beyond formal training, individuals who work in policing adopt the idiosyncratic language of law enforcement. An officer does not testify that he sees a cream-colored

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111. This is not to suggest that officers are deeply vested, personally or professionally, in convicting defendants; they are not. I explicate this point more fully in Stoughton, *supra* note 2, at 877–82.

112. *United States v. Martin*, 679 F. Supp. 2d 723, 734 (W.D. La. 2010) (internal quotation marks omitted).

113. *United States v. Floyd*, 740 F.3d 22, 35 (1st Cir. 2014).

114. *United States v. Valdes-Vega*, 738 F.3d 1074, 1079 (9th Cir. 2013).

115. *See, e.g.*, Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1125–30 (1997).

116. Police training begins in the police academy, where providing testimony is a common component of the curriculum. *See, e.g.*, *Police Academy Curriculum*, JOHNSON COUNTY COMMUNITY C., <http://www.jccc.edu/police-academy/police-academy-curriculum.html> (last visited Sept. 12, 2014) (including in the Kansas police academy curriculum ten hours of instruction on “Courtroom Testimony” out of a total 639 hours of instruction). Most law enforcement agencies that do not have their own police academies also require a certain amount of additional in-house training that is specific to that department, which may include further training on testifying. Additional training in testifying is also available to officers from a variety of private vendors in the form of in-person seminars and books. *See, e.g.*, DON LEWIS, *THE POLICE OFFICER IN THE COURTROOM* (2001); *Courtroom Testimony Seminar*, OAKLAND POLICE ACAD., <https://www.oaklandcc.edu/CREST/pdf%20training%20flyers/2015-03-27%20-%20Courtroom%20Testimony.pdf> (last visited Jan. 5, 2014).

117. *See, e.g.*, FLA. DEP’T. LAW ENFORCEMENT, 1 FLORIDA BASIC RECRUIT TRAINING PROGRAM: LAW ENFORCEMENT ACADEMY 383–90 (2014), available at [https://www.fdle.state.fl.us/Content/getdoc/b36cf30a-ebea-42dd-becb-152301d06da5/2014-07\\_LE\\_Text.aspx](https://www.fdle.state.fl.us/Content/getdoc/b36cf30a-ebea-42dd-becb-152301d06da5/2014-07_LE_Text.aspx).

vehicle, for example; instead, he sees a vehicle, “cream in color.”<sup>118</sup> The constant “training and experience” refrain may be another linguistic peculiarity, but it is one that contributes to the insularity of police culture. As a great many authors have remarked, the policing environment and culture inculcate an “us versus them” mentality that separates officers from non-officers,<sup>119</sup> creating a norm that limits sharing information about police practices outside of police circles.<sup>120</sup> The phrase “training and experience” serves to demarcate the line between officer and civilian, expressing explicitly that an officer’s conclusions are grounded in information available to them by virtue of their status.

Despite the manifold justifications for officers to ground their testimony in their “training and experience,” dressing lay opinions up in expert language cuts against the very reason that evidence law distinguishes the two. When a witness offers a lay opinion, the jury is expected to test that opinion against their own familiar, everyday reasoning. Providing a lay opinion using expert phrasing risks artificially altering the fact-finder’s credibility determination, presenting an officer as more knowledgeable, and thus more credible, than the rules of evidence contemplate. It may also have something of the same effect on officers themselves, advancing the mystique of law enforcement by encouraging officers to think that *all* of their conclusions are formed not by common reasoning, but by virtue of their special skill sets. Such a mindset can only reinforce the “us versus them” mentality that has been commented on so often.<sup>121</sup>

A second problem is the possibility that a prosecutor may solicit, and an officer provide, expert testimony in the guise of a lay opinion. These slips may be intentional—a dodge around both the requirement to disclose expert witnesses in advance of trial<sup>122</sup> and the burden of qualifying the officer as an expert at trial,<sup>123</sup> but it is also possible that they are inadvertent. Given the inconsistency among courts, it would not be a surprise that some number of prosecutors would have a good-faith, if

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118. See *United States v. Clarkson*, 551 F.3d 1196, 1199 (10th Cir. 2009).

119. See, e.g., HARRY W. MORE & LARRY S. MILLER, *EFFECTIVE POLICE SUPERVISION* 179 (7th ed. 2015) (“Insularity erects protective barriers between the police and the public and creates an ‘us versus them’ mentality.”). This aspect of police culture is both significant and consistent. See MILTON MOLLEN ET AL., *COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, ANATOMY OF FAILURE: A PATH FOR SUCCESS* 60 (1994).

120. JOHN HAGEDORN ET AL., *U. ILL. CHI. DEP’T POL. SCI., CRIME, CORRUPTION AND COVER-UPS IN THE CHICAGO POLICE DEPARTMENT* 9–10 (2013), available at [http://pols.uic.edu/docs/default-source/chicago\\_politics/anti-corruption\\_reports/policecorruption.pdf?sfvrsn=2](http://pols.uic.edu/docs/default-source/chicago_politics/anti-corruption_reports/policecorruption.pdf?sfvrsn=2).

121. See *supra* note 119 and accompanying text.

122. See *FED. R. CIV. P.* 26(2).

123. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).



mistaken, belief than an officer will be offering lay testimony. And officers, who can be surprisingly legally sophisticated in some ways, are unlikely to have any training or a great deal of information about the rules governing expert testimony. Regardless of the reasoning, when an expert opinion is provided as lay testimony, it avoids the reliability screening that the Rules of Evidence require. Although precise data are elusive, it takes no great imagination to conclude that expert testimony that has not been subject to such screening may be less reliable than expert testimony that has been screened by opposing counsel and a judge.

