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Alternatives to the Exclusionary Rule after Hudson v. Michigan: Preventing and Remedying Police Misconduct

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Articles

ALTERNATIVES TO THE EXCLUSIONARY RULE AFTER *HUDSON v. MICHIGAN*: PREVENTING AND REMEDYING POLICE MISCONDUCT

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I. INTRODUCTION

THE Supreme Court has rejected the exclusionary rule as the default remedy for Fourth Amendment violations. In the landmark decision of *Hudson v. Michigan*, the Court recognized that the exclusionary rule is a flawed doctrine that should be applied only "where its deterrence benefits outweigh its 'substantial social costs.'"[1]

The Supreme Court's limitation of the exclusionary rule is long overdue. Rather than deterring police misconduct, as was the rule's intent, the exclusionary rule, in fact, exerts tremendous pressure on law enforcement officers to commit perjury and other illegal acts in order to secure criminal convictions.[2] In addition, the exclusionary rule offers no remedy for innocent persons subjected to unlawful search or seizure.[3]

The Supreme Court's erosion of the exclusionary rule highlights the need for an effective remedy and deterrent for knock-and-announce violations. Under the common law, unless there were special circumstances, police officers could not forcibly enter a residence to execute a search warrant without first knocking at the door, identifying themselves as officers of the law, articulating their reason for requesting admittance to the home and being refused admittance by an occupant.[4] In *Wilson v. Arkansas*, the Supreme Court unanimously held that the "common-law 'knock

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1. Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006) (citing Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 363 (1998)).

2. *See, e.g.*, Tom Barker & David Carter, *"Fluffing Up the Evidence and Covering Your Ass": Some Conceptual Notes on Police Lying*, 11 DEVIANT BEHAV. 61, 69 (1990); Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

3. *See* Stone v. Powell, 428 U.S. 465, 484-86 (1976) (citing Linkletter v. Walker, 381 U.S. 618, 637 (1965)); *see also* William Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 911 (1991).

4. *See* Semayne's Case, 5 Co. Rep. 91a, 91b (K.B. 1604).

and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."[5] The *Hudson* decision did not relieve law enforcement officers from the obligation to follow the knock-and-announce rule, but it limited the force of the rule by holding that a failure to knock-and-announce does not justify exclusion of the evidence obtained in the search.[6]

Although the majority opinion in *Hudson* offered civil litigation under Section 1983, suits for common law torts and administrative sanctions as sufficient alternative deterrents to police misconduct, these sanctions have proved ineffectual in the past. A survey of civil actions arising from failure to knock-and-announce cases demonstrates that Section 1983 and state common law claims seldom provide any meaningful relief. Civil suits do not provide a strong deterrent because the long delays of civil litigation and the plaintiffs' frequent lack of success render any deterrent effect too remote and too uncertain to be effective. Current administrative sanctions are also an inadequate deterrent.

This article analyzes police motivations for violating the knock-and-announce rule, considers why current remedies are ineffective and suggests enhanced judicial and administrative remedies. First, the judiciary should act to protect the public from rogue officers who disregard the knock-and-announce rule. Prosecutors are under an existing ethical obligation to report law enforcement misconduct to the courts, and careful regard for these existing ethical obligations will bring violations of the knock-and-announce rule committed in the execution of search warrants to the attention of the courts.

Prosecutors should welcome the reporting obligation as a means of solving an ethical dilemma. Under the *Hudson* decision, prosecutors are permitted to use evidence acquired in the context of a knock-and-announce violation. Unless prosecutors report the offending police officers to the court, they are arguably complicit in the misconduct, could perpetuate the injury to the person whose rights were violated and may encourage officers to commit future acts of misconduct.

Exercising their inherent power to supervise the proper execution of courts' own writs, judges should punish offending officers and protect the public by issuing orders that bar the offending officers from executing future warrants issued by the court. Such disciplinary orders would serve as a strong deterrent to police officers and could include opportunities for rehabilitation through training or other remedial measures.

This article also recommends enhanced administrative measures that enforcement agencies can utilize to encourage officers to respect the Fourth Amendment and citizens' privacy rights. These measures, includ-

5. 514 U.S. 927, 929 (1995).

6. *See Hudson*, 126 S. Ct. at 2170 (holding that destruction of property may violate Fourth Amendment even though evidence obtained is not subject to suppression).

ing de-emphasizing arrest quota systems, utilizing stress management programs and implementing targeted training programs with the proactive participation of internal affairs, will reduce police misconduct. Internal affairs and professional responsibility units should act proactively as training resources instead of in a purely reactive investigatory role. The training methods recommended by this article would reinforce law enforcement officers' ethical value systems and would motivate officers to better respect suspects' constitutional rights. Additional administrative sanctions would provide officers with stronger deterrents against misconduct.

The exclusionary rule may have a legitimate role in cases where an officer's misconduct is extreme and outrageous, but a violation of the knock-and-announce rule will rarely rise to such level. Instead, the knock-and-announce rule is best enforced by sanctions that directly address the offending conduct and prevent its recurrence.

II. HISTORICAL BACKGROUND OF THE EXCLUSIONARY RULE

Some legal scholars have praised the exclusionary rule as an effective deterrent that protects both the innocent and the guilty from overzealous law enforcement officers.[7] Indeed, the exclusionary rule may have some positive impact. Studies indicate that it has at least raised law enforcement officers' awareness of the Fourth Amendment, as evidenced by the higher number of search warrants that officers have obtained since the *Mapp* de-

7. Scholars who have espoused support for the exclusionary rule in their writings include: Albert W. Alschuler, *Close Enough for Government Work: The Exclusionary Rule After* Leon, 1984 SUP. CT. REV. 309 (1984); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 429 (1974); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 622-24 (1990); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1242-43 (1989); Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 119 (2003); Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon, *Its Rationale And Ramifications*, 1984 U. ILL. L. REV. 895 (1984); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 49-50 (1994); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule Reconsidered: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283 (2006); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring The Status Quo Ante*, 33 WAKE FOREST L. REV. 261 (1998); Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule As A Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-52 (1994); Daniel B. Yeager, *From the 'Gatehouse' to the 'Mansion': Throwing Out Evidence in Criminal Cases*, CRIM L. BULL., Mar.-Apr. 1998, at 118.

cision.[8] However, the benefits of the rule are outweighed by the harsh toll its application exacts upon society.[9]

Since *Ohio v. Mapp* established that the exclusionary rule is the primary remedy for Fourth Amendment violations in state court proceedings, the number of suppression motions filed has soared.[10] Not only has the increased motion practice driven up court costs, thereby siphoning away limited judicial and prosecutorial resources, it has also exacted other more corrosive effects upon society.[11]

If a defense attorney's suppression motion is successful, the exclusionary rule may prevent the government from introducing at trial the only reliable evidence of a defendant's guilt. This exclusion can enable the guilty to escape punishment and can send dangerous criminals back to harm other innocent citizens.[12] The percentage of successful suppression motions varies depending upon the jurisdiction and the type and severity of the crime.[13] For instance, in an empirical study of state felony cases in various jurisdictions, sponsored by the Law Enforcement Alliance of America, researchers found that "due process related reasons accounted for only a small portion of the rejections at [prosecutor] screening—from 1 to 9 percent."[14] Given, however, the fact that in some states recidivism rates are higher than 60% for individuals who have been convicted of committing felonies, that statistic is frightening.[15] Proponents of the exclusionary rule assert that because the percentage of defendants who successfully argue suppression motions is small, the negative impact upon society is also small. This logic is flawed.

> Many . . . researchers have concluded that the impact of the exclusionary rule is insubstantial, but the small percentages with which they deal mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures.[16]

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8. *See* L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond The Exclusionary Rule*, 83 IOWA L. REV. 669, 710-11 (1998) (citing Mapp v. Ohio, 368 U.S. 871 (1960)).

9. *See Hudson*, 126 S. Ct. at 2163, 2165-66 (citing United States v. Leon, 468 U.S. 897 (1984)) (comparing costs and benefits of applying exclusionary rule to all knock-and-announce violations).

10. *See* Perrin et al., *supra* note 8, at 710-11; *see also Mapp*, 367 U.S. at 660.

11. *See id.*

12. *See Hudson*, 126 S. Ct. at 2163 (discussing substantial social costs of exclusionary rule).

13. *See Leon*, 468 U.S. at 908 n.6 (citing 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, 621 (1983)).

14. WAYNE R. LAFAVE, 1 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 28-29 (2004) (citing Kathleen Brosi, U.S. Dep't of Justice, *A Cross-City Comparison of Felony Case Processing* 18-20 (1979)).

15. *See* Samson v. California, 126 S. Ct. 2193, 2200 (2006).

16. *Leon*, 468 U.S. at 908 n.6 (1984).

A study by Raymond A. Atkins and Paul H. Rubin estimated that the exclusionary rule has "increased crimes of larceny by 3.9 percent, auto theft by 4.4 percent, burglary by 6.3 percent, robbery by 7.7 percent, and assault by 18 percent."[17] Furthermore, the adverse impact of the exclusionary rule on crime rates in suburban cities is even more alarming. In suburban cities, "the imposition of the exclusionary rule increased violent crimes by 27 percent and property crimes by 20 percent."[18]

Not only does the exclusionary rule frustrate the public's substantial interest in keeping dangerous criminals behind bars, it causes other direct and indirect harms upon society. The threat of the exclusionary rule can prompt law enforcement officers to engage in misconduct, particularly perjury.[19] In a suppression hearing, officers face much greater pressure to lie than in the context of a warrant application.[20] When officers applied for a warrant, they may have had only probable cause that the suspect was guilty. But at the suppression hearing, the officers have evidence sufficient to take the case to trial. Convinced of the defendant's guilt, the officers may perjure themselves to ensure that the jury hears all the relevant evidence and reaches the verdict the defendant actually deserves.[21]

When officers commit perjury, they are wronging themselves, wronging the defendant and cheating society. Scholars who follow the slippery-slope model of police corruption assert that once officers commit a corrupt act, they are more likely to commit other corrupt acts in the future.[22] It is also possible that the corrupt acts will escalate. For instance, the officer's first act of corruption may be lying to cover up another officer's failure to knock-and-announce. A future act of corruption could entail "stiffing in a call," telephoning in a phony anonymous tip to gain the probable cause necessary to apply for a search warrant.[23]

When police perjury is discovered, it damages the public's trust in government.[24] "[T]he revelation that some police routinely and casually lie under oath makes members of the public, including those who serve on juries, less willing to believe *all* police, truthful or not."[25] Witnesses and

17. Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 174 (2003).

