

Is the Exclusionary Rule Obsolete?

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Working for Justice Harry Blackmun was one of the great privileges of my life, so I am especially pleased and honored to be here today to deliver the third annual Blackmun Lecture. I thank the Moritz College of Law for creating this wonderful tribute to Justice Blackmun and for allowing me to be part of it this year.

I want to talk today about a celebrated hallmark of Justice Blackmun's jurisprudence and about the future of a rule that has served for over four decades as a cornerstone of criminal procedure law. The hallmark is the attention Justice Blackmun insisted on paying to the "real world."¹ The cornerstone is the Fourth Amendment exclusionary rule—the doctrine that generally prevents prosecutors from introducing evidence obtained in unconstitutional searches or seizures. This is the rule that—as a general matter—makes domestic wiretap evidence inadmissible if the police fail to get a warrant,² that—as a general matter—blocks the use of a confession if it followed an illegal arrest,³ and that—as a general matter—stops the government from introducing a gun the police found by frisking someone without just cause.⁴ The rule has lots and lots of exceptions,⁵ but since the 1960s it has been the most widely invoked, and certainly the most famous, remedy for police illegality.

In a recent, remarkable decision, though, a majority of the Supreme Court endorsed the view that the exclusionary rule has outlived its usefulness. Developments in law enforcement since the 1960s, the Court suggested, have drastically undercut any need for the rule. Now, skepticism about the exclusionary rule is nothing new, even in Supreme Court opinions. Justice Blackmun himself

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¹ See, e.g., LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005); Heidi Kitrosser, *Constitutional Interpretation and the "World Out There": An Introduction to the Symposium*, 72 *BROOK. L. REV.* 1, 2 (2006); Harold Hongju Koh, *A Tribute to Justice Harry A. Blackmun*, 108 *HARV. L. REV.* 20 (1994).

² See *Katz v. United States*, 389 U.S. 347, 359 (1967).

³ See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 101 (1990); but cf. *New York v. Harris*, 495 U.S. 14, 21 (1990).

⁴ See, e.g., *Florida v. J.L.*, 529 U.S. 266, 274 (2000).

⁵ See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 *MICH. L. REV.* 2466, 2504–27 (1996).

once stressed that the rule's scope should be "subject to change in light of changing judicial understandings about the effects of the rule outside the confines of the courtroom."⁶ Never before, though, has the Court suggested so strongly that changed circumstances have rendered the rule obsolete.

I want to give that suggestion the kind of scrutiny that I think Justice Blackmun would have wanted it to receive, examining how well the Court's assertions square with what we know about the real world of policing and criminal adjudication. Not to keep you in suspense, my conclusions will be these: The Court was right to suggest that policing has changed a lot since the 1960s. Those changes may in fact justify significant shifts in how we think about and regulate law enforcement. But they have not yet rendered the exclusionary rule superfluous, nor are they likely to do so anytime soon.

I. *HUDSON V. MICHIGAN*

The decision I will be talking about came in a case called *Hudson v. Michigan*.⁷ The actual holding was narrow. The issue was whether the exclusionary rule should apply to evidence found in a search conducted under a lawful warrant but marred because the police had entered the house too quickly after announcing their presence, thereby running afoul of the Fourth Amendment's "knock-and-announce" rule. The Court's negative answer was not particularly surprising.⁸

But Chief Justice Roberts, who voted with the majority, assigned the opinion-writing to Justice Scalia, and Justice Scalia wrote the kind of opinion that he tends to write these days. It was the sweep of his reasoning that made the case noteworthy. "We cannot assume," Justice Scalia said, "that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago."⁹ That would "forc[e] the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."¹⁰ Since the "heydays" of the exclusionary rule in the 1960s, Scalia pointed out, civil remedies for police illegality have expanded and grown more meaningful: liability under 42 U.S.C. § 1983, for example, has been extended to municipalities; a civil cause of action has been recognized for constitutional violations by federal law enforcement officials; and "[t]he number of public-

⁶ United States v. Leon, 468 U.S. 897, 928 (1984) (Blackmun, J., concurring).

⁷ 547 U.S. 586, 126 S. Ct. 2159 (2006).

⁸ Neither, though, was it inevitable. In fact the case may have come out differently had Justice O'Connor remained on the Court. *Hudson* was reargued after Justice Alito replaced Justice O'Connor, and there is some evidence the initial vote had gone the other way. See Karl Blanke, The Effect of Justice Scalia (June 27, 2006), <http://www.scotusblog.com/wp/uncategorized/the-effect-of-justice-alito/>.

⁹ *Hudson*, 126 S. Ct. at 2167.

¹⁰ *Id.*

interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.”¹¹

Justice Scalia stressed, too, what he called “the increasing professionalism of police forces,” and their “new emphasis on internal police discipline.”¹² We have “increasing evidence,” he said, “that police forces across the United States take the constitutional rights of citizens seriously.”¹³ Justice Scalia explained that modern police forces are better trained, better supervised, better disciplined, and—he said—“staffed with professionals.”¹⁴ Beyond that, there was “the increasing use of various forms of citizen review.”¹⁵ The bottom line, Justice Scalia concluded, was that controls on police illegality were “incomparably greater” today than in the 1960s.¹⁶

Four justices dissented from the decision in *Hudson*. Justice Kennedy, who voted with the majority, joined part but not all of Justice Scalia’s opinion, and declared in a short, separate concurrence that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”¹⁷ But the parts of Justice Scalia’s opinion that Justice Kennedy joined included the sweeping remarks about the ways in which expanding civil remedies and changes in American policing since the 1960s undercut the need for the exclusionary rule.