To resolve both problems—lay testimony being dressed up in the language of expertise and expert opinions being introduced as lay testimony—judges must carefully delineate between officers' lay and expert testimony, but in different ways. The first resolution is the simplest; officers should be counseled to avoid volunteering their training and experience as the basis of an opinion unless asked, and prosecutors—who may be fairly expected to have a better education about the nuances of evidence law—should structure their examination to avoid accepting the bare assertion of “training and experience” as grounds for an officer's opinion. Judges should also caution jurors that they are to test lay testimony against their own perceptions, keeping in mind the context of the officer's testimony and additional evidence present in the case. In many jurisdictions, this would be a departure from current practice; model jury instructions can include a pattern instruction for expert witnesses, but “an instruction on ‘lay’ opinion generally is not needed” and is typically reserved for special circumstances.<sup>124</sup> Other jurisdictions include instructions on lay opinion testimony as a matter of course; this should be the rule rather than the exception. The instruction used in California offers an excellent template:

(A witness/Witnesses)[, who (was/were) not testifying as [an] expert[s],] gave (his/her/their) opinion[s] during the trial. You may but are not required to accept (that/those) opinion[s] as true or correct. You may give the opinion[s] whatever weight you think appropriate. Consider the extent of the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence.<sup>125</sup>

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124. See PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 3.07 (1998), available at [https://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/pjury.pdf](https://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf).

125. JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS § 333 (2014), available

The resolution to the second problem is more complex; judges must identify whether a particular statement constitutes expert testimony or lay testimony. To qualify as an expert, remember, a witness must have “knowledge, skill, experience, training, or education,” and, for their opinion to be admissible, their “scientific, technical, or other specialized knowledge [must] help the trier of fact to understand the evidence or to determine a fact in issue.”<sup>126</sup> This problem, of course, is certainly not unique to the law enforcement context, and so much has been written on distinguishing between lay and expert testimony that it is impossible to provide either a full list of authorities or a concise description of all of the issues and possible solutions that evidence scholars have raised.<sup>127</sup> For policing, the best solution may be to acknowledge that a great deal of opinion testimony by police officers is likely beyond the permissible scope of lay testimony because it is based on specialized knowledge: the officer’s training and experience.<sup>128</sup>

Consider two contrasting examples. A police officer who had previously been exposed to the smell of marijuana could offer a lay opinion that the odor he smelled emanating from a vehicle was that of marijuana, under the simple reasoning that someone who has been exposed to an odor previously is capable of identifying it when he smells it again. Now perhaps it had been several years since the officer had last smelled marijuana and perhaps he had mistakenly identified other smells as marijuana in the past, but those are arguments that go to weight rather than admissibility. However, a police officer who had previously learned about the organization of a criminal operation could not offer a lay opinion that a group of people he had investigated were involved in a criminal enterprise (or, to use what would likely be more accurate phrasing, that the people were organized in a manner consistent with involvement in a criminal enterprise). While both officers are making a comparison of one thing (a smell or an organization) to another, determining the relevant points of similarity and dissimilarity between different organizations—both legitimate and criminal—to arrive at an opinion about the

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at [http://www.courts.ca.gov/partners/documents/calcrim\\_juryins.pdf](http://www.courts.ca.gov/partners/documents/calcrim_juryins.pdf). The bench instructions inform judges that the bracketed clause “who (was/were) not testifying as [an] expert(s)” is to be read “if an expert witness also testified in the case.” *Id.* Such a clarifying instruction should also be added when lay witnesses use language that suggests that their opinion rests on specialized knowledge, training, or experience.

126. FED. R. EVID. 702(a).

127. *See, e.g.,* Weinstein, *supra* note 79, at 478–79.

128. Some courts, but not all, have generally taken this approach. *See* *United States v. Valdivia*, 680 F.3d 33, 56–57 n.16 (1st Cir. 2012) (Lipez, J., concurring) (collecting cases from other circuits holding that officers may testify as experts about narcotics operations and coded language).

type of enterprise that a particular group of people are engaged in is not an exercise in “familiar, everyday” reasoning.

When an officer’s testimony relies, implicitly or explicitly, on knowledge beyond the ken of the average juror, the judge should turn to the second half of the gatekeeping function: assessing the reliability of the foundation for the officer’s opinion.

### B. *Assessing the Reliability of Expert Testimony*

In *Daubert v. Merrell Dow Pharmaceuticals*<sup>129</sup> and *Kumho Tire Co. v. Carmichael*,<sup>130</sup> the Supreme Court assigned trial court judges as gatekeepers, responsible for excluding unreliable expert testimony. *Daubert* provided some guidance for judges, offering five factors that, while neither necessary nor sufficient, could be used to assess the reliability of scientific testimony: whether the expert’s theory or technique can be (and has been) assessed for reliability, whether it has been subject to peer review and publication, whether it has been “generally accepted” among the relevant community, whether there is a known or potential error rate, and whether there are established standards and controls.<sup>131</sup> The *Kumho Tire* Court held that trial court judges must satisfy their gatekeeping function for both scientific *and* non-scientific expert testimony, although it acknowledged that the relevance of the factors mentioned in *Daubert* would depend on “the particular circumstances of the particular case at issue.”<sup>132</sup> The Advisory Committee Notes to Rule 702 suggest a series of additional factors that can assist a judge in determining whether proffered expert testimony is reliable: whether the expert witness has developed his opinion independent of or specifically for the purpose of testifying in the underlying litigation; whether the expert was as careful in developing his opinion for litigation as he would be in his regular professional work; whether the expert has made an unfounded jump from premise to conclusion; whether the expert has accounted for obvious alternative explanations; and whether the expert’s field of expertise is known to reach reliable results in the specific context of the proffered opinion.<sup>133</sup>

In the context of policing, some law enforcement witnesses certainly testify on the basis of “scientific” or “technical” knowledge—officers who testify about forensic analysis, accident reconstruction, or the production of methamphetamine, for example. For these officers,

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129. 509 U.S. 579 (1993).

130. 526 U.S. 137 (1999).

131. *Daubert*, 509 U.S. at 593–94.

132. *Kumho Tire Co.*, 526 U.S. at 149–52.