18. *Id.*

19. *See, e.g.*, Barker & Carter, *supra* note 2, at 69; Dripps, *supra* note 2, at 696-97; Slobogin, *supra* note 2, at 1040.

20. *See* Stuntz, *supra* note 3, at 915, n.75 (citing H. RICHARD UVILLER, TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR'S YEAR ON THE STREETS WITH THE NEW YORK CITY POLICE ch. 12 (Contemporary Books 1988)).

21. *See* Barker & Carter, *supra* note 2, at 67-69; Slobogin, *supra* note 2, at 1044.

22. *See* MICHAEL A. CALDERO & JOHN P. CRANK, POLICE ETHICS: THE CORRUPTION OF NOBLE CAUSE 104-05, 113-14 (Anderson 2d ed. 2004).

23. *See id.* at 114.

24. *See* SAM S. SOURYAL, ETHICS IN CRIMINAL JUSTICE: IN SEARCH OF THE TRUTH 346 (Anderson 3d ed. 2003) (describing how police corruption undermines public faith); Slobogin, *supra* note 2, at 1039.

25. Slobogin, *supra* note 2, at 1039.

crime victims who distrust police are less likely to report criminal activity and cooperate with police investigations.[26] The public's perception that police lie can become so pervasive that prosecutors feel compelled to make defensive comments about law enforcement officers before they testify to reassure jurors that the officer is telling the truth.[27] Some jurors and members of the public may suspect that prosecutors and even the judge are complicit in the officer's lies.[28] The problem of police perjury and the corrosive effect it has on the justice system is addressed further in Part XI of this article.

Perjury is not the only form of police misconduct encouraged by the exclusionary rule. In addition to resorting to "fluffing up the evidence" against suspects and committing perjury, some officers become so frustrated with the system that they resort to exacting extralegal punishments, such as harassing or committing violent acts against suspects.[29] "The exclusionary rule . . . has driven the police to methods less desirable than those for which the judges shut truth from the jury's ears."[30] In short, the exclusionary rule fosters a regime where the guilty go free, the police resort to extralegal means to secure convictions and the public loses respect for the criminal justice system.

These harms could perhaps be justified if the exclusionary rule provided an effective remedy for the victims of police misconduct. The exclusionary rule, however, does not even acknowledge the injuries done to an innocent victim of an unreasonable search or seizure. "Post-*Mapp* decisions have established that the [exclusionary] rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'"[31]

Fortunately, the Supreme Court has recognized that the exclusionary rule is a flawed curative measure that does indeed carry substantial social costs.[32] The Court has "repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."[33] Because of this high toll, the

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26. *See* SOURYAL, *supra* note 24, at 333-34.

27. *See* Slobogin, *supra* note 2, at 1039; Joseph Sexton, *Jurors Question Honesty of Police*, N.Y. TIMES, Sept. 25, 1995, at B3.

28. *See* Slobogin, *supra* note 2, at 1039; Sexton, *supra* note 27, at B3.

29. *See* Barker & Carter, *supra* note 2, at 69; Albert T. Quick, *Attitudinal Aspects of Police Compliance with Procedural Due Process*, 6 AM. J. CRIM. L. 25, 40 (1978).

30. *Id.*; Quick, *supra* note 29, at 40 (citing Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., C & P.S. 255, 257 (1961)).

31. Stone v. Powell, 428 U.S. 465, 486 (1976) (citing Linkletter v. Walker, 381 U.S. 618, 637 (1965)); *see also* Stuntz, *supra* note 3, at 911 (stating that exclusionary rule only protects guilty criminals).

32. *See* Hudson v. Michigan, 126 S. Ct. 2159, 2166 (2006) (citing United States v. Leon, 468 U.S. 897, 907 (1984)).

33. *See id.* at 2163 (citing Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 364-65 (1998) (changes in original).

Court has held the rule to be applicable only "where its remedial objectives are thought most efficaciously served."[34]

The debate on the applicability of the exclusionary rule in failure to knock-and-announce situations is particularly timely given the Supreme Court's recent decision in *Hudson v. Michigan.* The next section of this article surveys the evolution of the knock-and-announce rule and the public policy arguments that the Supreme Court considered in *Hudson.*

III. Background of the Knock-and-Announce Rule

The requirement that law enforcement officers must knock and announce their presence before entering a residence is not a new rule. Under the common law, unless there were special circumstances, police officers could not forcibly enter a residence to execute a search warrant without first knocking at the door, identifying themselves as officers of the law, articulating their reason for requesting admittance into the home and being refused admittance by an occupant.[35] Statutes in the majority of U.S. states address the issue of whether law enforcement officers are required to knock-and-announce when executing a warrant.[36] The federal statute, 18 U.S.C.A. § 3109, provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of a warrant.[37]

The common law is consistent with the high value the Framers of the Fourth Amendment placed on the sanctity of the home.[38] In the 1995 Supreme Court case *Wilson v. Arkansas,* the Court unanimously held that the common law knock-and-announce principle "forms a part of the reasonableness inquiry under the Fourth Amendment."[39] Therefore, "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[40]

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34. *Id.* (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

35. *See* Semayne's Case, 5 Co. Rep. 91a, 91b (K.B. 1604); *see also Hudson,* 126 S. Ct. at 2162 (citing Wilson v. Arkansas, 514 U.S. 927, 931-32 (1995)).

36. *See* Craig Hemmens & Chris Mathias, United States v. Banks*: The "Knock-and-Announce" Rule Returns To The Supreme Court,* 41 Idaho L. Rev. 1, 12 (2004); *see also* Frank W. Miller, Robert O. Dawson, George E. Dix & Raymond I. Parnas, The Police Function 31 (Foundation 6th ed. 2000).

37. 18 U.S.C. § 3109 (1988).

38. *See* Phillip A. Hubbart, Making Sense of Search and Seizure Law: A Fourth Amendment Handbook 240 (Carolina Academic Press 2005).

39. *Wilson,* 514 U.S. at 929.

40. *Id.* at 931.

Proponents of the knock-and-announce rule assert that (1) it protects life and limb because a frightened resident may mistake an unannounced police entry for a criminal invasion and brandish a weapon or take other defensive measures; (2) it protects property by giving the occupant the opportunity to admit the officers; and (3) it protects privacy and preserves dignity by reducing the risk that the police will enter the wrong residence.[41] Even when there is no mistake about the place to be searched, it permits those within to have brief notice to prepare for the police entry.[42] For example, if officers knock-and-announce their presence, a sleeping resident might have time to don a robe before officers enter his bedroom.

Even when the entry is made without force, as when the residence door is not locked or an apartment manager agrees to open the door, the police must ordinarily observe the requirement to knock-and-announce before entering.[43] Even if the residence door is wide open, some courts require that police must first announce their presence before entering.[44] To comply with the notice requirements under the knock-and-announce rule, the officers must identify themselves as police and indicate that they are at the home to execute a search warrant.[45] After this announcement is made, they must wait a reasonable time for an occupant of the premises to admit them. If they are denied entry or there is no response from within the residence, the officers may proceed with a forcible entry if necessary.[46]

The Supreme Court first addressed how much delay is necessary before forcible entry in *United States v. Banks*.[47] In this 2003 decision, the Court instructed that in a situation where there is "no reason to suspect an immediate risk of frustration or futility in waiting at all," an occupant must be given enough time to answer the door.[48] If, however, the officers have a reasonable suspicion that there is a risk of destruction of evidence, the test is how much time the occupant needs to destroy evidence.[49] In *Banks*, the Court concluded unanimously that the fifteen to twenty second wait by the police before they forced the door open with a battering ram was sufficient because the police had reason to believe that if they waited longer, Banks would destroy his suspected stash of cocaine. The officers that executed the search were unaware that Banks was showering when they

41. *See* Hudson v. Michigan, 126 S. Ct. 2159, 2165 (2006); *see also* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 167 (Thompson 4th ed. 2004).

42. *See Hudson*, 126 S. Ct. at 2165; *see also* LAFAVE ET AL., *supra* note 41, at 167.

43. *See, e.g.*, Sabbath v. United States, 391 U.S. 585, 586 (1968); Keiningham v. United States, 287 F.2d 126, 130 (D.C. Cir. 1960); *see also* LAFAVE ET AL., *supra* note 41, at 167.

44. *See* LAFAVE ET AL., *supra* note 41, at 167.

45. *See id.*

46. *See, e.g.*, United States v. Banks, 540 U.S. 31, 43 (2003).

47. *See id.* at 34-35.

48. *Id.* at 41.

49. *See id.* at 40.

knocked on the door. The Court reasoned, "the facts known to the police are what count in judging reasonable waiting time."[50]

In addition to destruction of evidence, the Supreme Court has recognized other situations where police do not have to knock-and-announce: a reasonable suspicion of a threat of physical violence to the officers or someone within the residence, a reasonable suspicion that knocking and announcing would be futile or a hot pursuit of a fleeing criminal.[51] With regard to futility, proof that the officers have made a demand for entry and that entry has been refused has been deemed unnecessary.[52] For instance, if a uniformed officer is seen by an occupant of a residence before the officer announces his presence and the occupant proceeds to slam an open door in the officer's face, it would be a senseless ceremony for the officer to have to knock on the door and demand admittance. Reasonable suspicion, rather than probable cause, is the appropriate showing when a no-knock entry is challenged.[53] The reasonable suspicion standard strikes the proper balance between respecting individual privacy interests and addressing legitimate law enforcement concerns in the execution of search warrants.[54]

The Supreme Court has rejected a bright-line rule that certain categories of cases, such as felony narcotics investigations, should always be exempt from knock-and-announce.[55] Instead, the Court requires a case-by-case, totality of the circumstances analysis.[56] Furthermore, "a magistrate's decision not to authorize a no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."[57] In situations where law enforcement officers did not follow the knock-and-announce rule and later failed to show the required reasonable suspicion of exigent circumstances, state courts have not uniformly excluded evidence, even if the jurisdiction has a knock-and-announce statute. Until *Hudson v. Michigan*, the Supreme Court had not decided whether the exclusionary rule is an appropriate remedy for an improper no-knock entry.