It is possible that the rhetoric in *Hudson* about how much things have changed was just a way to dress up a renewed assault on the exclusionary rule. Changed circumstances were only part of the Court’s reasoning in *Hudson*; the majority also suggested that even if the exclusionary rule made sense elsewhere, it did not make sense in the context of knock-and-announce violations.¹⁸ And since handing down *Hudson*, the Supreme Court has not returned to the theme of changes in policing—not even when placing limits on the exclusionary rule. Two weeks after deciding *Hudson*, for example, the Court ruled in a case called *Sanchez-Llamas v. Oregon*¹⁹ that the exclusionary rule does not apply to statements obtained from a foreign national arrested but not informed, as required by the Vienna Convention, that he has a right to have officials of his home country notified of his detention. Writing for the Court, Chief Justice Roberts had plenty of negative things to say about the exclusionary rule. It is a rule invoked “lightly,” he explained, and it applies only to

¹¹ *Id.* (citing, *inter alia*, *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), and *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc.*, 403 U.S. 388 (1971)).

¹² *Id.* at 2168.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 2170 (Kennedy, J., concurring).

¹⁸ For a good discussion of the other parts of the Court’s opinion, see Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH. L. REV. 1207 (2007).

¹⁹ 126 S. Ct. 2669 (2006).

“certain violations of the Fourth Amendment.”²⁰ Outside the United States, the Chief Justice noted, the rule has been “universally rejected.”²¹

This last claim, by the way, was something of an exaggeration. The Chief Justice was quoting an article by Professor Craig Bradley, and what Professor Bradley actually said was that outside the United States a rule of *broad, mandatory* exclusion for search and seizure violations is “universally rejected.” In contrast, there is considerable international support for the narrower principle that police illegality should *sometimes* result in the suppression of evidence, depending on a range of other factors.²²

But that is not what I wanted to point out about *Sanchez-Llamas*. What I wanted to point out is that the Court said nothing in *Sanchez-Llamas* about changes in policing. It did not cite, let alone quote, its decision two weeks earlier in *Hudson*. Nor has it returned since then to the arguments it advanced in *Hudson*. So maybe the bottom line of *Hudson* is not that policing has changed in ways that have made the exclusionary rule obsolete, but simply that conservatives still hate the exclusionary rule, and there are more of them now on the Supreme Court.

Perhaps. But Justice Scalia is perfectly capable of attacking the Warren Court head-on when he wants to. I am inclined to think we should take the reasoning in *Hudson* at face value. It may be that the justices would welcome a renewed assault on the exclusionary rule even if policing had not changed, but the fact remains that they chose to justify it in *Hudson* based on altered circumstances. Judging from *Hudson*, most of the members of the Supreme Court think that law enforcement has changed radically since the 1960s, and that the changes have seriously eroded the case for the exclusionary rule, regardless how strong that case used to be.

Even if that is not the Court’s view, I hope to convince you today that there is another reason to take *Hudson* seriously. Justice Scalia had his finger on something important. The police *have* changed since the 1960s, and mainly for the better. They have even changed in some promising ways that *Hudson* ignored. What I want to do in the remainder of my time with you today is canvas those changes, and then ask whether the Court was right in *Hudson* to call the continued wisdom of the exclusionary rule into doubt. I believe that is the kind of serious “real world” scrutiny Justice Blackmun would have wanted the Court’s suggestion to receive.

II. POLICING, THEN AND NOW

American policing has undergone three transformations since the 1960s. The first is the one Justice Scalia highlighted in *Hudson*: the strengthening of the *systems of accountability* under which the police operate. Those systems include,

²⁰ *Id.* at 2681, 2678.

²¹ *Id.* at 2678 (quoting Craig M. Bradley, *Mapp Goes Abroad*, 52 CASE W. RES. L. REV. 375, 399 (2001)).

²² *See* Bradley, *supra* note 21, at 399.

as Justice Scalia suggested, not only damages liability but also civilian review boards and internal affairs sections. They include, too, the consent decrees under which a number of large American police departments now operate. The second transformation, to which Justice Scalia alluded briefly in *Hudson*, is the change in *organizational philosophy*. Justice Scalia described this as increased “professionalism,” but it is more accurately characterized as a shift from a certain insular ideal of professionalism to a new ideal, or at least a new rhetoric, of “community policing.” The third transformation, which the Court largely ignored in *Hudson*, is the change in the *composition* of American police forces: the dramatic, although uneven and incomplete, diversification of the profession; the rising levels of education among officers; and the associated changes in the occupational culture of policing. Each of these changes could conceivably undercut the need for strong judicial oversight in the form of the exclusionary rule. So let me address each of the three transformations in turn.²³

A. *Systems of Accountability*

Justice Scalia was right in *Hudson* to suggest that systems of accountability for police misconduct have improved since the 1960s.²⁴ But the particular system Justice Scalia talked about most in *Hudson*—civil damage actions—is the one for which there is the least evidence of significant improvement.

There is a widespread sense that lawsuits against the police have steadily climbed since the 1960s, as restrictions on litigation of this kind have loosened. But the statistics are actually fairly limited, particularly for any year after 1980. It is obviously true, as Justice Scalia pointed out, that damages for police illegality became more available in 1971, when the Supreme Court held that federal officers could be sued for constitutional torts,²⁵ and in 1978, when the Court extended liability under 42 U.S.C. § 1983 to local governments with policies or customs that violated constitutional rights.²⁶ It is also clear that there are more lawyers around today than in the 1970s willing to sue the police for violating civil rights, and that the law has grown more complicated. In 1978, when Michael Avery and David Rudovsky published the first edition of their manual for police misconduct litigation, it stretched seventy-eight pages. The third edition, which came out last

²³ American policing has undergone a fourth important transformation over the past forty years: much of it has been privatized. Justice Scalia ignored this change, too, in *Hudson*, and I will ignore it as well—partly because it has fewer direct implications for how public law enforcement should be regulated, and partly because I have discussed those implications elsewhere. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) [hereinafter Sklansky, *The Private Police*]; David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89 (2006).