133. FED. R. EVID. 702 advisory committee notes to the 2000 amendments.

like other scientific experts, the *Daubert* factors and additional factors provide meaningful guidance. That is not the case for the majority of police expert testimony, however, which falls under the general catch-all of “other specialized knowledge.” In most cases, the courts eschew the factors discussed above and instead recite the number of years of experience a police officer has, his current and prior job duties and assignments, and any special training that the officer has received.<sup>134</sup> This opinion from the United States Court of Appeals for the Second Circuit is typical:

Prior to his employment with the [Drug Enforcement Administration (“DEA”)] in 1988, [the testifying officer] had been a member of the Hartford Police Department for approximately seventeen years. His training and experience in narcotics investigations included six months at the Hartford Police Academy and several specialized courses in drug enforcement and investigating techniques. [He] had posed as an undercover officer for the Hartford Police Department, as both a buyer and seller of drugs, well over 600 times.<sup>135</sup>

Having recited the testifying officer’s pertinent specialized training and professional experience, the court then typically accepts the officer as an expert, assured that the officer’s background provides a solid foundation for opinion testimony. Further, Federal Rule of Evidence 703 allows experts to base their opinion on information that is reasonably relied upon by experts in that field, even if that information is inadmissible in the given case.<sup>136</sup> In the policing context, courts have credited “general training and experience, [and] discussions with other law enforcement officers” as information “reasonably relied upon by experts in the law enforcement field.”<sup>137</sup> The underlying assumption is explicit: it is reasonable to rely on the information generated by general training and experience and discussions with other officers.

For many of the most common types of officer testimony, however, this approach is problematic; police training cannot, in a great many cases, support the inference of reliability that expert qualification demands. Much of police training comes in the form of verbal instruction, a series of anecdotes passed along by more senior officers. Some are first-hand accounts, some are second-hand, and some have passed through so many hands that it is appropriate to refer to them not as an

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134. *United States v. Flores-De-Jesús*, 569 F.3d 8, 21–22 (1st Cir. 2009); *United States v. Mejia*, 545 F.3d 179, 186–99 (2d Cir. 2008); *United States v. Gwynn*, 82 F. App’x 787, 788 (4th Cir. 2003); *United States v. Velasquez*, 271 F.3d 364, 366–69, 372–74 (2d Cir. 2001); *Smith v. United States*, No. 1:09-cv-00533, 2012 WL 3929943, at \*11 (D. Del. Sept. 7, 2012).

135. *Velasquez*, 271 F.3d at 367.

136. FED. R. EVID. 703.

137. *United States v. Steed*, 548 F.3d 961, 975 (11th Cir. 2008).

account or even a series of accounts, but rather as part of an oral tradition within the law enforcement culture. This oral tradition serves multiple purposes—it is, as one scholar has observed, “a sanity-preserver, social glue, [and] a type of survival handbook”<sup>138</sup>—but the relevant aspect for this article is the prominent role that storytelling plays in police training. In this context, shared experiences and stories from more senior officers take on a patina of veracity that becomes a mechanism of carrying “cop knowledge” from the station house into the courtroom.

This is particularly acute given the heavy weight that the police culture puts on learning from more experienced officers who have “been there and seen it.” Learning from the stories and verbal guidance offered by older peers is the primary method by which a new officer learns the way things are done. The most popular police training books are widely praised within law enforcement circles precisely because they use stories and anecdotes from the street as support for various points.<sup>139</sup> In the world of police training, anecdotes rule. If it does not originate from the lived experience of some officer somewhere, knowledge that has been reduced to manuals and training guides is discounted. This is particularly true with mandatory training materials such as those that a police recruit or officer candidate receives at a police academy. A rookie police officer hears variations on the phrase “forget everything you learned in the academy” with astounding frequency, both when they are in the academy itself<sup>140</sup> and certainly once they have graduated from the acad-

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138. Connie Fletcher, *Listening to Narratives: The Dynamics of Capturing Police Experience*, 13 INT'L J. LISTENING 46, 47 (1999).

139. For example, the first paragraph of the introduction to Remsberg's *The Tactical Edge: Surviving High-Risk Patrol* sets the stage for a discussion of the importance of officer survival training with two graphic pictures, one of dead officers and one of a bloodstained patch of road next to an empty police car, and the following text:

Back before officer survival got the attention it does today, four California Highway Patrolmen were gunned down one night during a traffic stop involving two ex-convicts with bank robbery on their minds. Later the offender who started the shooting reflected on the first victim: “He got careless, so I wasted him.”

CHARLES REMSBERG, *THE TACTICAL EDGE: SURVIVING HIGH-RISK PATROL 1* (1986) [hereinafter *THE TACTICAL EDGE*]. Although not explicitly identified, the incident being described is known as the Newhall massacre of April 1970. The book is replete with this and other stories and references, but it fails to include any citation for this or any other event that it describes. Remsberg's later books follow the same convention. See CHARLES REMSBERG, *BLOOD LESSONS: WHAT COPS LEARN FROM LIFE-OR-DEATH ENCOUNTERS* (2008); CHARLES REMSBERG, *TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY & OFFICER SURVIVAL* (1995); CHARLES REMSBERG, *STREET SURVIVAL: TACTICS FOR ARMED ENCOUNTERS* (1980). Similarly, a guide on “reality based training” makes a point of demonstrating the dangers of an improperly run training program by providing a list of twelve anecdotes of training accidents, none of which have accompanying citations. 1 KENNETH R. MURRAY, *TRAINING AT THE SPEED OF LIFE 9–10* (2006).

140. A 2005 post on a forum for law enforcement officers is instructive. In it, the original contributor, then in the police academy, notes that the academy instructors are telling the would-be officers that they “have to do this by the book,” but that a field training officer will have them

emy and are in training at a specific police department.<sup>141</sup> The phrase and the concept behind it are not just empty words; in the wake of the Rodney King beating, the Los Angeles Police Department was dismayed by the “chasm between what recruits are taught at the Police Academy about the proper use of force and what they learn[ed] from training officers in the field.”<sup>142</sup> Academy training, it seems, was viewed by field training officers as too removed from the “real world” to be a good model for new officers.