IV. *HUDSON V. MICHIGAN*

In the June 15, 2006 decision for *Hudson v. Michigan*, the Supreme Court considered whether narcotics and firearms seized during a search

50. *Id.* at 39.

51. *See, e.g.*, United States v. Ramirez, 523 U.S. 65 (1998); Richards v. Wisconsin, 520 U.S. 385 (1997).

52. *See* Wilson v. Arkansas, 514 U.S. 927, 936 (1995)

53. *See Richards*, 520 U.S. at 394-95.

54. *See id.* at 394.

55. *See id.* at 395; *see also* United States v. Cantu, 230 F.3d 148, 152 (5th Cir. 2000).

56. *See Richards*, 520 U.S. at 394.

57. *Id.* at 396 n.7.

should be suppressed because the police officers who executed the warrant failed to follow the knock-and-announce rule. Although the Detroit police officers who executed the warrant announced their presence, they waited only a short time, perhaps three to five seconds, before opening the unlocked front door and entering Booker Hudson's home.[58] Because Michigan conceded that the officers had violated the requirement to knock-and-announce, the sole issue was whether to apply the exclusionary rule.[59] Although there were firearms found in Hudson's residence, including a loaded gun found between the chair cushion and armrest where Booker Hudson had been sitting when the officers entered, during Michigan court proceedings, the prosecutor conceded that the danger-to-officers exception to the knock-and-announce requirement did not apply in this particular case.[60]

In delivering the opinion of the Court, Justice Scalia concluded that violation of the knock-and-announce rule does not require application of the exclusionary rule. Exclusion of evidence was not warranted because "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence."[61] The police would have executed the warrant and found the guns and cocaine even without the knock-and-announce violation.[62] Furthermore, even if the violation was the but-for cause of the seizure, it would not necessarily be a sufficient condition for suppression.[63] The Court noted, "we have 'never held that evidence is "fruit of the poisonous tree" simply because "it would not have come to light but for the illegal actions of the police."'"[64] The Court emphasized that, "Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[65]

The officers who executed the search of Hudson's residence did have a search warrant and the knock-and-announce rule has never protected "one's interest in preventing the government from seeing or taking evidence described in a warrant."[66] "Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."[67] In addition, the exclusionary rule is not an appropriate remedy for a knock-and-announce violation because its deter-

58. Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006).
59. *See id.* at 2163.
60. *See id.* at 2162.
61. *Id.* at 2164.
62. *See id.*
63. *See id.*
64. *Id.* at 2164 (citing Segura v. United States, 468 U.S. 796, 815 (1984)).
65. *Id.* (citing Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)).
66. *Id.* at 2165.
67. *Id.*

rence benefits would not outweigh its "substantial social costs."[68] If Hudson had prevailed, other criminal defendants would flood the courts with complaints that their rights similarly had been violated.[69] The courts would be burdened with judging the merits of this endless stream of suppression motions, many of which would be groundless, and dangerous criminals would inevitably be set free.[70] In addition, a victory for Hudson would also have meant increased risks for law enforcement officers.[71] Fearing baseless claims of misconduct, officers might endanger themselves by waiting too long to enter after announcing their presence.[72]

The Court reasoned that the threat of internal police discipline and the threat of civil suits were effective motivators to prompt officers to follow the knock-and-announce rule.[73] This is especially so because "[t]he number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded . . . . [T]he lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity."[74] The Supreme Court further reasoned that police forces are now more professional, have improved the supervision and training of officers and have improved internal discipline programs that punish officers who commit misconduct.[75] Police departments are taking the constitutional rights of citizens seriously.[76]

The Supreme Court was correct in asserting that the exclusionary rule should not be applied to violations of the knock-and-announce rule. Unfortunately, however, current alternative remedies do not adequately prevent or punish police misconduct. As the next two sections of this article shall demonstrate, police officers almost always escape liability for plaintiffs' injuries, even when those officers search the wrong residence, find no evidence of criminal activity and cause physical harm to residents.

V. PLAINTIFFS' CURRENT POTENTIAL CIVIL REMEDIES

A. *The Federal Civil Rights Act*

After the Civil War, Congress enacted the Federal Civil Rights Act, 42 U.S.C. Section 1983, to provide Americans with a remedy for unlawful ar-

68. *See id.* (quoting Pa. Bd. of Prob. and Parole, 524 U.S. 357, 363 (1998)).

69. *See id.* at 2165-66.

70. *Id.* at 2162.

71. *See id.* at 2166 (discussing how delayed entrance may increase preventable violence).

72. *See id.*

73. *See id.* at 2167-68.

74. *Id.* at 2167.

75. *See id.* at 2168.

76. *Id.*

rests, detentions or killings committed by police.[77] Section 1983 was originally written to protect citizens from racist groups like the Ku Klux Klan.[78]

Unlike plaintiffs in other types of causes of action whose attorneys sometimes demand a retainer before they begin work, plaintiffs with low incomes are not barred from seeking legal redress for civil rights violations.[79] Under 42 U.S.C. Section 1988(b), Congress has authorized attorney's fees for civil rights plaintiffs. Civil rights plaintiffs may not benefit from this provision, however, because most plaintiffs in these cases do not prevail, recovery of attorney's fees is by no means certain and there are other forms of litigation that are more attractive to a plaintiffs' lawyer.[80]

In order for a plaintiff to state a claim under Section 1983, the plaintiff must meet two requirements. First, the plaintiff must allege the violation of a right secured by the Constitution and laws of the United States.[81] Second, the plaintiff must show that the alleged deprivation was committed by a person who was acting under color of state law.[82] The threshold for meeting the color of law requirement is low. For example, even if an officer is acting in a harassing or abusive manner, if he is acting in his capacity as an officer, he will be found to be acting under color of law.[83]

> It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it.[84]

Therefore, if an officer tortures a suspect to extract a confession, the officer is acting under color of law. Section 1983 causes of action are filed in federal court. The plaintiff does not have to exhaust state court or administrative remedies before the Section 1983 suit or suits are filed.[85] Furthermore, if the plaintiff prevails, under the Attorney's Fee Act of 1976, he can recover attorney's fees.[86]

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77. *See* Crumpton v. Gates, 947 F.2d 1418, 1421 (9th Cir. 1991) (citing Smith v. City of Fontana, 818 F.2d 1411, 1419 (9th Cir. 1987)).

78. *See* CRANK & CALDERO, *supra* note 22, at 145.

79. *See* 42 U.S.C. § 1988(b) (2000).

80. *See* Don B. Kates & J. Anthony Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-37, 151 (1972).

81. *See, e.g.*, Brower v. County of Inyo, 489 U.S. 593, 558-59 (1989); West v. Atkins, 487 U.S. 42, 48 (1988).

82. *See West*, 487 U.S. at 48.

83. *See, e.g.*, Vang v. Toyed, 944 F.2d 476, 479 (9th Cir. 1991) (quoting *West*, 487 U.S. at 49-50).

84. Screws v. United States, 325 U.S. 91, 111 (1945).

85. *See, e.g.*, Patsy v. Fla. Bd. of Regents, 457 U.S. 496, 516 (1982).

86. *See* Robert J. Meadows, *Legal Issues in Policing, in* VISIONS FOR CHANGE: CRIME AND JUSTICE IN THE TWENTY-FIRST CENTURY 105 (Rosyln Muraskin & Albert R. Roberts eds., 1996).

Section 1983 provides for equitable relief and money damages for the deprivation of any rights, privileges or immunities secured by the Constitution.[87] The deterrent effect of such remedies, however, is questionable because most police officers lack sufficient assets to pay any substantial judgment.[88] If the individual officer defendant is judgment-proof, the plaintiff is not adequately compensated even if the plaintiff achieves a victory in court. Furthermore, although a plaintiff in a Section 1983 suit does not have to prove that the officer had a specific intent to deprive him of a federal right, the officer can raise the defense that he acted with probable cause or in good faith.[89] Thus, while municipality liability under Section 1983 may provide a judgment against a deep pocket, such claims present substantial hurdles, as discussed below in section 7.[90]

Plaintiffs asserting Section 1983 claims arising from knock-and-announce violations have advanced many different theories of liability. The litigation survey discussed below at Part VII includes at least six different claims, all arising from the failure to knock and announce.[91]

1. *Danger Creation Doctrine*

Where action on the part of the police places plaintiffs in danger, they can recover even if they were never in police custody.[92] For example, in the middle of the night, the police force a man to wait alone outside his home while it is being searched. He is robbed and beaten by a passerby. The police may be liable for his injuries.

2. *The Fourth and Fourteenth Amendment Rights to Bodily Privacy*

Police may violate the right to bodily privacy when they cause a plaintiff's unclothed body to be seen by strangers.[93] For example, if a partially unclothed woman is forced to wait in the lobby while her apartment is searched and a neighbor sees her, she may be able to assert a claim for violation of her right to bodily privacy.

3. *Section 1983 Liability for the Acts of Others*

An officer can be held liable for other officers' acts even without acting in a supervisory role. Officers subject citizens to the deprivation of a constitutional right within the meaning of Section 1983 if they perform an

87. *See* Quick, *supra* note 29, at 34.

88. *See id.* at 40.

89. *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 557 (1967).

90. For a further discussion of municipality liability, see *infra* notes 105-16 and accompanying text.

91. Due to the extensive array of causes of action that can be brought by plaintiffs, the list in Part V should be treated as an introduction, not a complete summary of all available remedies.

92. *See, e.g.*, Johnson v. City of Seattle, 385 F. Supp. 2d 1091, 1095-96 (W.D. Wash. 2005).