²⁴ And not just in the United States. See Christopher Stone, *Treating Police Accountability in Theory and Practice: From Philadelphia to Abuja and Sao Paulo*, 11 THEORETICAL CRIMINOLOGY 245 (2007).

²⁵ *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc.*, 403 U.S. 388 (1971).

²⁶ *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

year, is more than ten times as long. The introduction points out that in the 1970s “very few lawyers would even consider representation of persons who had civil rights claims against the police,” but that today “[c]itizens and lawyers are much more willing to seek relief in the courts for police misconduct.”²⁷

Justice Scalia quoted that language in *Hudson*. He did not quote what Avery and Rudovsky and their new co-author, Karen Blum, said next, which was this: “But the development of the law has not been linear. In certain respects it is now easier to challenge police misconduct in court *In other respects, it is far more difficult.*”²⁸ After *Hudson* was handed down, a footnote was added to this paragraph, calling Justice Scalia’s selective quotation “highly misleading.”²⁹ Chief among the new barriers to suing the police, of course, are the expanding doctrines of official immunity, which alone take Avery, Rudovsky and Blum more than 120 pages to describe. More and more, these doctrines look like the Blob That Ate Section 1983.

The growth trajectory is less ambiguous for another system of accountability Justice Scalia mentioned in *Hudson*: citizen review panels. Forty years ago, such bodies were non-existent in the United States. Early experiments with civilian review in the 1960s—in New York, in Philadelphia, and in a small handful of other cities around the country—had been killed off by implacable opposition from police unions. In fact, when police unionism, moribund since the early 20th century, began to resurface in the late 1960s, opposition to civilian review was one of its chief rallying cries.³⁰

Slowly but surely, though, citizen review boards began to appear again in the 1970s, and today there are more than a hundred such bodies around the country. They take a wide variety of shapes. Some of them independently investigate and adjudicate complaints filed by citizens against police officers, others monitor disciplinary procedures administered by uniformed personnel, and still others review police policies across the board and make recommendations for their improvement.³¹

Ironically, however, one of the reasons citizen review panels have spread so broadly is that they have almost always proven much more sympathetic to rank-and-file officers than the unions feared and than most of the original backers of the idea expected. Recently, the Federal Bureau of Justice Statistics [BJS] reviewed citizen complaints at the roughly 800 police departments around the country employing a hundred or more officers. A fifth of these agencies operated with a

²⁷ MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION*, at v (3d ed. 2007).

²⁸ *Id.* (emphasis added).

²⁹ *Id.*

³⁰ See, e.g., ROBERT M. FOGELSON, *BIG-CITY POLICE* 284–86 (1977); STEPHEN C. HALPERN, *POLICE-ASSOCIATION AND DEPARTMENT LEADERS: THE POLITICS OF CO-OPTATION* 87 (1974); JEROME H. SKOLNICK, *THE POLITICS OF PROTEST* 278–81 (Simon and Schuster 1969).

³¹ See SAMUEL WALKER, *POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT* (2001).

civilian complaint review board. Those agencies appeared to generate twice as many citizen complaints as the other agencies, adjusting for the number of officers in each department. But the complaints filed in jurisdictions with civilian review boards were sustained at only half the rate of complaints filed in the remaining jurisdictions. The end result was that the number of sustained complaints in the two groups, adjusting for the number of officers employed, appeared to be roughly equal.³²

Even taken at face value, that finding does not mean that citizen review panels are unimportant. They may be important symbolically. They may be important for transparency, and for building public confidence. If nothing else, the availability of citizen review seems to make people much more willing to come forward with complaints against the police, and that alone is significant. And aggregate statistics cannot tell us the difference that citizen review makes in extreme, high-profile cases. Nor do these statistics tell us anything about the effectiveness of citizen review bodies in spurring policy reform, as opposed to reviewing individual cases.

But what the statistics *do* suggest is that the introduction of citizen review does not increase the likelihood that an officer will face disciplinary sanctions for any given act of misconduct. It is only a suggestion. In theory, a constant volume of disciplinary sanctions could be disguising a drop in the level of violations, matched by an increase in the likelihood that any particular violation will be sanctioned. Citizen review boards may in fact be deterring violations. But that story is hard to square with the qualitative and anecdotal evidence we have about citizen review panels, most of which suggests that civilians involved in police discipline are, if anything, more reluctant to second-guess officers than are officers themselves.³³

In fact, the most important system of accountability in policing today is almost certainly the one that gets the least attention—internal affairs divisions. Of the 800 departments examined in the BJS study, roughly four-fifths had a separate division for investigating complaints against officers. Adjusting for the number of officers employed, those departments generated complaints against officers at almost *three times* the rate of departments without internal affairs divisions—and, once those complaints were generated, they were just as likely to be sustained as the complaints in those other departments.³⁴ The bottom line is that internal affairs divisions, much more so than civilian review boards, do seem to increase dramatically the likelihood that an officer will be disciplined for any given instance of misconduct.

This has been common knowledge in law enforcement management circles for decades. It has even penetrated the world of television police dramas, where

³² See MATTHEW J. HICKMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CITIZEN COMPLAINTS ABOUT POLICE USE OF FORCE 5 tbls.6 & 7 (2006).