This emphasis on learning from real world experiences, as opposed to formalized police training, is even more powerful in the context of privileging knowledge that originated within the law enforcement community over information that originates outside of it. As David Harris put it in the context of police skepticism of externally-imposed evidence reforms, like sequential line-ups, “[P]olice believe that they have special, experience-based and intuitive knowledge that those outside their occupational circle neither share nor understand.”<sup>143</sup> Laboratory experiments are derided or dismissed, and the observations of psychologists and other scholars who study police interactions and procedure are discounted for being divorced from the experiential knowledge collected by generations of police officers.<sup>144</sup>

This is not to suggest that “cop knowledge” always gets it wrong—that certainly is not the case. A great deal of accurate factual knowledge is developed from repeated observations. But the system of information dissemination within the law enforcement community renders verification difficult in many cases, opening the door to inaccuracy and unreli-

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change the way they do things “once [they] are out of the academy.” The first respondent points out that the “academy instructors are required to provide you information in a certain way to avoid vicarious liability and failure to properly train litigation,” but he goes on to note that the academy instructors “know damn well that you will be doing things different [sic] once you get out on the street.” Cat\_Doc, Comment to *Academy vs. FTO Procedures*, REAL POLICE (Sept. 2, 2005, 2:53 AM), <http://www.realpolice.net/forums/ask-cop-112/39066-academy-vs-fto-procedures.html>.

141. See, e.g., Mark Malmin, *Changing Police Subculture*, FBI L. ENFORCEMENT BULL., Apr. 2012, at 14, available at <http://leb.fbi.gov/2012/april/leb-april-2012> (“Sometimes, [field training officers (“FTO”)] tell recruits that they should forget everything they learned in the academy because their FTO will teach them about ‘real’ police work—including the subculture.”); Matthew D. Bostrom, *The Influence of Higher Education on Police Officer Work Habits*, POLICE CHIEF (Oct. 2005), [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=722&issue\\_id=102005](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=722&issue_id=102005) (“[W]hen officers enter the field training program, they are often assigned to work with veteran officers who utter statements similar to ‘Forget about what you learned in the academy, kid. Things are different in real life.’”).

142. Ted Rohrlich, *LAPD Seeking to Improve Rookies’ Training?: Police: The Common Advice from Field Officers to ‘Forget Everything You Learned at the Academy’ Is Subverting Teaching on Restraint in the Use of Force, Administrators Say*, L.A. TIMES (Sept. 17, 1991), [http://articles.latimes.com/1991-09-17/local/me-2874\\_1\\_field-training-officers](http://articles.latimes.com/1991-09-17/local/me-2874_1_field-training-officers).

143. HARRIS, *supra* note 58, at 67.

144. *Id.*

ability. As a result, cop knowledge is often a confusing amalgam of accurate and inaccurate information. For example, officers are trained to look for threats in part by looking at a person's hands.<sup>145</sup> That makes sense; the vast majority of weapons that an officer may encounter will either be the hands themselves (curled into fists) or held in a hand. But not all of the cop knowledge that an officer is imbued with is so straightforward. In the March 2014 issue of the *American Bar Association Journal*, for example, the president of the New York City Patrolmen's Benevolent Association described how easy it was for officers to articulate reasonable suspicion for a *Terry* frisk. "For instance," he said, "when you have a person who is carrying a weapon, they tend to be heavy on one side. They're nervous and repeatedly tap the area."<sup>146</sup> There was, not surprisingly, no substantiation for this statement. At the February 2014 Symposium hosted by the *University of Miami Law Review*, Judge John Gleeson referred to a similar statement made in his courtroom by an officer who stopped and frisked a defendant based on the distinctive way that the defendant stepped up onto a curb. That manner of stepping onto a curb, the officer had read, indicated that the individual was carrying a weapon in the waistband. And, sure enough, the officer found a weapon on the defendant. When Judge Gleeson asked the officer how many people who stepped onto a curb that particular way actually had a weapon, the officer responded that he had conducted something of an experiment to answer that exact question, counting the number of people with the distinctive step who did and did not have a weapon. Of the roughly fifty people that the officer stopped for taking that distinctive step onto a curb, only one was armed.<sup>147</sup>

Questionable cop knowledge is not limited to identifying armed individuals, of course. Similar assertions can be found in many different areas of police training, and there are any number of beliefs that may not bear the weight of serious scrutiny,<sup>148</sup> from accurately identifying decep-

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145. Paul Howe, *Tactical Shooting: How to Find the Right Tactical Shooting System for Your Agency*, POLICEONE.COM (Feb. 1, 2007), <http://www.policeone.com/police-products/firearms/articles/1204309-Tactical-Shooting-How-to-find-the-right-tactical-shooting-system-for-your-agency/>; Henry Lee, *Agencies Investigate Blue-on-Blue Shootings in Wake of Tragedy*, POLICEONE.COM (Jan. 27, 2014), <http://www.policeone.com/investigations/articles/6770325-Agencies-investigate-blue-on-blue-shootings-in-wake-of-tragedy/>.

146. Stephanie Francis Ward, *Stopping Stop and Frisk*, A.B.A. J., Mar. 2014, at 38, 44, available at [http://www.abajournal.com/magazine/article/has\\_stop\\_and\\_frisk\\_been\\_stopped/](http://www.abajournal.com/magazine/article/has_stop_and_frisk_been_stopped/).

147. Hon. John Gleeson, *University of Miami Law Review Symposium: Leading from Below: Panel 3—Criminal Procedure in the Courtroom*, U. MIAMI SCH. L. (Feb. 15, 2014), at 21:15–23:15, [http://www.law.miami.edu/webcast/video.php?location=departments&stream=201402\\_14-15\\_UMLawReviewSymposium\\_Panel3.mp4&width=480&height=270&page=](http://www.law.miami.edu/webcast/video.php?location=departments&stream=201402_14-15_UMLawReviewSymposium_Panel3.mp4&width=480&height=270&page=).

148. Shima Baradaran, for example, has called into question the long-standing assumptions, made by both cops and courts, about the relationship between drugs and violence. Shima

tion during an interrogation<sup>149</sup> to predictably reducing the duration of hostage situations.<sup>150</sup> For police expert testimony, this presents a problem; we would not qualify a witness to testify as an expert based on information he learned from Wikipedia, but in the policing context we are more willing to tolerate information gleaned from the in-person equivalent, what we might reasonably call Cop-ikipedia. Worse yet, questionable information delivered as officer training can lead to the creation of a series of self-fulfilling prophecies. When a police officer who has been trained to look for someone tapping their waistband or stepping up onto a curb in a specific way stops someone and finds a firearm, for example, their training is validated by personal experience. When the individual is *not* armed, however, the trained officer's cognitive bias kicks in;<sup>151</sup> it becomes almost impossible for the officer to view the incident as a failure of the technique itself. Instead, the officer may conclude that the individual is *used to* carrying a weapon and so exhibited the same behavioral symptoms, or perhaps the officer will assume that he (the officer) misinterpreted the individual's behavior and so misapplied a perfectly valid technique.