93. *See, e.g.*, Lee v. Downs, 641 F.2d 1117, 1118-19 (4th Cir. 1981).

affirmative act, participate in someone else's affirmative act or omit to perform an act that officers are legally required to perform, and that dereliction of duty causes the deprivation of plaintiffs' rights.[94] An officer does not have to participate personally in the act to be held liable.[95] If an officer sets in motion a series of acts by others which the officer knew or reasonably should have known would cause others to inflict the constitutional injury, the officer can be held liable.[96]

4. *Conspiracy Liability*

If a law enforcement officer joins in a plan with one or more other officers or supervisors, and that plan results in a deprivation of constitutional rights, the officer may be held liable as a coconspirator under Section 1983:[97]

> Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.[98]

Although a plaintiff may introduce circumstantial evidence to provide proof of conspiracy, vague allegations unsupported by material facts will not be sufficient to state a claim under Section 1983.[99]

5. *Liability for Failure to Prevent Harm to Others*

If an officer was in a position to prevent constitutional injuries that were inflicted by another officer and that first officer failed to take action to prevent those injuries, the first officer may be held liable under Section 1983. In order for liability to attach, four requirements must be met: (1) the officer had a duty; (2) the officer failed to perform the duty; (3) a relationship between the failure to perform and the original duty exists; and (4) damage or injury resulted.[100]

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94. *See, e.g.*, Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978); Crowe v. County of San Diego, 303 F. Supp. 2d 1050, 1091 (S.D. Cal. 2004); *see also* Diane M. Allen, Annotation, *Liability of supervisory officials and government entities for having failed to adequately train, supervise, or control individual peace officers who violate plaintiff's civil rights under 42 U.S.C.A. § 1983*, 70 A.L.R. 17 § 2(a) (1984).

95. *See, e.g., Crowe*, 303 F. Supp. 2d at 1091-92 (quoting *Johnson*, 588 F.2d at 743).

96. *See Johnson*, 588 F.2d at 743; *Crowe*, 303 F. Supp. 2d at 1091.

97. *See* Hooks v. Hooks, 771 F.2d 935, 943-44 (6th Cir. 1985).

98. *Id.* at 944.

99. *See* Gutierrez v. Lynch, 826 F.2d 1534, 1538 (6th Cir. 1987).

100. *See* Meadows, *supra* note 86, at 106.

6. *Injunction Against the Offending Officer*

In addition to seeking money damages from the officer, the plaintiff can also seek injunctive relief under Section 1983.[101] Although this remedy could be granted to end a pattern of specific abuses, and in that sense would be a deterrent, the injunction would be powerless to deter many of the potential non-recurring constitutional infringements.[102] "If a deliberate pattern is not present or the identity of a party is unknown, the judge has no grounds to order an injunction since there is no one or nothing to enjoin."[103]

For instance, if the plaintiff was repeatedly being harassed by a police officer, injunctive relief might be granted. On the other hand, if an anonymous officer beats the plaintiff while the plaintiff is at home, and the officer leaves and is never identified, the plaintiff would not be able to attain injunctive relief against that officer. Furthermore, some courts have required a plaintiff to have "clean hands" to obtain equitable relief, a difficult requirement for the plaintiff to attain in criminal cases. Some courts also have required a plaintiff to seek a legal remedy before requesting an injunction against the officer who allegedly poses a threat of future injuries.[104] In addition, even if the court determines that the plaintiff is otherwise entitled to injunctive relief, the court may be unable to draft an effective injunctive order that does not unduly restrict essential law enforcement activities.[105] In sum, courts rarely grant injunctive relief against police misconduct, even when the alleged misconduct is part of a pattern of abuse or unconstitutional policies.[106]

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101. *See* 42 U.S.C. § 1983 (1971) (stating that every person who causes any citizen deprivation of any rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

102. *See, e.g., Lankford*, 364 F.2d 197, 201-02 (4th Cir. 1066) (granting injunctive relief to plaintiffs for pattern of police misconduct); *see also* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1399-1404 (2000); Kates & Kouba, *supra* note 80, at 136-37. *But see* City of Los Angeles v. Lyons, 461 U.S. 95, 120-21 (1983) (overturning preliminary injunction enjoining Los Angeles Police Department from using chokehold). The Supreme Court reasoned that neither Lyons's previous exposure to the chokehold nor the department's continued policy to authorize use constituted a sufficient threat of future harm to confer equitable standing to Lyons. *See id.* at 105-08; *see also* Gilles, *supra*; Kates & Kouba, *supra* note 80, at 136-37.

103. Quick, *supra* note 29, at 41.

104. *See id.* at 42-43 (citing Siedel, *Injunctive Relief for Police Misconduct in the United States*, 50 J. URBAN L. 681, 686 (1973)).

105. *See id.* at 43.

106. *See* Marshall Miller, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 159-60 (1998-1999) (citing Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1455, 1513 (1993)).

7. *Municipality Liability*

Suits against a law enforcement officer's employer are no longer barred by the doctrine of sovereign immunity.[107] After the Supreme Court's decision in *Bivens v. Six Unknown Named Agents*, the Federal Torts Claims Act was amended to permit suits against the federal government for misconduct committed by federal law enforcement officers.[108] Since the 1978 holding in the Supreme Court case *Monell v. Department of Social Services of New York*, citizens have also been able to reach into the pockets of municipalities through Section 1983 actions.[109] In 1989, however, the Supreme Court held that citizens could not sue states or state officials acting in their official capacities under Section 1983 because the states have preserved their immunity by virtue of the Eleventh Amendment.[110]

To state a claim for Section 1983 municipality liability, the plaintiff must prove that a custom or official policy of the municipality caused the plaintiff's constitutional injury.[111] A municipality will not be held liable simply because the officer was acting under color of law, or within the scope of the duties of her office:

> Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort . . . a municipality cannot be held liable *solely* because it employs a tortfeasor,—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.[112]

Municipality liability under Section 1983 "is limited to action for which the municipality is actually responsible."[113]

Despite the plaintiff's hurdles in meeting the burden of proof, if an occupant of a residence is injured or killed as a result of a knock-and-announce violation, and Section 1983 claims are brought against the participating officers and the municipality that employed them, the plaintiff is

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107. *See* CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION LEGAL, HISTORICAL, EMPIRICAL AND COMPARATIVE MATERIALS 555 (LexisNexis 2002).

108. *See* 28 U.S.C. § 2680(h) (2006).

109. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 701 (1978).

110. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66, 71 (1989).

111. *See Monell*, 436 U.S. at 690-94; *see also* Piotrowski v. City of Houston, 237 F.3d 567, 578-79 (5th Cir. 2001); Doe v. City of Waterbury, 453 F. Supp. 2d 537, 542 (D. Conn. 2006).

112. *Monell*, 436 U.S. at 691; *see, e.g.*, Bennett v. Pippin, 74 F.3d 578, 586 (5th Cir. 1996) (holding that County sheriff's rape of suspect in murder investigation constituted county policy sufficient to impose municipality liability). *But see* Kohler v. City of Wapokoneta, 381 F. Supp. 2d 692, 712 (N.D. Ohio 2005) (holding municipality was not liable for final policymaker's unauthorized, personal acts not taken in course of any official function).

113. Estate of Davis v. City of N. Richland Hills, Nos. 4:00-CV-438-Y, 4:01-CV-1008-Y, 2007 WL 750474, at *3 (N.D. Tex. Mar. 13, 2007).

more likely to recover from the municipality than the individual officers. Municipalities have deeper pockets and are more attractive targets of suits. Furthermore, the Supreme Court's holding in *Owen v. Independence* has limited municipalities' ability to exercise good faith as a defense.[114] Courts have not, however, universally held that the federal government cannot assert a good faith defense. In *Norton v. Turner*, the Fourth Circuit reasoned that because the Federal Torts Claims Act was intended only to be a supplement to claims under *Bivens*, the federal government is not barred from asserting good faith as a defense.[115]

Theories of Section 1983 municipal liability include that the violation was consistent with municipal policy, custom or practice.[116] Even if the violation was a new practice, if the police chief, sheriff or other supervisor directed the action that produced the violation, the municipality will be held liable. Municipalities can also be held liable for Section 1983 violations for failure to train, control or discipline their officers.[117] These failures have been interpreted as deliberate indifference to the citizens' need for safety.

B. *State Law Intentional Torts*

In addition to Section 1983 claims, plaintiffs may also seek redress through state law intentional tort causes of action.[118] "Intentional torts refer to a wanton disregard for a person's rights."[119] These include, but are not limited to, assault, battery, trespass, false imprisonment, false arrest, intentional infliction of emotional distress and breaking and entering.[120]

VI. Criminal Sanctions

Though criminal prosecutions are rare, officers who violate federal or state laws may face criminal liability. The charges that can be brought against an officer vary depending upon whether the officer is an employee of the federal or the state government, and whether the law that was allegedly violated was a federal or a state law.[121] Federal officers can be charged with maliciously and without probable cause securing a search

114. *See* Owen v. City of Independence, 445 U.S. 622, 657 (1980); *see also* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

115. *See* Norton v. Turner, 581 F.2d 390, 395-97 (4th Cir. 1978).

116. *See* Johnson v. City of Aiken, No. 98-2611, 2000 U.S. App. LEXIS 3628, at *12 (4th Cir. Mar. 9, 2000).

117. *See* Doran v. Eckold, 409 F.3d 958, 959-60 (8th Cir. 2005), *cert. denied*, 546 U.S. 1032.

118. *See* Molina v. Spanos, No. 98-4119, 1999 U.S. App. LEXIS 22370, at *26 (10th Cir. Aug. 18, 1999), *cert. denied*, 528 U.S. 1192 (2000); *see also* Hall v. Lopez, 823 F. Supp. 857, 866 (D. Colo. 1993).

119. Caldero & Crank, *supra* note 22, at 146.

120. *See* Quick, *supra* note 29, at 34.

121. *See* Slobogin, *supra* note 107, at 553-54.

warrant under 18 U.S.C. § 2235; exceeding authority granted in a search warrant under 18 U.S.C. § 2234; and conducting a warrantless search not incident to arrest or consent under 18 U.S.C. § 2236. The federal officers can also be charged with conspiracy to violate constitutional rights under 18 U.S.C. § 241.[122] State officers who, under color of state law, deprive a person of constitutional rights can be charged under 18 U.S.C. § 242. In addition, most jurisdictions provide criminal sanctions for false arrest and trespass. Both state and federal officers can also be prosecuted for murder.[123] A successful criminal prosecution, of course, requires proof beyond a reasonable doubt of the officer's guilt.[124]

Although the currently available remedies for knock-and-announce violations seem numerous, they do not adequately address plaintiffs' injuries. It is often difficult to quantify the harm caused by an illegal search.[125] Furthermore, Section 1983 and common law tort remedies are too remote and uncertain to address plaintiffs' injuries. The plaintiff must find a competent attorney who is willing to undertake protracted litigation, and the plaintiff, as indicated by this author's survey of cases, usually fails to win any material monetary remedy. Thus, the victim receives no meaningful remedy and the offending officer faces no substantial sanction to deter future misconduct. In addition, criminal sanctions do nothing to compensate plaintiffs for their injuries, and the majority of officers who commit knock-and-announce violations, even when the violations were committed in bad faith, suffer no criminal sanctions. Also disturbing are the statistics about internal departmental actions, or lack thereof, taken against officers who allegedly committed misconduct. One study reported that officers who are sued are more than twice as likely to get promoted as to be punished.[126] The next section of this article provides a concise overview of knock-and-announce cases and discusses factors that affected a plaintiff's ability to recover for his or her injuries through the courts.