³³ See, e.g., DOUGLAS W. PEREZ, COMMON SENSE ABOUT POLICE REVIEW 138 (1994).

³⁴ See HICKMAN, *supra* note 32, at 5 tbls.6 & 7.

the members of the “rat squad” regularly appear as by-the-book heavies. Unfortunately, we know very little about how internal affairs divisions actually work, or what makes them work best, or how much they have improved since the 1960s, or what kind of difference they are making. Scholars have almost entirely ignored internal affairs divisions. The reason, I suspect, is the nearly universal assumption that police simply cannot police themselves, and that it is foolish to imagine otherwise.

I want to return to that assumption a little later. First, though, I want to finish up our examination of new systems of police accountability by mentioning one other development since the 1960s: structural reform decrees. Twenty years ago, many people thought judicial injunctions were all but dead as a tool of police reform. The Supreme Court had used standing doctrine to block injunction actions against the police in Philadelphia and Los Angeles, and the one-two punch of *Rizzo v. Goode*³⁵ in 1976 and *Los Angeles v. Lyons*³⁶ in 1983 looked like they had delivered a knock-out. But nothing in those decisions prevented departments from voluntarily settling civil suits in part by agreeing to structural reform measures, including on-going, court-supervised monitoring. That is exactly what has happened in some notable cases, ranging from the *Handschu* litigation in New York³⁷ to the so-called *Riders* decree in Oakland, California.³⁸ Since 1995, the U.S. Department of Justice has also been authorized to sue local police departments for patterns and practices of civil rights violations. A handful of such cases, initiated under the Clinton Administration, also resulted in negotiated consent decrees, most notably in Los Angeles and in Washington, D.C.³⁹ Columbus, Ohio, was also sued by the Justice Department for its police practices, but the lawsuit was dropped after the police here implemented a range of reforms, including a substantial increase in the size of its internal affairs bureau.⁴⁰

³⁵ 423 U.S. 362 (1976).

³⁶ 461 U.S. 95 (1983).

³⁷ See *Handschu v. Special Servs. Div.*, 475 F. Supp. 2d 331 (S.D.N.Y. 2007) (reviewing history of the case).

³⁸ See, e.g., Janine DeFao, *Oakland Settles “Riders” Suits: Record \$10.5 Million Payout—Police Reforms Required*, S.F. CHRON., Feb. 19, 2003, at A1. See also Negotiated Settlement Agreement, *Delphine Allen v. City of Oakland*, No. C00-4599 TEH (JL) (N.D. Cal. 2004), available at <http://www.opdimt.net/32.html>.

³⁹ See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 33–36 (2003).

⁴⁰ See Robert Ruth, Mark Ferenchik & Kevin Mayhood, *Civil-Rights Suit Dropped*, COLUMBUS DISPATCH, Sept. 5, 2002, at 01A; Letter from Mayor Michael B. Coleman, Columbus, Ohio, to Ralph F. Boyd, Jr., Assistant Attorney General for Civil Rights, U.S. Department of Justice (Sept. 4, 2002), available at http://www.usdoj.gov/crt/split/documents/columbus_cole_boyd_letters.htm.

B. *Organizational Philosophy*

Let me now shift gears and address the second great transformation in policing over the past few decades: the shift in organizational philosophy from police professionalism to community policing.

Community policing is so over-hyped, and so ill-defined, that it is important to remind ourselves, periodically, that there really is a “there there.” For almost twenty years now, the “community policing” label has been slapped on virtually every innovative program mounted by any police department in the country—and on many so-called “programs” that really amount to business as usual. Part of what has happened, certainly, is that “community policing” has replaced “professional policing” as a fancy way of saying “good policing.” But the change in labels has also been accompanied by some changes in emphasis.

Two of these changes have been especially widespread and especially profound. The first is a decline, far from complete but still significant, in the self-conscious insularity of police departments—a decline, that is to say, in the ferocity with which police departments defend their independence and autonomy, insist on deference to their expertise, and refuse to look to outsiders for help or guidance.⁴¹ The second is a renewed appreciation of the ways in which criminal incidents are related to each other, and related to other community problems. This is something beat cops have always known, of course, but the kind of police professionalism that held sway in the 1950s and 1960s treated these kinds of patterns and connections as largely irrelevant to running a good police department, emphasizing instead the importance of bureaucratically efficient, centrally managed responses to individual incidents.⁴²

Community policing has meant all kinds of things, from bicycle patrols and community outreach, to crackdowns on “quality of life” offenses, to CompStat-style exercises in supervisory accountability. What links these programs together is that, in widely different ways, they all try to take communities more seriously: to take seriously the idea that the police need to work with the communities they patrol, and to take seriously the idea that crime grows out of communities, is shaped by them, and in turn takes a toll on them.⁴³ These are pretty abstract ideas, but they are important ideas, and they get a lot more respect by police managers today than they did forty years ago. Policing is better for that.

I should hasten to add that it is not better everywhere and for everyone. For a variety of reasons, community policing programs sometimes have bypassed the

⁴¹ See, e.g., David Thacher, *Conflicting Values in Community Policing*, 35 LAW & SOC'Y REV. 765 (2001).

⁴² See, e.g., HERMAN GOLDSTEIN, *PROBLEM-ORIENTED POLICING* 6–8 (1990); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 566–68 (1997).