The criticism that police ignore the evaluative import of false positives is not new; the same observation has been made in the context of interrogations<sup>152</sup> (the Reid technique, the most popular law enforcement interrogation method, claims that, properly used, it simply does not produce false confessions<sup>153</sup>), fingerprint identification<sup>154</sup> (“the friction ridge [analysis] community actively discourages its members from testifying in [probabilistic] terms . . . ; when a latent print examiner testifies that two [fingerprint] impressions ‘match,’ they are communicating the notion that the prints could not possibly have come from two different

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Baradaran, *Drugs and Violence*, S. CAL. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414202).

149. See HARRIS, *supra* note 58, at 40–47; Gary I. Wilson, *Perspective on Neurolinguistic Programming (NLP)*, POLICE CHIEF, Dec. 2010, at 40, 40–51, available at <http://www.nxtbook.com/nxtbooks/naylor/CPIM1210/#/40>.

150. See, e.g., THE TACTICAL EDGE, *supra* note 139, at 174 (“Some researchers claim that the average barricading (with hostages) lasts about 12 hours. But with good psychological skills, you usually can at least get the talk turned toward alternative solutions to the suspect’s problem within one to three hours.”) (emphasis omitted).

151. For a thorough explanation of the multiple causes of cognitive bias in criminal justice, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–31 (2006).

152. HARRIS, *supra* note 58, at 40–47; CONVICTING THE INNOCENT, *supra* note 58, at 14–45.

153. See *Interrogation*, JOHN E. REID & ASSOCIATES, INC., [http://www.reid.com/educational\\_info/criticinterrogation.html](http://www.reid.com/educational_info/criticinterrogation.html) (last visited Sept. 13, 2014) (addressing criticisms of various interrogation methods and explaining how correctly using the Reid method can help to avoid false or coerced confessions).

154. See CONVICTING THE INNOCENT, *supra* note 58, at 106–09; HARRIS, *supra* note 58, at 24–30.



individuals”<sup>155</sup>), police canines,<sup>156</sup> and other aspects of criminal investigations.<sup>157</sup> When viewed in the context of expert testimony, it is worth remembering that an officer’s years of experience are shaped by and viewed through the training that an officer receives—including the good, the bad, and the ugly.

I cannot, I must confess, offer some elegant solution to the problem of reliability in police training, an easy-to-apply rule that will guide courts to admit officer opinion testimony only when it is grounded in a reliable foundation. I will leave it to evidence scholars to draw more precise lines in the murk that seems to swirl around Federal Rules of Evidence 701 and 702. I, myself, think that in this area, as in other areas of police regulation, courts, prosecutors, and defense attorneys “must still slosh [their] way through the factbound morass” of each individual case.<sup>158</sup> But that acknowledgement does not reduce the potential impact of looking beyond the bare assertion of an officer’s years of service and attendance in general or specialized training programs. By rejecting opinion testimony based on unreliable or questionable training, courts encourage police agencies to improve their training. While most individual officers are neither personally nor professionally vested in obtaining convictions,<sup>159</sup> evidentiary rulings can prompt police reform by leveraging the commitment to professionalism that incentivizes law enforcement officers and agencies to do things the “right” way. If an officer, particularly one who has previously been accepted as an expert or who hopes to testify as such in future cases, is told that his training is insufficiently reliable to support the opinion he seeks to offer, or if an agency is informed by judges, prosecutors, or officers that they need to improve the quality of their training so officers can retain the distinction of being experts, the end effect may well be an improvement in officer training that leads not just to more reliable testimony, but also to better policing.

#### IV. CHALLENGES TO POLICE REFORM THROUGH EVIDENTIARY RULINGS

The prior Part described how evidentiary rulings could help improve modern policing, using the example of police lay and expert

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155. See NAT’L RESEARCH COUNCIL, *supra* note 58, at 141–42.

156. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (Souter, J., dissenting) (questioning the “assumption that trained sniffing dogs do not err”). *But see* *United States v. Diaz*, 25 F.3d 392, 395–96 (6th Cir. 1994) (“[A] very low percentage of false positives is not necessarily fatal to a finding that the drug detection dog is properly trained and certified.”).

157. See Findley & Scott, *supra* note 151, at 296–307.

158. *Scott v. Harris*, 550 U.S. 372, 383 (2007) (rejecting the general adoption of brightline rules in the context of determining reasonableness under the Fourth Amendment).

159. Stoughton, *supra* note 2, at 876–82.

opinion testimony. I concluded optimistically, suggesting that police agencies and officers could be responsive to evidentiary rulings in a way that has the potential to meaningfully change police training, practices, and culture. Despite the reasons for optimism, however, there are also theoretical and practical challenges to reforming police through evidentiary rulings. In this Part, I address those challenges.