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122. *See id.*

123. *See, e.g.*, Rhonda Cook & Mike Morris, *More Atlanta Cops Suspended in Fatal No-Knock Raid*, THE ATLANTA JOURNAL-CONSTITUTION, June 28, 2007, at B1; Beth Warren, *Kathryn Johnston Shooting: Informant hiding out, plans to sue police, city*, THE ATLANTA JOURNAL-CONSTITUTION, Apr. 28, 2007, at B1. A botched no-knock drug raid resulted in an elderly woman being shot to death by Atlanta police officers. *See id.* Two of the officers pled guilty to criminal charges, including voluntary manslaughter, violation of oath by a public officer, giving of false statement, criminal solicitation and perjury. *Id.* A third officer was indicted on state charges of false statements, violation of oath of office by a public officers and false imprisonment. *Id.* As of June 28, 2007, he is still contesting those charges. *See* Cook & Morris, *supra*. On June 28, 2007, three more Atlanta police officers who were involved in the raid were suspended with pay pending the outcome of a federal investigation. *Id.* The drug informant involved in the scandal plans to sue the police department and the city. *Id.*

124. *See* SLOBOGIN, *supra* note 107, at 554.

125. *See* Stuntz, *supra* note 3, at 910-18.

126. *See* CALDERO & CRANK, *supra* note 22, at 146.

VII. SURVEY AND ANALYSIS OF KNOCK-AND-ANNOUNCE CASES

Only rarely do victims of knock-and-announce violations sue law enforcement officers or their municipal employers, and only rarely do those victims who do sue in this context recover any meaningful relief.[127] In this author's survey of knock-and-announce civil suits, more than fifty cases were examined.[128] The earliest case examined was decided on appeal in 1973.[129] The two most recent cases examined were heard by courts in 2007, and six cases were examined that were heard by courts in 2006.[130] The survey of cases revealed that plaintiffs who received physical injuries or who had relatives who were killed by police were more likely to recover damages than plaintiffs who suffered no physical harm. Of the plaintiffs who did recover, if there was a physical injury or a death the amount of the total recovery tended to be larger. Nevertheless, most of the plaintiffs who experienced physical injuries did not prevail in their suits against individual law enforcement officers or the municipalities that employed the officers.

The research also revealed a correlation between whether the search uncovered evidence of criminal activity and the plaintiff's likelihood of success. Regardless of the conduct of the offending officers, juries find it difficult to sympathize with a plaintiff who has committed crimes, particularly when the crimes are serious.[131] If no evidence of criminal activity was

127. *See* Moran, *supra* note 7, at 301 (citing Hudson v. Michigan, 126 S. Ct. 2159, 2167 (2006)).

128. In order to identify knock-and-announce cases to include in the survey, the all cases database, the all text and periodicals database, and the jury verdict and settlement reporters on Lexis and Westlaw were searched. Online news sources were also searched.

129. *See* Rodriguez v. Jones 473 F.2d 599 (5th Cir. 1973). Dallas County Sheriffs and Dallas Police Department officers, in a joint operation, executed an arrest warrant for two individuals who were suspected of murdering three deputy sheriffs. *Id.* The plaintiffs, Tomas Rodriguez and his family, alleged that the deputy sheriffs and police officers failed to properly knock and announce their presence and then wait a reasonable amount of time before entering the apartment. *Id.* The suspects were not at the apartment, but gunfire was exchanged between the deputy sheriffs and Tomas Rodriguez; Rodriguez and his wife were shot and wounded. *Id.* The United States Court of Appeals for the Fifth Circuit found that though the law enforcement officers were mistaken in their belief that the murder suspects were at the apartment, the officers had acted reasonably. *Id.* Therefore, the plaintiffs were not entitled to recover under Section 1983. *Id.*

130. *See* Harman v. Pollock, 446 F.3d 1069 (10th Cir. 2006); Trujillo v. Large, 165 Fed. Appx. 619 (10th Cir. 2006); Estate of Davis v. City of N. Richland Hills, Nos. CIV.A.4:00-CV-438-Y, 4:01-CV-1008-Y, 2007 WL 750474 (N.D. Tex. Mar. 13, 2007); Closure v. Onondaga County, No. 5:06-CV-926 (NPM/GJD), 2007 U.S. Dist. LEXIS 8947 (N.D.N.Y. Feb. 7, 2007); Kniffen v. Macomb County, No. 04-70497, 2006 U.S. Dist. LEXIS 90839 (E.D. Mich. Nov. 22, 2006); Tolliver v. Baxter County, No. 05-3036 (W.D. Ark. filed July 18, 2006); Hernandez v. Conde, 442 F. Supp. 2d 1141 (D. Kan. 2006); Cassady v. Yellowstone County Mont. Sheriff Dep't, 2006 MT 217 (Mont. Sep. 6, 2006).

131. *See* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 115 (2002); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than*

found, the plaintiff was more likely to receive a favorable result at trial or in a settlement; however not all of these innocent plaintiffs were granted relief.

Even when the jurisdiction had a statute that required notice be given before the search, such as a codified knock-and-announce rule, these statutes did not necessarily aid plaintiffs.[132] In the more than fifty cases reviewed, courts almost always granted summary judgment for the officers, or the municipalities, or both, based on findings of qualified immunity. An additional eight cases were identified through jury verdict or settlement reports. The amount of total recovery in each of these cases ranged from $169,000 in *Ajamu v. City of Orlando*,[133] to $3,500,000 in *Heard v. Board of County Commissioners*.[134]

In *Ajamu*, three police officers had a warrant to search a unit in the same building as the plaintiff's unit, but they searched the plaintiff's home in error. The plaintiff alleged that arresting officers threw him to the ground, handcuffed him and detained him for several hours while his home was searched before he was transported, handcuffed to a gurney, to the hospital. He alleged that the officer's rough handling caused him to suffer a lip laceration that required stitches. Hospital records confirmed that he arrived for treatment wearing handcuffs. The plaintiff was released from the hospital by the police and allowed to return home. No narcotics or other evidence of criminal activity were discovered in his home. He sued the City of Orlando and three individual officers, alleging false arrest, battery, violation of his right to privacy, negligence and violation of Section 1983, including unconstitutional pat-down, search and detention and use of excessive force. Plaintiff further asserted that he lived in a house that was a duplex that had two mailboxes and two electric meters, and that defendants knew or should have known that the house contained two separate residences.[135]

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the Disease, 68 S. CAL. L. REV. 1, 56 (1994); Jonathan Papik, *Don't Knock Them Until We Try Them: Civil Suits as a Remedy for Knock-And-Announce Violations After* Hudson v. Michigan, 30 HARV. J.L. & PUB. POL'Y 417, 424 (2006).

132. *See, e.g.*, Pierre v. Neudigate, No. C-1-01-670, 101 Fed. Appx. 50, 2004 LEXIS 11150 (6th Cir. June 3, 2004); Molina v. Spanos, No. 98-4119, 1999 LEXIS 22370 (10th Cir. Aug. 18, 1999), *cert. denied*, 528 U.S. 1192 (2000); Thompson v. Mahre, 110 F.3d 716 (9th Cir. 1997); Todosijevic v. County of Porter, No. 2:04 CV 260, 2005 LEXIS 36753 (N.D. Ind. Dec. 2, 2005); Cacciatore v. City of Phila., No. 04-5596-04-5597, 2005 LEXIS 19064 (E.D. Pa. Sept. 1, 2005); Byrd v. Duffy, No. 96-0070, 1998 LEXIS 19987 (E.D. Pa. Dec. 11, 1998); Martin v. Hatfield, 1994 LEXIS 18758 (E.D. Pa. 1994); McCoy v. Kummerman, No. C-91-3933-DLJ, 1993 LEXIS 2158 (N.D. Cal. Feb. 16, 1993); Blair v. City of Norwalk, No. H-97-005, 1998 LEXIS 438 (Ohio Ct. App. Feb. 6, 1998).

133. *See* Ajamu v. City of Orlando, No. 48-2000-CA-9770-O, 14 FLA. JURY VERDICT REV. & ANALYSIS, Mar. 2004 (Fla. Orange Cty. Ct. Nov. 6, 2003).

134. *See* Heard v. Bd. of Cty. Comm'rs, Civil Action No. 00-2173-JWL (D. Kan. Mar. 9, 2001), as reported in Vol. 16, Issue 6, NAT'L JURY VERDICT REVIEW & ANALYSIS (June 2001).

135. *See Ajamu*, No. 48-2000-CA-9770-O.

The defendants introduced evidence that undercover officers had purchased crack cocaine at the front of the house. When the unit that belonged to plaintiff's neighbor was searched, firearms were found. The defendants further contended that when a search was considered "high risk," a pat-down was conducted to search all individuals present for weapons.