⁴³ See, e.g., WESLEY G. SKOGAN, *POLICE AND COMMUNITY IN CHICAGO: A TALE OF THREE CITIES* (2006).

poor, minority communities that need them most. Even the Chicago Police Department, which has done a better job than many other cities bringing community policing to African-American neighborhoods, has had far less success reaching out to Latinos and Asian-Americans.⁴⁴ And minority youth, in particular, are too often written out of the “community” that the police see themselves working with.⁴⁵

Then, too, there have been trends in policing—especially in poor, minority neighborhoods—that run contrary to core ideas of community policing. One of those countervailing trends has been the greatly escalated use—most famously in New York City, but elsewhere as well—of aggressive stop-and-frisk sweeps.⁴⁶ Another has been the dramatic and disturbing increase, over the past two decades, in the prevalence, size, and routine deployment of heavily armed paramilitary units, or SWAT teams. When these units began to appear in the 1960s and 1970s, they were largely limited to big cities and were chiefly used for hostage situations, barricaded suspects, and civil disturbances. By the late 1990s, even medium and small departments tended to have SWAT teams, and their use had shifted. By far their most common use today is for no-knock drug raids, of the kind that *Hudson v. Michigan* has now made clear will yield admissible evidence even if the failure to knock is unjustified and illegal. In many cities, moreover, the police at least occasionally use paramilitary squads to patrol “high-crime” neighborhoods—which of course is another way to say poor, minority neighborhoods.⁴⁷

Like virtually every other police program these days, aggressive stop-and-frisk sweeps and even militarized patrol have been described as aspects of “community policing.”⁴⁸ But they are difficult to reconcile with, and frequently frustrate, efforts by the police to collaborate with communities in controlling crime. The increased use of these tactics should temper optimism about the broader shifts in organizational philosophy I described earlier. But it should not obscure the larger, positive picture. The orthodox ideals of police management have changed for the better. The new ideals sometimes receive only lip service, but they often receive a good deal more. And ideals matter, even when they are imperfectly achieved.

⁴⁴ See *id.*

⁴⁵ See James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1 (2004).

⁴⁶ See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 90–104, 172–75 (2001); James Foreman, Jr., *Children, Cops, and Citizenship: Why Conservatives Should Oppose Racial Profiling*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 150 (Marc Mauer & Meda Chesney-Lind eds., 2002).

⁴⁷ See RADLEY BALKO, *OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA* (2006); Matthew T. DeMichele & Peter B. Kraska, *Community Policing in Battle Garb: A Paradox or Coherent Strategy?*, in *MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE* 82 (2001).

⁴⁸ See BALKO, *supra* note 47, at 11; DeMichele & Kraska, *supra* note 47, at 85–87, 94–95.

C. Demographics of Police Personnel

Systems of police accountability really have improved. And the rise of community policing over the last twenty years, even as rhetoric, really does matter. But neither of these developments matters as much as a third transformation in policing, which has gotten far less attention, and which Justice Scalia entirely ignored in *Hudson*. I refer to the dramatic change in the demographics of police personnel.

At the close of the 1960s, black officers made up somewhere around 6% of the sworn personnel of the 300 or so largest American police departments. Today the figure is around 18%.⁴⁹ In cities with populations over a quarter-million, 19% of sworn officers are black, 15% are Latino, and 4% are members of other racial minorities.⁵⁰ In 2005, for the first time ever, a majority of the new officers graduating from the NYPD's academy were members of racial minorities.⁵¹ In some major metropolitan departments, the entire force is now majority-minority. Los Angeles is in that category. So is Detroit. So is Washington, D.C.⁵²

Women were 2% of sworn officers in large police agencies in 1972. Today they are close to 13%. Again, the figure in some departments is significantly higher, although it tops off around 25%.⁵³ It is much harder to estimate the number of gay and lesbian officers, or even those who are open about their status. But the mere fact that there are *any* openly gay and lesbian officers, let alone gay and lesbian police executives, is a sea-change from the situation thirty years ago.⁵⁴

These dramatic changes do not get the attention they deserve, in part because it long ago became an article of faith among social scientists and police reformers that police behavior is shaped by the occupational culture of policing, not by the background of individual officers.⁵⁵ There is actually a fair bit of evidence for that view, but the evidence is not nearly as one-sided as it is generally thought to be. More importantly, there is a growing body of evidence that the new diversity in the ranks is having a profound effect on the occupational culture of policing itself. There is more division and disagreement in police forces today, more internal debate, more factionalism, more mutual suspicion, more discord. Much of the

⁴⁹ David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209, 1213 (2006).

⁵⁰ See MATTHEW J. HICKMAN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LOCAL POLICE DEPARTMENTS, 2003, at 3 tbl.3, 7 tbl.13 (May 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/lpd03.pdf>.

⁵¹ See Jennifer 8. Lee, *In Police Class, Blue Comes in Many Colors*, N.Y. TIMES, July 8, 2005, at B1.

⁵² See Sklansky, *supra* note 49, at 1213–18.

⁵³ See *id.* at 1219–21.

⁵⁴ See *id.*

⁵⁵ See David Alan Sklansky, *Seeing Blue: Police Reform, Occupational Culture, and Cognitive Burn-In*, in POLICE OCCUPATIONAL CULTURE: NEW DEBATES AND DIRECTIONS 19 (Megan O'Neill, Monique Marks & Anne-Marie Singh eds., 2007).

division is along lines of race, gender, and sexual orientation—which is just what some opponents of affirmative action in policing warned about decades ago. The good news is that the decline in solidarity does not seem to have had any effect on operational effectiveness—when police officers respond to a call, there is still a strong sense that “blue is blue.” But in-between calls, when cops are talking, strategizing, organizing, or just hanging out, there is a lot more discord and disagreement in the ranks, and by and large that seems to be a very positive development.⁵⁶