#### A. *Assumptions of Institutional Competence*

The most obvious starting place for legal scholars may be the institutional objection: perhaps trial judges are well suited to make rulings in individual cases, but provoking more systemic police reform is far outside their ken. In short, my ambitions for police reform through evidentiary rulings rest on two assumptions about the judicial role that some legal thinkers find objectionable.<sup>160</sup> First, that engaging in judicially-driven police reform is a legitimate exercise of judicial authority; and, second, that judges are capable of competently exercising what authority they have to reform police agencies. Judges, so the argument would go, should not be able to impose on law enforcement agencies their own vision of acceptable police tactics—which are better left to the executive agencies—or permissible police strategies—which are better left to decisionmakers in the legislative branch. This is true for several reasons, not least because judges are not in a position to manage the implementation of the reforms they impose. Further, judges must be careful not to undermine the adversarial system by effectively coopting a

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160. I acknowledge at the outset the limitations of that phrasing, which intentionally abstracts away from a wide literature encompassing a long history of contentious debates among scholars, judges, and politicians about the propriety, or lack thereof, of judicial activism. No single footnote can hope to encompass the many dimensions of these spirited debates, and I will not make any attempt to do so here, but it would be inexcusable to not provide at least a few citations. For a general background on the chimeric definition of “judicial activism,” see Kennan D. Kmiec, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441 (2004). For empirical work, see STEPHANIE A. LINDQUIST & FRANK B. CROSS, *MEASURING JUDICIAL ACTIVISM* (2009); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1 (2011). For a sense of the debate about the relative costs and benefits of judicial activism, see Frank M. Johnson, Jr., *In Defense of Judicial Activism*, 28 EMORY L.J. 901 (1979); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012); J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968); Suzanna Sherry, *Why We Need More Judicial Activism* (Vanderbilt Public Law, Working Paper No. 13-3) (forthcoming 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2213372](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213372). For a discussion of judicial activism by state supreme courts, see Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982). For the political dynamics of judicial activism, see Geoffrey R. Stone, *Selective Judicial Activism*, 89 TEX. L. REV. 1423 (2011), as well as Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 COLO. L. REV. 1401 (2002), and other articles from a 2002 *University of Colorado Law Review* Symposium entitled “Conservative Judicial Activism.”

defense attorney's opportunity to challenge—or, for strategic reasons, to *not* challenge—the qualification of a prosecution witness as an expert.<sup>161</sup>

I share many of the concerns that motivate such objections, but I do not believe that they should control in this context. This proposal is not about the direct regulation of police practices, but rather about the incidental regulation of police practices through the mechanism of evidentiary rulings.<sup>162</sup> The role of trial court judges does not change; they continue to make the same types of evidentiary determinations that they have been entrusted for years to make. And, while I am sensitive to the need to respect the adversarial system, the gatekeeping role that trial courts must fulfill does and should permit a significant amount of discretion for the judge to satisfy herself about the reliability of a putative expert's proffered opinions. My suggestion involves revising the level of attention and detail that judges bring to bear when they make evidentiary decisions that affect police, particularly those related to opinion testimony, but the essence of my proposal is well within the legitimate function and core competency of trial court judges. Indeed, my argument is that police agencies and officers are *already* responsive to evidentiary rulings such that judges who improve the quality of their evidentiary rulings may also improve the quality of police training, which in turn has the potential to improve the quality of policing.

### B. *Lack of Information Sharing*

When a judge does make an evidentiary ruling, law enforcement agencies must have both access to the ruling itself and the inclination to review the ruling before it can have any impact on police training or behaviors.<sup>163</sup> Unfortunately, it is rare for police departments to analyze and incorporate information developed during litigation into institutional decisionmaking, at least in the context of civil suits for police misconduct.<sup>164</sup> Police agencies, as a rule, are not attentive to the types of claims that are filed, the evidence developed during litigation, or even the outcomes of individual cases.<sup>165</sup> Those departments that do monitor civil litigation are often “stymied by technological glitches or human

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161. For prosecutors and defense attorneys both, this can be a very real concern. Civil procedure scholar Michael Morley was involved in a prosecution in which the judge asked literally hundreds of questions directly to witnesses, inducing at least one to substantively change their testimony. *See* Amended Appellant's Brief at 12, *Walker v. State*, No. 1490 (Md. Ct. Spec. App. 2009).

162. *See generally* Stoughton, *supra* note 4.

163. STEPHEN L. WASBY, *SMALL TOWN POLICE AND THE SUPREME COURT: HEARING THE WORD* (1976); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 *UCLA L. REV.* 1023 (2010).

164. Schwartz, *supra* note 163, at 1066–67.

165. *Id.* at 1057–59, 1066–67.

error . . . . And other [agencies] appear to be sabotaged by those hiding harmful information or maintaining the law enforcement ‘code of silence.’”<sup>166</sup> When this is true, there is unlikely to be any “connection between lawsuits filed [against a police department] and the discipline, supervision, and training of its officers.”<sup>167</sup>

Under existing practices, the situation may not be any better in the context of suppression hearings or other aspects of criminal cases. Individual officers are not commonly told that evidence that they or another officer seized in relation to an arrest has been suppressed. If they *are* told about the fact of suppression, they are unlikely to be told about underlying reasons for suppression.<sup>168</sup> And even when officers do have some information about both the fact of and the reasons for suppression, the general perception among law enforcement officers is that suppression is more attributable to failures in the legal system than it is to officer actions.

A 2010 discussion in an Internet forum on the popular police website Officer.com is demonstrative. A relatively inexperienced officer opened a thread about a pending suppression hearing in an underage possession of alcohol case, asking, “And if I do lose will this hurt my reputation overall?”<sup>169</sup> The first response is representative; it begins, “Things get suppressed all the time, often due to legal wrangling that has nothing to do with you or how you did the job.”<sup>170</sup> Another user was equally blunt, writing, “Welcome to the court system . . . you [sic] win some, you lose some . . . often through no fault of your own.”<sup>171</sup> Other posters agreed, suggesting that there will be reputational damage only if the officer lies under oath or if the stop that lead to the seizure was blatantly illegal. In short, although the individual officer was advised to treat suppression as a “learning experience,” no one expected suppres-

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166. *Id.* at 1060.

167. *Id.* at 1048 (writing specifically about the Philadelphia Police Department). This conclusion is not inevitable. In other work, Schwartz has described the potential for police departments to gather litigation information that can be incorporated into policy and procedure decisions. See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 *CARDOZO L. REV.* 841 (2012).

168. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 *MIL. L. REV.* 211, 229–30 (2012); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 *EMORY L.J.* 937, 953 (1983); see also Schwartz, *supra* note 163, at 1045–52.

169. Thin Blue Line, *Ever Had Something Suppressed?*, OFFICER.COM (Jan. 21, 2010, 7:19 PM), <http://forums.officer.com/t138969/>.

170. SRT936, Comment to *Ever Had Something Suppressed?*, OFFICER.COM (Jan. 21, 2010, 7:26 PM), <http://forums.officer.com/t138969/>.