The court directed a verdict against the City of Orlando on the false arrest and illegal pat-down claims. The jury found for the plaintiff against the City of Orlando on the claims of unconstitutional detention and violation of his rights of privacy and awarded him a total of $20,000, comprised of $10,500 for past pain and suffering and $9,500 for past medical expenses. The jury rejected the civil rights claims against the individual officers, and also found for the City on the claims of battery, negligence, unconstitutional search and use of excessive force. The case settled post verdict for $169,000.[136]

In *Heard*, the plaintiffs were asleep when the police set off a flash-bang device and breached the door of the residence. A total of twenty officers were involved in executing a search warrant to search for narcotics. The husband was shot during the first eleven seconds of the raid. Neither he, nor his wife, nor daughter was armed.[137]

The wife and daughter claimed that their civil rights were violated by the police officers who entered their home without consent, shot the decedent, and subjected them to false arrest as the decedent lay dying from the gunshot wound the police had inflicted. The plaintiffs were held for several hours. No narcotics nor other evidence of a crime were found in the home or found on the plaintiffs or on the decedent's body. The plaintiffs were not charged with any crimes. The defendant officers and the police department denied wrongdoing, claiming that they lawfully entered the premises to execute the warrant. The case settled prior to trial for a structured settlement of $3,500,000.[138]

In the knock-and-announce cases surveyed, instances of alleged law enforcement misconduct varied from officers making what courts interpreted to be good-faith mistakes, to officers who attempted to perpetrate lies, such as fabricating testimony from a nonexistent informant in order to obtain a search warrant. The more egregious the conduct, the more likely the plaintiff would prevail. Nevertheless, even where officers searched the wrong residence, found no evidence of criminal activity, and inflicted physical injury, plaintiffs did not always recover. In particular, where there was no physical injury, plaintiffs rarely recovered. The outcomes of these cases suggest that civil litigation is inadequate to enforce the knock-and-announce rule. The remainder of this article discusses existing additional means for deterring police misconduct and recommends

136. *See id.*
137. *See Heard*, No. 00-2173-JWL.
138. *See id.*

additional mechanisms that will more effectively redress plaintiffs' injuries and deter officers from committing further acts of misconduct.

VIII. CURRENT MECHANISMS FOR DETERRING POLICE MISCONDUCT

A. *Internal Accountability and Administrative Sanctions*

In recent decades, police departments have improved their training, supervision and oversight of officers, but there is need for further improvement. Effective deterrence must target officers' value systems and the forces that motivate officers to act dishonorably. Law enforcement agencies utilize internal accountability mechanisms to deter officers from engaging in misconduct and to punish officers who do commit misconduct. These measures include conducting random drug testing of officers, having written standard operating procedures, utilizing a chain of command, mounting video cameras on patrol cars, requiring dispatch notification when an officer leaves a patrol car, having citizen complaint files and having an internal affairs division or office of professional responsibility.[139] Although the in-department methods of preventing misconduct are numerous, they are not always adequate.

B. *External Accountability*

External accountability mechanisms are the mechanisms outside the officers' police departments that influence officers to avoid engaging in

139. *See* Part VII of this article, Author Survey and Analysis of Knock-and-Announce cases; *see also* CALDERO & CRANK, *supra* note 22, at 77; Rhonda Cook and Mike Morris, *More Atlanta Cops Suspended in Fatal No-Knock Raid*, THE ATLANTA JOURNAL-CONSTITUTION, June 28, 2007, at B1; Ken Foskett and Rhonda Cook, *After Botched Raid, Atlanta Drug Warrants Drop*, THE ATLANTA JOURNAL-CONSTITUTION, June 11, 2007, at B1; Ken Foskett, *Drug Officers Got Little Scrutiny After Abuse Claim in '05*, THE ATLANTA JOURNAL-CONSTITUTION, June 3, 2007, at B1; Bill Torpy and Rhonda Cook, *The Kathryn Johnston Shooting*, THE ATLANTA JOURNAL-CONSTITUTION, April 28, 2007, at B1. As a result of the Kathryn Johnston shooting, a civilian review board has been instituted and the Atlanta Police Department is examining its policies for the hiring, training and supervision of narcotics investigators. All of the officers on the Atlanta Police Department's narcotics squad have been replaced. Kathryn Johnston was shot to death during a no-knock search. Officers lied to obtain the warrant and planted drugs in Ms. Johnston's home after they killed her. In April of 2007, two of the officers who executed the search pled guilty to numerous charges, including voluntary manslaughter and perjury. In pleading guilty, Gregg Junnier admitted to having lied on other occasions in order to obtain search warrants. A third officer who took part in the raid at Kathryn Johnston's home has been indicted on state charges of violation of oath of office by a public officer, false statements and false imprisonment. That third officer is contesting those charges. On June 28, 2007, three additional police officers who were allegedly involved in the raid of Johnston's home were suspended with pay pending a federal inquiry that is ongoing. As part of their investigation, FBI agents are interviewing individuals whose homes were searched by members of the team who executed the raid at Johnston's residence to determine if misconduct was committed during those prior searches. According to accounts in the media, during the six months following the botched raid, Atlanta Police Department narcotics investigators have not applied for a single no-knock search warrant.

misconduct, or that punish officers who do engage in misconduct. These external accountability mechanisms include the threat of criminal and civil liability and oversight from the media, citizen review boards and elected officials.[140] Part XIII of this article provides recommendations for additional internal and external accountability mechanisms that will assist in more effectively preventing and punishing police misconduct.

IX. Correlations Between Police Officers' Motivations and Misconduct

An effective deterrent must reflect the actual motivations of law enforcement officers. Most police officers are ends-oriented rather than means-oriented.[141] They are motivated to incarcerate criminals and to remove narcotics, weapons and other contraband from the streets. Their identity is bound up in protecting the public, and many believe it is permissible to bend the rules to preserve public safety.[142]

If an officer is convinced that a suspect is factually guilty of committing an offense, but necessary elements of the legal guilt are lacking, that officer may be tempted to "fluff up the evidence" in order to attain the necessary probable cause to obtain an arrest or search warrant.[143] Officers who commit these types of acts are motivated by deep-seated moral beliefs. "[M]any officers see a cruel world in which good citizens are routinely victimized and a court system that is unresponsive, and believe they have few alternatives than to enact their own particular brand of extralegal justice."[144]

For an officer who follows this philosophy, a good "bust" is not necessarily a bust that follows official departmental procedures and that respects the suspect's Fourth Amendment right to be free from unreasonable search and seizure. A good bust is a bust that accomplishes the officer's objectives: getting the narcotics, weapons, or other contraband off the streets and obtaining evidence for a conviction:[145]

> The policeman views criminal procedure with the *administrative bias of the craftsman*, a prejudice contradictory to due process of law. That is, the policeman tends to emphasize his own expertness and specialized abilities to make judgments about the measures to be applied to apprehend "criminals," as well as the ability to estimate accurately the guilt or innocence of suspects. He sees himself as a craftsman, at his best, a master of his trade. As such, he feels he ought to be free to employ the techniques of his

140. *See* Caldero & Crank, *supra* note 22, at 77.

141. *See id.* at 79.

142. *See* Souryal, *supra* note 24, at 103.

143. *See* Barker & Carter, *supra* note 2, at 68-69.

144. Caldero & Crank, *supra* note 22, at 22.

145. *See Interview with anonymous police detective*, Chicago Police Dep't, detective who wishes to remain anonymous (Feb. 21, 2007).

> trade, and that the *system* ought to provide regulations contributing to his freedom to improvise, rather than constricting it.[146]

Many police officers believe that their job is to enforce the law, not necessarily to follow it. Officers who break the law in order to achieve "good" ends are committing noble cause corruption.[147]

Law enforcement agencies adopt codes of ethics, but some officers believe that there is an unwritten rule that you will not report on a fellow officer who commits misconduct.[148] Police have to watch their backs and their partners' backs.[149] It is a police officer's job to keep society under control. Officers may rationalize that unless individuals are directly affected by police behavior, they would rather not be informed of the methods that are used to combat crime.[150] We expect police to do the "dirty" work to achieve good ends.[151]

Another way our justice system contributes to police corruption is the use of quota systems to monitor the effectiveness of police departments.[152] Many police departments evaluate their officers' performance by measuring their clearance rates or the percentage of cases they have "solved."[153] A police department's clearance rate is primarily applied at the detective level, but it is also applied to the entire department. All personnel are pressed to compile impressive clearance rates.[154]

If a police department's clearance rate is not competitive with the rates of other law enforcement agencies, that police department may establish a quota system to improve its statistics. Under a new quota system, officers would be expected to issue a certain number of summonses or conduct a certain number of field investigations during a set time period.[155] A police officer who must operate under a quota system will find it difficult to be sympathetic to due process guidelines that stand in the way of filling the required quota.[156] Arrests and seizures are rewarded

146. JEROME SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 196 (1971); *see also* Wesley, *Violence and the Police, in* CRIME & THE LEGAL PROCESS, 157 (1969); Livermore, *Policing,* 55 MINN. L. REV. 649, 714 (1971).

147. *See* Michael C. Braswell, Belinda R. McCarthy, and Bernard J. McCarthy, *Justice Crime and Ethics* 110 ch. 7, *in* POLICE ETHICS, LEGAL PROSELYTISM, AND THE SOCIAL ORDER: PAVING THE PATH TO MISCONDUCT 110 (Victor E. Kappeler & Gary W. Potter eds., 2005).

148. *See* ANTHONY B. BOUZA, THE POLICE MYSTIQUE 70-71 (1990); *see also* CONNIE FLETCHER, BREAKING AND ENTERING 224-50 (1995).

149. *See* GINA GALLO, ARMED & DANGEROUS: MEMOIRS OF A CHICAGO POLICEWOMAN 55-56 (2001).

150. *See* BOUZA, *supra* note 148, at 70-73.

151. *See* Carl Klocknars, *The Dirty Harry Problem, in* THINKING ABOUT POLICE: CONTEMPORARY READINGS 428-32 (Carl Klocknars ed., 1983).

152. *See* CALDERO & CRANK, *supra* note 22, at 10; *see also* Quick, *supra* note 29, at 31-32.

153. *See* Quick, *supra* note 29, at 30-31.

154. *See* J. GRIFFIN, STATISTICS ESSENTIAL FOR POLICE EFFICIENCY 69 (1958).

155. *See* Quick, *supra* note 29, at 31.

156. *See id.* at 31.

with favorable statistics, and earning such favorable numbers can lead to bonuses and promotions.[157] In addition, some police departments pay their officers overtime if the officers appear in court. Officers have been caught after they falsified reports, listing fellow officers who had no involvement in their cases as witnesses. Those colleagues testified in court, thereby bolstering the "evidence" against the suspects whose crimes they had "witnessed." At the same time these fake witnesses were committing perjury, they were also lining their own pockets with extra income from the overtime pay.[158]

This ends-oriented attitude of rewarding officers who get "results" in the form of seizures and arrests and in overtime pay for court appearances is fed by high recidivism rates. Law enforcement officers see the justice system as a revolving door and develop a cynical attitude about their role in it. Officers are aware that most offenders who are arrested, prosecuted, convicted and serve time behind bars will later commit other crimes. In some states such as California, recidivism rates are in excess of 60%.[159] To these officers, whether the search or arrest leads to a conviction may seem immaterial. They believe their duty is to haul in as many perpetrators as they can and seize as much contraband as they can, by whatever means necessary.