The greater complexity of social alignments, both within policing and between officers and community members, is reflected in the growing diversity of organizations claiming to represent the interests of police officers. It used to be that on any issue relating to the police—the creation of a civilian review board, for example, or the imposition of new restrictions on the use of deadly force, or new reporting requirements for investigatory stops—there was a unified police position, generally reactionary and recalcitrant. Nowadays the mainline police unions, still typically called “benevolent associations,” share the stage with a range of other organizations, many highly vocal, representing the interests of minority officers. At both the local and national level, these organizations often take positions at dramatic variance from the position of the benevolent associations—not just on hiring and promotion policies, but on issues like racial profiling, police brutality, civilian oversight, and internal discipline. And they often work closely with minority organizations outside law enforcement, decreasing the insularity of police forces as well as their monolithic solidarity. In many cases, moreover, competition from these rival organizations of officers has forced mainstream police unions to rethink their own resistance to reform initiatives.⁵⁷

III. THE EXCLUSIONARY RULE, THEN AND NOW

Since the 1960s, American police agencies have been transformed, for the better, along three different dimensions: systems of accountability, organizational philosophy, and workforce demographics. Law enforcement today really is different than it was forty years ago, and in some pretty fundamental ways. So it was not crazy for Justice Scalia and four of his colleagues to suggest in *Hudson* that criminal procedure rules fashioned in the 1960s might be ripe for reexamination—particularly since those rules were themselves a kind of delayed reaction to an earlier transformation of policing.

The Warren Court looked out and saw a vast paramilitary bureaucracy of law enforcement, bearing roughly the same relationship to its eighteenth-century predecessors that “the standing army [had] to the people’s militia.”⁵⁸ Over the

⁵⁶ See *id.*

⁵⁷ See Sklansky, *supra* note 49, at 1232–33.

⁵⁸ Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 838 (1994).

course of roughly a hundred years, beginning in the mid-nineteenth century, a ragtag collection of part-time constables and semi-amateur watchmen reporting to the courts had been supplanted, both in England and in America, by uniformed, bureaucratically autonomous, quasi-military forces of full-time, salaried officers. The English, who pioneered this development, called the uniformed forces “the new police” to underscore their radical differences from the Dickensian cobweb of public and private operators they swept aside—the “old police.”⁵⁹

By the middle of the twentieth century, the absence of effective legal constraints on the new police seemed less and less tolerable, particularly given what scholars of law enforcement—an emerging academic specialty—were beginning to report. The police had a culture of violence and secrecy;⁶⁰ they administered “justice without trial.”⁶¹ Beyond that, they were racist, intolerant, arrogant, insular, and heavy handed—characteristics that seemed more and more apparent, and more and more troubling, as the 1960s wore on.⁶² So the Supreme Court fashioned a new, constitutional law of policing, reinterpreting eighteenth- and nineteenth-century rules to fit twentieth-century challenges. However belatedly, the new police and their distinctive pathologies brought forth a new constitutional law of policing, with the exclusionary rule as its procedural linchpin.

That was almost half a century ago. The differences between police today and police in the 1960s are not as dramatic and all-encompassing as the changes between the “new police” of the mid-nineteenth century and the “old police” they replaced. Nonetheless, the changes over the past four decades have been fundamental and far-reaching. We have our own “new police,” and that is plainly worth knowing.

But does it mean we have outgrown the exclusionary rule? “As far as we know,” Justice Scalia wrote in *Hudson*, civil liability is now all the deterrent we need for police illegality.⁶³ Justice Breyer’s dissent accurately called this “a support-free assumption” at variance with the skepticism the Court generally has shown, since the 1960s, about the adequacy of damage actions to enforce the constitutional restrictions on law enforcement.⁶⁴ But what we know about the real world of policing allows us to say more than that.

⁵⁹ See, e.g., T. A. CRITCHLEY, *A HISTORY OF POLICE IN ENGLAND AND WALES, 900–1966*, at 50 (1967); LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 68–69 (1993); WILBUR R. MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON, 1830–1870*, at 8–32, 37–44 (1977); David A. Sklansky, *The Private Police*, *supra* note 23, at 1200–11.

⁶⁰ See, e.g., William A. Westley, *Secrecy and the Police*, 34 *SOC. FORCES* 254 (1956); William Westley, *Violence and the Police*, 59 *AM. J. SOC.* 34 (1953).

⁶¹ See generally JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

⁶² See, e.g., Herbert L. Packer, *The Courts, The Police, and the Rest of Us*, 57 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 238, 241 (1966); David Alan Sklansky, *Police and Democracy*, 103 *MICH. L. REV.* 1699, 1771–72 (2005); SKOLNICK, *supra* note 30, at 241–92.

⁶³ *Hudson v. Michigan*, 126 S. Ct. 2159, 2168–69 (2006).

⁶⁴ *Id.* at 2175 (Breyer, J., dissenting).

There is a large and erudite debate among scholars about whether the exclusionary rule would have a place in an ideal system of criminal procedure. I do not propose to delve into that literature here, or to add to it. Instead, I want to make some fairly simple observations about the continuing significance of the exclusionary rule in the system of criminal procedure we actually have.

To begin with, there is the simple issue of scale. The best figures suggest that about 2000 police misconduct cases are filed each year under section 1983.⁶⁵ Compare that to the number of criminal cases thrown out each year, by judges or prosecutors, based on Fourth Amendment violations. A conservative estimate of *that* figure is upwards of 300,000. Three-hundred-thousand is a tiny fraction—about 2 percent—of the 14 million annual arrests in the United States.⁶⁶ But it is two orders of magnitude larger than the number of civil damage actions. And of course the vast majority of those 2000 civil damage actions are unsuccessful.