171. JLee, Comment to *Ever Had Something Suppressed?*, OFFICER.COM (Jan. 22, 2010, 3:02 AM), <http://forums.officer.com/t138969/>.

sion to occasion any formal, let alone systemic, response.<sup>172</sup>

For evidentiary rulings to live up to their potential to affect officer training and behavior, an information-forcing mechanism may prove essential. I see three possibilities, all of which could complement each other. First, a trial court judge could enter an order having the clerk of the court forward to the appropriate party a copy of the opinion or, if there is no written opinion, a copy of the transcript of the judge's reasoning from the bench. I would think that sending a copy to the individual officer would not prove terribly effective, but providing a copy to the training division, a high-level supervisor in charge of operations, or an internal affairs or quality assurance unit would be one way of providing useful information to individuals with institutional interests.

Second, the prosecutor's office could take the same tack; where prosecutors now provide officers with very little information or even no information at all about case dispositions,<sup>173</sup> providing that information not just to the officers themselves but to the relevant offices within the police structure may motivate meaningful change. The prosecutorial interest in obtaining convictions—which has led at least one office concerned about evidentiary considerations to track police officers that prosecutors “do not trust as witnesses in criminal trials”<sup>174</sup>—provides an incentive for prosecutors to push for changes in training that courts deem insufficiently reliable.

Finally, law enforcement agencies themselves could proactively solicit information from courts and prosecutors. Some departments have taken an active approach to gathering litigation information and incorporating that information into their decisionmaking processes,<sup>175</sup> but none that I am aware of have yet adopted policies that regularly gather infor-

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172. Interestingly, several users observed that, even if the evidence *was* suppressed (and, implicitly, the prosecution unsuccessful), the arresting officer should not consider it a loss because the arrest itself had punished the suspect and served law enforcement goals. As one user put it, “The person still took a ride, had to pay a lawyer etc and you probably got someone off the streets for the night that should not have been driving after drinking.” Zeitgeist, Comment to *Ever Had Something Suppressed?*, OFFICER.COM (Jan. 21, 2010, 10:21 PM), <http://forums.officer.com/t138969/>. Another user agreed, writing, “Even if [the prosecution] is tossed, the defendant is about \$5k into his attorney and you're [getting paid] overtime.” Blatant, Comment to *Ever Had Something Suppressed?*, OFFICER.COM (Jan. 22, 2010, 5:16 AM), <http://forums.officer.com/t138969/>.

Scholars have long noted that arrest can be a tool to advance an interest other than criminal conviction. See Stoughton, *supra* note 2, at 881–82; WAYNE R. LAFAYE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437 (Frank J. Remington ed., 1965). It is uncommon to see open acknowledgements that arrests and prosecutions can be punishment in themselves.

173. Stoughton, *supra* note 2, at 880–81.

174. Jeff McDonald, *DA Keeps Secret List of Bad Cops*, UT SAN DIEGO (July 26, 2014, 11:31 AM), <http://www.utsandiego.com/news/2014/jul/26/da-secret-brady-list-bad-cops/>.

175. Schwartz, *supra* note 163, at 1052–71.

mation from evidentiary rulings, let alone use that information to make training decisions. Even given the limited nature of individual officers' interest in obtaining convictions, the information-gathering function could align with a department's interest in demonstrating its commitment to professionalism.

### C. *The Limited Opportunities for Police Reform*

Even when police agencies do have access to information about evidentiary rulings and are willing to incorporate that information into their training regimens, it is important to note the limits of using evidentiary considerations as a mechanism for police reform. After all, most of what police actually do never makes it into court and therefore is not subject to any evidentiary considerations. This observation can be counterintuitive, especially for lawyers and legal scholars who, by virtue of legal training grounded in judicial opinions and constitutional principles, are focused on litigation-driven reform. According to the 2008 data collected by the Federal Bureau of Investigation and the Bureau of Justice Statistics, roughly 885,000 federal, state, and local officers made a total of just over 14 million arrests,<sup>176</sup> or approximately fifteen each that year.<sup>177</sup> With an average of just over one arrest every month, officers clearly have to be spending most of their time doing something other than arresting people. Some of that time is spent on investigations,<sup>178</sup> traffic stops, detentions, frisks, searches, and other activities that implicate constitutional, statutory, or common law concerns and so could conceivably get into court in a civil claim under 42 U.S.C. § 1983 or one of the various state law analogs, even though most interactions are not the subject of any litigation whatsoever. But most of policing is not subject to judicial review, including an officer's decision to patrol a particular neighborhood more or less heavily, to check only some of the businesses on a street, to arrest some people but not others, to "unarrest" someone in exchange for information, to interview some witnesses instead of

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176. See Brian A. Reaves, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 (2011), available at <http://www.bjs.gov/content/pub/pdf/cslea08.pdf>; Brian A. Reaves, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008 (2012), available at <http://www.bjs.gov/content/pub/pdf/fleo08.pdf>; Table 29, 2008 CRIME IN THE UNITED STATES, FED. BUREAU INVESTIGATION, [http://www2.fbi.gov/ucr/cius2008/data/table\\_29.html](http://www2.fbi.gov/ucr/cius2008/data/table_29.html) (last updated Sept. 2009).

177. Obviously, this rough estimate should not be taken as accurate; one could reasonably assert that local officers make far more arrests than their federal counterparts.

178. For an interesting study on the average number of hours needed for officers at one Florida agency to close various types of investigations, see WILLIAM PRUMMELL, FLA. DEP'T OF LAW ENFORCEMENT, ALLOCATION OF PERSONNEL: INVESTIGATIONS, available at <http://www.fdle.state.fl.us/Content/getdoc/34d5daa2-28ca-4381-be9a-f2d084208e89/prummell-bill-final-paper-%281%29.aspx> (last visited Nov. 7, 2014).

others, to credit some witnesses over others, to write a report in a particular way, et cetera. Formal manpower studies have found that most of any given officer's time is spent performing tasks that are extremely unlikely to lead to any sort of litigation: performing administrative actions, providing non-enforcement services, and the like.<sup>179</sup> The opportunity to use evidentiary considerations to reform police training and behavior is admittedly limited when the desired reform is unrelated to criminal prosecution or civil litigation that officers may be involved with. But this observation does not weaken the observation that important aspects of police training and behavior—reasonable suspicion determinations, the decision to use force and the choice of force options to use, officer safety tactics, et cetera—are responsive to evidentiary considerations.