X. Inadequate Police Training on Criminal Procedure and Defendants' Constitutional Rights

Inadequate law enforcement training in criminal procedure contributes to police misconduct. In some police departments, assignment to a training unit is viewed as a punishment.[160] "Most 240-hour programs contain at most 30 hours of law-related material."[161] In that small portion of training that is related to the law, the majority of the instruction focuses on substantive areas of the law, such as the definition of criminal acts, rather than procedure.[162] In departments where recruits are given a better grounding in criminal procedure, the training may fail to have an influence on improving officer compliance with rules that are designed to protect individuals' constitutional rights. This failure can be attributed to

157. *See* Arthur Niederhoffer, Behind the Shield: The Police in Urban Society 53 (1969).

158. *See* Souryal, *supra* note 24, at 237 (citing *HeraldLink*, July 29, 1997).

159. *See* Samson v. California, 126 S. Ct. 2193, 2200 (2006) (citing California Attorney General, Crime in California 37 (Apr. 2001)) (explaining that 68% of adult parolees are returned to prison, 55% for parole violation, 13% for commission of new felony offense).

160. *See* Slobogin, *supra* note 107, at 15 (citing Report on the Boston Police Department, Management Review Committee 70-83 (Jan. 14, 1992)).

161. Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 Pol'y Stud. J. 461, 464 (1978).

162. *See id.* at 464; *see also* Quick, *supra* note 29, at 29; Police Training and Performance Study, 178-79 (N.Y. City Police Dep't 1970) (Report by the N.Y. City Police Dep't).

the way in which legal rulings are communicated. Instructors often omit discussing the rationale underlying the Supreme Court's and other courts' decisions.[163] Furthermore, "[t]he spirit and tone of communication about the law, particularly when the law is favorable to defendant's rights, is often negative, which the need for compliance stressed only infrequently . . . many training materials engage in 'negative advocacy,' with stress placed on how to 'live with'—if not avoid—Supreme Court standards."[164] In addition, if an instructor shares war stories about officers who caught criminals or gathered evidence by breaking rules, those stories convey the message that rules can be flouted.

XI. Police Perjury

After they graduate from the Academy, officers in their probationary period are assigned to training officers who monitor their work.[165] They know they can be fired for failing to satisfy their training officers' expectations or demands. Therefore, they are reluctant to report a training officer who commits misconduct because of fears of reprisal.[166]

Rookie officers are sometimes counseled by their training officers to forget everything that they learned at the Academy, including their legal training. The training officer may advise the new officer that everyone lies: witnesses, suspects, crime victims, cops, prosecutors, defense attorneys and the media.[167] Criminals will lie to avoid getting arrested, to circumvent the police from gathering evidence of their culpability, to avoid confessing and to avoid getting convicted of their crimes.[168] To combat this devious behavior, some officers believe that there are instances where it is not wrong for them to lie.[169] They become frustrated with the inefficiencies of the justice system and justify lies as necessary to ensure that criminals do not get off on "technicalities."[170] These officers fail to recognize or choose to ignore the knowledge that such behavior threatens civil liberties and that officers who commit perjury are committing a crime that could be considered as improper as the criminal behavior of the accused.[171] Lies told in the guise of furthering police objectives take place both on the streets and in the courtroom. It is not uncommon for police

163. *See* Wasby, *supra* note 161, at 466.

164. *Id.*

165. *See* Fletcher, *supra* note 148, at 19; *see also* Ellwyn R. Stoddard, *Blue Coat Crime*, *in* Thinking about Police: Contemporary Readings 343-48 (Carl B. Klockars ed., 1983).

166. *See* Crank & Caldero, *supra* note 22, at 62.

167. *See* Gallo, *supra* note 149, at 56.

168. *See* Ellen Kirschman, I Love a Cop: What Police Families Need to Know 22 (1997).

169. *See* Barker & Carter, *supra* note 2, at 61, 62-67.

170. *Id.* at 69.

171. *See id.*

officers to exchange banter about "testilying" before they testify in court.[172]

XII. Perjury and Prosecutorial Ethics

Some prosecutors turn a blind eye towards law enforcement misconduct; other prosecutors are complicit or even coach law enforcement officers on how to circumvent the law. They may instruct law enforcement officers to tweak their in-court testimony to deflect defense allegations of a Fourth Amendment violation.[173] Police officers who are surveyed about their opinions of their fellow officers' in-court testimony have reported that they do believe that law enforcement officers lie in court.[174] And corruption investigations have revealed many prosecutors knowingly have allowed officers to submit false testimony. One study revealed:

> Sixty-one percent [of prosecutors], including 50% of state's attorneys, believed that prosecutors knew, or had reason to know, more than 50% of the time when police fabricated evidence in case reports. . . . Fifty percent of those responding, however, believe prosecutors know that police fabricated evidence in search warrants most, or all, of the time that such fabrications occur.[175]

Furthermore, if an officer is caught committing perjury, not only can the officer be prosecuted for obstruction of justice and other charges, but also, all of the officer's testimony in that case will be discredited.[176] Prosecutors are obviously aware of this risk, but some wish to continue to have a good relationship with police officers and are going along with the officers' schemes because they wish to avoid conflict. Other prosecutors agree with the police that securing a conviction justifies perjury.[177]

Law enforcement officers and prosecutors who assert that such "noble cause" corruption is not wrong are conveniently forgetting or deliberately ignoring the risk to potentially innocent suspects and the fundamental rights of all accused that both police and prosecutors are sworn to protect. As evidenced by the analysis of knock-and-announce violation cases, innocent individuals have been hurt and even killed as a result of law enforcement officers fabricating evidence in order to obtain search warrants or committing other varieties of misconduct. Remedies currently available to address these injuries are inadequate. The remainder of this article rec-

172. Author's personal knowledge of law enforcement officer's behavior; *see also* Slobogin, *supra*, note 2 at 1037, 1040 n.11.

173. *See* Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 110 (1992).

174. *See* Barker & Carter, *supra* note 2, at 68.

175. Orfield, *supra* note 173, at 110.

176. *See* Carmine J. Motto & Dale L. June, Undercover 131-32 (2d ed. 2000).

177. *See* Slobogin, *supra* note 2, at 1046-47.

ommends mechanisms that will more effectively prevent and punish police misconduct.

XIII. Preventing and Remedying Police Misconduct: Proposed Alternatives

A. *Stress Management Programs and Improved Law Enforcement Training*

Internal law enforcement accountability mechanisms must be proactive as well as reactive.[178] Supervisors, training officers, instructors and other administrators need to be alert for signs that an officer is depressed, is disillusioned with the job, or is having other job-related or personal problems.

> Those who study suicide say that in the nation as a whole, police commit suicide at a far higher rate than the rest of the population—roughly twenty-nine cops out of a thousand commit suicide compared to the general population's eleven suicides out of a thousand.[179]

Stress, whether it is a product of the job, a product of the officer's home life, or an outgrowth of some other issue, can increase the likelihood that an officer will engage in misconduct:

> Cops work in bureaucracies, and these bureaucracies create stress that far exceeds the stress they experience in the line of duty. Danger is not an everyday occurrence for most cops, but organizational stress and office politics are. Cops are taught how to deal with danger as though it happens every day, but rarely, if ever, are they taught to anticipate—and, in turn to manage—the daily grind of a bureaucratic system.[180]

Ideally, law enforcement agencies should have peer support programs and counselors to provide advice and treat officers before stress leads them to harm themselves or others. To insure that the maximum number of officers who need help take advantage of the programs, the professional counselors, such as psychologists, should observe patient confidentiality. Peer counseling is never confidential, but officers may be more willing to confide in a fellow officer than a mental health professional, even if they know their communications can be shared with supervisors.[181]

If participation in counseling is mandatory, the counseling will not be confidential, even if it is conducted by a mental health professional, such as when counseling is part of a fitness-for-duty evaluation.[182] Psychologists who treat officers in fitness-for-duty evaluations or in other contexts, such

178. *See* Caldero & Crank, *supra* note 22, at 275.
179. Fletcher, *supra* note 148, at 224.
180. Kirschman, *supra* note 168, at 53.
181. *See id.* at 186.
182. *See id.* at 184-85.

as when counseling is offered in lieu of firing, should require the officers in their care to sign agreements that state they understand that records of the therapy will be turned over to the department.[183]

In addition to offering counseling programs, departments can incorporate stress management skills into training programs, both at Police Academies and at in-services. Another way that departments can proactively address the problem of potential misconduct is to involve the department's internal affairs or professional responsibility department with officer training, rather than just using members of those units as investigators of alleged corruption.[184] "An ethically proactive unit meets with various units, carries out in-service training, and provides officers with discussions and examples of complex corruption cases."[185]

Law enforcement officers must be better educated about the consequences of committing misconduct, and utilizing members of the internal affairs unit or the office of professional responsibility as educators can facilitate this objective. If an officer violates an individual's constitutional rights, the officer must realize the potential for civil liability, criminal liability and administrative sanctions, including potential job loss. The officer is also exposing fellow officers, their supervisors and employer to potential liability. Furthermore, an officer who commits a bad act in the aim of "doing her duty" cannot guarantee that her actions will have a positive outcome. As the study of failure to knock-and-announce cases demonstrates, officers who perform unreasonable searches or engage in other forms of misconduct are injuring the innocent as well as the guilty.

Improved police academy training and in-service training on criminal procedure and ethics would educate officers about these issues. Improved training would also foster a renewed respect for citizens' rights of privacy. Officials who design these enhanced training programs and the training instructors should start with the premise that law enforcement officers are ethical. They have an ingrained sense of duty and a desire to serve justice.

Rather than focusing on the mere memorization of rules, training should appeal to officers' inherent value systems by incorporating problem-solving situations that address real-life situations.[186] These practical applications will enable the officer to put rules into practice and better prepare both rookies and veteran officers to make judgment calls that coincide, not conflict, with the law and departmental policies. Training should also incorporate the rationale behind the Supreme Court's and other courts' holdings and the rationale behind the protections afforded by the Constitution. Training that fails to give officers a better understanding of why judges decide that rules should be followed will fail to appeal to officers' sense of ethics.