Being sued, even unsuccessfully, may well concentrate a police officer's mind, or a police department's mind, more strongly than having a criminal case tossed. So numbers of cases alone—300,000 versus 2000—do not tell us the whole story. But they tell us something. Think of civil cases and case dismissals as pointed messages sent to the police. When one channel of communication carries more than a hundred times as many messages as a second channel, there is reason to be skeptical that the second can substitute entirely for the first.

Let's turn from considerations of scale to practical experience. What has happened when evidentiary exclusion is removed as a remedy for police illegality? The best example of this I know occurred in my home state of California. For the past twenty-five years, by virtue of an initiative passed by California voters in 1982, the exclusionary rule has been inapplicable to restrictions placed on the police by the state constitution but not by the federal constitution. The most prominent example of such a restriction is the ban that California constitutional law places on warrantless searches of trash placed at curbside for collection.⁶⁷ That restriction was rejected, as a matter of federal constitutional law, by the U.S. Supreme Court in 1984.⁶⁸ Since that time, as far as I can tell, police in California have pretty much completely ignored the warrant requirement imposed by state constitutional law for garbage searches. Without the remedy of the exclusionary rule, the rule has evaporated.⁶⁹

⁶⁵ See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 772 n.48 (2004).

⁶⁶ See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611 (1983) (2.35% of arrests "lost" because of exclusionary rule); Uniform Crime Reporting System, Federal Bureau of Investigation, *Crime in the United States 2005*, tbl.29, http://www.fbi.gov/ucr/05cius/data/table_29.html (last visited Dec. 1, 2007) (14,094,186 arrests nationwide in 2005).

⁶⁷ See *People v. Krivda*, 8 Cal. 3d 623 (1973).

⁶⁸ *California v. Greenwood*, 486 U.S. 35 (1988).

⁶⁹ See, e.g., *Greenwood*, 486 U.S. 35; *People v. Thuss*, 133 Cal. Rptr. 2d 149 (2003).

In fact, California police officers are now trained to ignore it. Police academy materials explain that garbage loses most if not all of its “expectation of privacy” when it is “bagged and placed at the curbside.”⁷⁰ The authoritative legal sourcebook distributed to police departments by the state’s Department of Justice dutifully notes that “[o]ld California cases” prohibited “exploratory” searches of trash left for collection, but immediately reassures officers that the 1982 initiative makes any “evidence seized in compliance with federal law . . . admissible in court, even if there was a violation of California law.”⁷¹ Elsewhere the Sourcebook points out that “[a]s a practical matter . . . no [search or seizure] case has discussed any ‘independent state grounds’ for many years,” and suggests that “the differences which once existed between ‘federal law’ and ‘California law’ have for the most part faded into history.”⁷²

Fading into history is just what critics of *Hudson v. Michigan*—including the dissenting justices—have predicted will now happen, nationwide, to the knock-and-announce rule. They may not be completely right. It is just possible that storming a house without warning can, when things go wrong, produce the kind of terrible consequences that give rise to big damage awards—heart attacks, fatal gunshots fired in confusion, and so on.⁷³ Fear of civil suits may yet do for the knock-and-announce rule what it has not done for the California ban on warrantless searches of garbage—keep the rule from completely disappearing. It is sobering, though, that neither the lawyers in *Hudson* nor the justices and their law clerks could find any example of a significant damage award arising solely from a knock-and-announce violation.⁷⁴

It would be a mistake to make too much of the single example of garbage searches in California, just as it would be a mistake to make too much of the enormous difference of scale between suppression hearings and civil damage actions for police illegality. But both pieces of evidence point to a conclusion consistent with other available evidence. Despite the genuinely vast changes in law enforcement over the past forty years, the exclusionary rule probably still does a lot of work that no other remedy stands ready to duplicate.

At least it does so in cases that the police expect they will wind up taking to court. And that is an important qualifier. It is not exactly news that the exclusionary rule can only deter the police when they care about the admissibility

⁷⁰ E.g., CALIF. COMM’N ON PEACE OFFICER STANDARDS & TRAINING, BASIC COURSE WORKBOOK SERIES: STUDENT MATERIALS, LEARNING DOMAIN #16, SEARCH AND SEIZURE, at 1–10 (1998).

⁷¹ CALIF. DEP’T OF JUSTICE, CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK 3.39–3.40 (revised May 2002 and Sept. 2006).

⁷² *Id.* at 2.2a (revised July 2005).

⁷³ See, e.g., Brian Haas, *Parents of Man Shot by Police in Sunrise File Lawsuit*, S. FLA. SUN-SENTINEL, Mar. 17, 2007, at B1; Rocco Parascandola, *Police Raid Wrong Home*, NEWSDAY, Apr. 8, 2005, at A6; *Better Planning Could Help Arrest Botched Police Raids*, USA TODAY, Apr. 26, 2004, at A17; BALKO, *supra* note 47.

⁷⁴ *Hudson v. Michigan*, 126 S. Ct. 2159, 2174 (2006) (Breyer, J., dissenting).

of the evidence they obtain. The Supreme Court itself pointed that out almost forty years ago in *Terry v. Ohio*.⁷⁵ But recent empirical work on street-level policing underscores not only that the exclusionary rule is largely powerless in cases the police do not expect to take before a judge, but also that this category constitutes the majority of the cases in which the police operate. Several years ago, for example, a statistical analysis of street stop reports prepared by New York City police officers revealed that 90% of stops did not result in an arrest—and that was excluding the stops for which the police did not bother to file a report.⁷⁶ Researchers at George Mason University, riding along with officers in a medium-sized police department for three months, found that 70% of the searches the police carried out never resulted in an arrest or citation.⁷⁷

Both studies, by the way, also found that searches in violation of constitutional restrictions were much less likely to result in arrest than searches that followed the rules.⁷⁸ Much of the explanation for that may be that the constitutional rules typically require evidence of illegality—either probable cause or reasonable articulable suspicion, depending on the nature of the search. Almost by definition, searches carried out without that kind of preliminary evidence are less likely to produce new evidence, and therefore less likely to give the police the kind of evidence needed for an arrest.⁷⁹ On the other hand, though, police officers who are willing to ignore the prerequisites for a lawful search might be expected to be just as willing to ignore the prerequisites for a lawful arrest. So there is likely something else at work here too: because of the exclusionary rule, the police probably took more care to comply with the Fourth Amendment in the first place when they thought the case might wind up in court.