A related concern involves the possibility of police gamesmanship. Police officers have inarguably picked up on the fact that formulaic language can often satisfy a court about the propriety or validity of a particular action. Judges have themselves noted the apparent ability of officers, for example, to describe almost any given action as “suspicious.”<sup>180</sup> Officers have developed verbal templates, typically based on case law, that they use and reuse not just in their own testimony, but also in search and arrest warrant applications. When the template language accurately conveys the facts and nuances of each individual case, there is very little to object to; many attorneys do something similar in their briefs and many judges do much the same in their opinions. There is always the risk, however, that adopting a particular form of presentation as reliable will “lead to the substitution of words for analysis.”<sup>181</sup> To a significant extent that has already happened in police testimony; recall my criticism that courts tend to qualify officers as experts after a cursory

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179. See, e.g., FIONA MCLEAN & JOE HILLIER, NPIA, AN OBSERVATIONAL STUDY OF RESPONSE AND NEIGHBOURHOOD OFFICERS (2011), available at [http://whatworks.college.police.uk/Research/Documents/An\\_observational\\_study\\_of\\_response\\_and\\_neighbourhood\\_officers.pdf#search=fiona%20mclean](http://whatworks.college.police.uk/Research/Documents/An_observational_study_of_response_and_neighbourhood_officers.pdf#search=fiona%20mclean); STEPHEN D. MASTROFSKI ET AL., POLICING NEIGHBORHOODS: A REPORT FROM INDIANAPOLIS (1998), available at <https://www.ncjrs.gov/textfiles/fs000223.txt>; Roger B. Parks et al., *How Officers Spend Their Time with the Community*, 16 JUST. Q. 483, 499 (1999); John A. Webster, *Police Officers Spend Nearly Half Their Working Day on Paperwork and Meetings*, DAILY MAIL (Apr. 28, 2010, 2:31 PM), <http://www.dailymail.co.uk/news/article-1269405/Police-officers-spend-nearly-half-working-day-paperwork-meetings.html>.

180. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (“[T]he officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and getting out and accosting him he noticed that Broomfield was ‘star[ing] straight ahead.’ Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, ‘furtive.’ Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you.”).

181. *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (criticizing the Court's application of the “reasonable expectation of privacy” analysis).

recitation of their years of service, assignments, and training.<sup>182</sup>

Nor is bland recounting of an officer's tenure and training the only example of form over substance. Another common example is the use of the phrase "furtive movements," often offered as support for an investigatory stop or frisk. By using that particular phrase, officers may be obscuring, rather than describing, the actions that gave rise to their suspicion. "Furtive" literally means "[a]ttempting to avoid notice or attention" or "suggestive of guilty nervousness."<sup>183</sup> In police circles, "furtive" has taken on a different meaning; well-known lethal force trainer Massad Ayoob described "a furtive movement" as "a movement reasonably consistent with going for a weapon and not reasonably consistent with anything else under the circumstances."<sup>184</sup> Regardless of which definition officers are trying to employ, it remains, as Judge Shira Scheindlin observed in her remarks at the Symposium, a "vague or subjective" standard on which to base an investigatory detention.<sup>185</sup> Without additional explanation, the phrase does not provide meaningful information that could be used to weigh the reasonableness of a particular stop or frisk.

Similarly, the use of the phrase "high crime area"—another phrase commonly used to support the reasonableness of a particular police action—has multiple dimensions of vagueness. It fails to provide any meaningful description of the relevant "area." It could mean a particular intersection, neighborhood, or, as Judge Scheindlin suggested, describing the testimony of an officer in her courtroom, "The entire borough of Brooklyn."<sup>186</sup> Further, it fails to distinguish "high crime" areas from areas with only moderate crime, or seasonal crime, or crime that, while frequent, is limited to a small set of criminal offenses. Without that information, the description of a particular place as a "high crime area" is manifestly empty of meaning. The same criticism applies to the non-descriptive identification of any given action as "suspicious." As the United States Court of Appeals for the Seventh Circuit noted, "Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you."<sup>187</sup> Officers commonly refer to their "training and experience" to provide some substance for their description of some-

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182. See *supra* note 134 and accompanying text.

183. OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/furtive](http://www.oxforddictionaries.com/us/definition/american_english/furtive) (last visited Jan. 15, 2015).

184. Massad Ayoob, *Skulking in the Vestibule*, GUNS MAG., Jul. 1, 2000.

185. Shira A. Scheindlin, *Judicial Fact-Finding and the Trial Court Judge*, 69 U. MIAMI L. REV. 367 (2015).

186. *Id.*

187. *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005).



thing as furtive or suspicious and for their identification of a high crime area, but that foundation has become as vacuous a concept as “furtive,” “suspicious,” and “high crime area” themselves. The possibility, even the probability, of officers adopting formulaic language as a method of satisfying the court’s determination of expertise is a very real one, but one that can only be addressed with what Harry Potter fans might call “constant vigilance!”<sup>188</sup>

#### V. CONCLUSION

This article is an entry in the ongoing conversation about going beyond the exclusionary rule and the threat of civil liability in the search for legal mechanisms that will promote police reform. In it, I argued that law enforcement agencies are responsive to evidentiary considerations such that a trial court judge’s evidence ruling, where properly communicated, has the potential to affect officer training that shapes police culture. There are limitations, some obvious and some less so, but those limitations do not obviate the possibility of using evidentiary rulings to affect important aspects of policing.

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188. J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* 213 (2000). Many readers will misattribute this quote to Alastor “Mad Eye” Moody; close readers will properly attribute this quote to Bartemius “Barty” Cough, Jr., who repeated it on multiple occasions while using polyjuice to disguise himself as Mad Eye Moody. I leave it to the reader to determine for themselves the propriety of urging judges to follow the advice of a Death eater disguised as a paranoid ex-Auror.