So there are two lessons here about our new police. The first is that they have not made the exclusionary rule obsolete. The second is that they have not eliminated the need to supplement the exclusionary rule with other remedies, particularly for that vast category of police conduct that is not aimed at obtaining evidence for use in court. The exclusionary rule remains what it has always been—irreplaceable and by itself inadequate.

⁷⁵ 392 U.S. 1, 13 (1968).

⁷⁶ See The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, tbl.I.B.2 (1999), available at http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html.

⁷⁷ See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 333 (2004).

⁷⁸ See Gould & Mastrofski, *supra* note 77, at 331–32; The New York City Police Department's "Stop & Frisk" Practices, *supra* note 76, at tbl.II.B.2.

⁷⁹ The George Mason researchers also observed at least one case in which officers chose to let a suspect go because they realized there were legal problems with the search they had conducted. See Gould & Mastrofski, *supra* note 77, at 323 n.4.

IV. OLD RULES AND NEW POLICE

If the vast changes in policing over the past four decades do not provide grounds for abandoning the exclusionary rule, what implications *do* they have? First and foremost, they mean that we should stop assuming cops are monolithic, implacable obstacles to reform, and that we should start working much harder to tap into the collective insight and expertise of rank-and-file officers in reshaping the way that policing is done. But that is not a lesson about the rules of criminal procedure; it is a lesson about the opportunities for complementing and building on those rules through other avenues of police reform.⁸⁰

One other possibility has to do with the *substantive* rules of criminal procedure: the warrant requirement, the restrictions on investigatory stops, and so on. Most of these rules can be understood as efforts to rein in police discretion through judicial oversight, and a number of smart scholars have been arguing, for several years now, that this agenda is doubly outmoded. It is outmoded first, they say, because police departments are less insular and less reactionary than they used to be, and more representative of and more accountable to the communities they serve. It is outmoded second, they say, because community policing, to work best, requires giving patrol officers a healthy amount of discretion—more than current constitutional law contemplates.⁸¹

There is no doubt that community policing—or any kind of effective policing, for that matter—requires giving line officers a large amount of leeway. There is also no doubt that police forces, on the whole, are better and more trustworthy than they used to be. Let me return briefly to the George Mason study I mentioned a few moments ago. Professors Jon Gould and Stephen Mastrofski, who conducted the study, concluded that 34 of the 115 searches they and their students had observed were unconstitutional, but only two or three were egregious enough to provide grounds for civil liability.⁸² They called the pattern of constitutional violations they observed “a steady drumbeat of droplets rather than a torrential deluge.”⁸³ One way to read this data is that the violations they uncovered were largely technical—objectionable not intrinsically, but only because search-and-seizure doctrine defines them as illegal. Gould and Mastrofski worry that even a steady drumbeat of droplets can do damage, over time, to the legitimacy of the police. But of course one way to fix that would be to change the rules, legalizing the milder forms of what now count as police illegality.

On balance I do not think that would be the right response—at least not until a case can be made that our current rules of criminal procedure constrain discretion in ways that significantly impair, in actual practice, the effectiveness of the police.

⁸⁰ See DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 155–88 (2008).

⁸¹ See, e.g., Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Livingston, *supra* note 42.

⁸² See Gould & Mastrofski, *supra* note 77, at 333–34.

⁸³ Gould & Mastrofski, *supra* note 77, at 334.

That case has not been made yet, and until it is, it is hard to argue that changes in policing justify relaxing the substantive rules of criminal procedure. That is particularly true given the widespread view among police scholars that these rules have played, and continue to play, an important role in changing the occupational culture of law enforcement—in bringing the rule of law, so to speak, inside the mindset of police officers themselves.⁸⁴

This is very much the view, for example, of Samuel Walker, probably the nation's leading scholar of civilian oversight of policing. Justice Scalia cited Walker in *Hudson v. Michigan* for the proposition that there have been “wide-ranging reforms in the education, training, and supervision of police officers.”⁸⁵ Walker has in fact said that, but he has given much of the credit for those reforms to changes in occupational culture catalyzed and sustained by the exclusionary rule and by the substantive rules of constitutional criminal procedure. Professor Walker, by the way, was so happy with Justice Scalia's use of his work in *Hudson v. Michigan* that he published an op-ed piece in the *Los Angeles Times* with the title, “Thanks for Nothing, Nino.”⁸⁶

My own verdict on *Hudson* is more mixed. I think Justice Scalia and his colleagues deserve credit for calling attention to the remarkable changes in policing over the past four decades, and for raising the legitimate and important question whether those changes have implications for criminal procedure law. Where they can be faulted is in the attention they paid to what we know about the real world of policing.

⁸⁴ That view, in turn, resonates with the emerging international consensus that police accountability is best secured through three overlapping and mutually reinforcing forms of control: internal, governmental, and social. See Stone, *supra* note 24, at 249–53.

⁸⁵ *Hudson v. Michigan*, 126 S. Ct. 2159, 2168 (2006) (quoting SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 51 (1993)).

⁸⁶ Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5.