183. *See id.* at 185.
184. *See* CALDERO & CRANK, *supra* note 22, at 275.
185. *Id.* at 276.
186. *See id.* at 272.

In order to better reinforce the benefits of training programs once officers reach the field, agencies must exercise greater oversight in the selection of training officers who oversee rookie officers during their probationary period. Training officers play an important role in indoctrinating rookie officers into the culture of their law enforcement agency and in shaping rookies' value systems. If a training officer has a cynical attitude about departmental regulations, or about rules mandated by the Constitution or the common law, that attitude will be adopted by the rookie.

> It takes only a few disappointments for an idealistic young officer to build a self-protective wall of cynicism against being made to look foolish or feel naïve. There is so much cynicism in police work that the cynical officer easily finds like-minded company to reinforce his or her position.[187]

Cynicism is corrosive. It can lead officers to lose empathy for those they have sworn to protect.

B. *De-emphasize the Use of Quota Systems*

Just as unfavorable influences from peers can contribute to cynicism and dissolution with the job, so can quota systems. Less emphasis should be placed on meeting quotas for issuing summons, conducting arrests and searches and seizing specific quantities of narcotics, contraband or other evidence of crimes. Rather than contributing to a department's effectiveness, quota systems can be destructive to the individual officers and detrimental to the department. Quota systems are often perceived by officers as unfair and arbitrarily enforced. They encourage officers to falsify evidence in order to "make up the numbers."[188]

C. *Administrative Sanctions*

Every law enforcement agency should implement a written discipline matrix. A discipline matrix specifies the range of disciplinary sanctions that will be imposed for particular kinds of misconduct. The goals of a written discipline matrix are: communicating the values of the particular police department, ensuring accountability by specifying minimum discipline, ensuring consistent, fair, and appropriate discipline and ensuring accountability for command officers and other supervisors.[189]

Respecting principles of due process requires the department to provide each officer with notice of the rules and the opportunity to be heard if the officer is alleged to have violated the rules. Communicating the rules and the rationale behind those rules also serves to communicate the

187. KIRSCHMAN, *supra* note 168, at 22.

188. *See* Quick, *supra* note 29, at 31.

189. *See* Samuel Walker, *The Discipline Matrix: An Effective Accountability Tool?*, BEST PRACTICES IN POLICING CONFERENCE REPORT 4-6 (Police Professionalism Initiative University of Nebraska at Omaha, Jan. 2003).

values of the agency. "All organizations inherently resist change, and comprehensive improvements involve transforming the culture of the organization."[190] Without information about these values, officers are more likely to see the discipline matrix as just another set of regulations that are designed to make their lives miserable. But if lines of communication about the department's system of administrative sanctions are kept open, and the policies in the discipline matrix are enforced fairly and equally all through the ranks, it is much more likely to be perceived in a positive light, and to be an effective deterrent against police misconduct. In addition, supervision and training policies should be modified if they do not coincide with the law enforcement agency's desired values.

Providing information about the discipline matrix can enhance the department's image with the public. Some people, particularly members of ethnic or racial minority communities, believe that officer misconduct is never punished. If the community learns that the department does in fact have an official written policy dictating what appropriate officer conduct is, and what the sanctions are for misconduct, that can serve to restore trust in the police. Trust will be raised even further if the municipality acknowledges instances of officer misconduct and does in fact sanction those officers who break departmental violations. In addition, if an officer breaks the law, the municipality should cooperate with the outside agency that conducts an investigation into the misconduct and should also cooperate with prosecutors.

D. *Courts Should Use Their Well-Established Power to Dictate Who Is Allowed to Execute Warrants*

It is a well-established principle that a court has the inherent power to supervise the manner in which the court's own writs and warrants are executed. If a law enforcement officer has committed misconduct in the context of executing a warrant, under the common law the court that issued the warrant can punish the officer by contempt or other sanction.[191] "The power to punish for contempts is inherent in all courts."[192] Under 18 U.S.C.A. § 2234, an officer who in executing a search warrant "willfully exceeds his authority or exercises it with unnecessary severity" can be fined or imprisoned for not more than one year.[193]

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190. Samuel Walker, *Report of the Conference on Police Pattern or Practice Litigation: A 10-Year Assessment*, BEST PRACTICES IN POLICING CONFERENCE REPORT 3 (Police Professionalism Initiative University of Nebraska at Omaha, Mar. 2005).

191. *See, e.g.*, State v. Sherrick, 98 Ariz. 46, 58 (1965); State v. Berg, 76 Ariz. 96, 99 (1953), *overruled on other grounds by* State v. Pina, 94 Ariz. 423 (1963); State v. Frye, 58 Ariz. 409 (1942), *overruled on other grounds by* State v. Pina, 94 Ariz. 423 (1963); *see also* Chambers v. Nasco, 501 U.S. 32, 43-44 (1991).

192. *Chambers*, 501 U.S. at 44 (citing Ex parte Robinson, 19 Wall. 505, 510 (1874)).

193. *See* 18 U.S.C.A. § 2234 (2002); *see, e.g.*, United States v. Freeman, 144 F. Supp. 669, 670-71 (D.D.C. 1956) (referencing 18 U.S.C.A. § 2234).

In addition, an officer who commits misconduct can lose his license to work in law enforcement in the state where the misconduct occurred.[194] These licenses, also known as certificates, are issued by the Peace Officer Standards Training Commissions.[195] Before the officer's license or certificate to work in law enforcement can be revoked, the officer must be assigned counsel and afforded a hearing.[196] The definition of what constitutes misconduct so egregious that revocation of a license is warranted varies from state to state.[197]

Although Peace Officer Standards Training Commissions have the power to revoke officers' licenses to work in law enforcement, that does not foreclose courts from also using their inherent powers to sanction officers who commit misconduct. The Supreme Court's cases and other precedents "have indicated that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."[198]

Police departments cannot be relied upon to enforce Fourth Amendment principles by themselves . Although the exclusionary rule was designed to deter law enforcement misconduct, it has been proven ineffective. This author's recommended approach is directly focused on what should be of the greatest concern: if a law enforcement officer has shown that he commits misconduct in the context of executing a search warrant, the court can refuse to authorize that officer to execute search warrants in the future unless the officer is later found to be fit for duty. As shall be discussed below, prosecutors are ethically and legally obligated to report misconduct to the court.

Once the court is informed that a law enforcement officer may have committed misconduct, an investigation should be conducted by the officer's employer and by independent outside agencies, if appropriate. For instance, if a citizen alleges that a police officer committed a civil rights violation, the matter can be referred to the Department of Justice, and the Federal Bureau of Investigation can conduct an investigation of the allegations.[199] The court could also refer the matter for investigation by the

194. Roger L. Goldman, *State Revocation of Law Enforcement Officers' Licenses and Federal Criminal Prosecution: An Opportunity for Cooperative Federalism*, 22 ST. LOUIS U. PUB. L. REV. 121, 122 (2003); Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct?*, 45 ST. LOUIS U. L.J. 541, 542 (2001).

195. *See* Goldman, *supra* note 194, at 121; *see also* Rachel Kane & Anne M. Payne, *Sheriffs, Police, and Constables Eligibility and Qualification*, 70 AM. JUR. 2D § 7 (2007).

196. *See* Goldman, *supra* note 194, at 122 (stating that hearings are conducted by either administrative judge or held before Peace Office Standards Training Commission and must comport with due process protections); *see also* Schwenke v. State, 960 S.W.2d 227 (Tex. Ct. App. 1997).

197. *See* Goldman, *supra* note 194, at 122-23.

198. Chambers v. Nasco, 501 U.S. 32, 49 (1991).

199. *See* UNITED STATES ATTORNEY'S MANUAL, 9-27.00 Principles of Federal Prosecution, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm.

United States Attorney or district attorney, as courts sometimes proceed with instances of perjury or criminal contempt.

The officer's actions should be evaluated on a case-by-case basis, using a totality-of-the-circumstances analysis.[200] Some of the factors that should be considered are whether the officer acted in good or bad faith, the severity of the misconduct, the result of the misconduct, whether this was the first instance of the officer committing a knock-and-announce violation and whether the officer has committed misconduct in another context.

Any officer who commits a knock-and-announce violation should be required to undergo mandatory retraining in criminal procedure and ethics. Other measures designed to prevent future misconduct, such as anger management therapy or psychological counseling, should be considered on an as-needed basis. After these rehabilitative measures are complete, the law enforcement agency should be in a better position to assess whether the officer is now, or may later become, fit for duty. During the investigation, depending upon the severity of the allegations and the evidence to support them, the officer should be placed on limited duty or suspended.

Once the investigation is complete, a report should be prepared for the court. If the officer was cleared of the allegations, he can resume regular duty. If he was not cleared of the allegations, the municipality should take appropriate action, according to the municipality's internal discipline matrix and the law. The court should be the ultimate arbiter of whether the officer will be authorized to resume executing search warrants issued by the court.

An analogy can be drawn to another situation where officers who are not fit for duty are no longer permitted to perform law enforcement functions. Under a 1996 amendment to the Gun Control Act of 1968, individuals who have been convicted in any court of misdemeanor domestic violence charges cannot ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearms or ammunition.[201] This law is retroactive.[202] The legislation has had a significant impact on law enforcement agencies.

Police departments that had previously ignored complaints about their officers committing domestic battery were prompted to improve their officer counseling programs and to cease ignoring complaints from officers' spouses who said they were being battered. These positive changes occurred because an individual who cannot carry a firearm can-

200. *See* Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (describing importance of individualized factual analysis).

201. *See* 18 U.S.C. §§ 925(a)(1), 922(g)(9); *see also* Fraternal Order of Police v. United States, 981 F. Supp. 1, 4 (D.D.C. 1997) (applying § 922(g)(9) to police officers).

202. *See* KIRSCHMAN, *supra* note 168, at 153; *see also Fraternal Order of Police*, 981 F. Supp. at 1.

not work in law enforcement.[203] If courts were to use their power to ban unfit officers from executing search warrants it would provide a much stronger incentive for police departments and other law enforcement agencies to adhere to the knock-and-announce rule and to respect suspects' privacy rights. This would have the direct effect of preventing law enforcement misconduct.

E. *Prosecutors' and Defense Attorneys' Obligations to Report Police Misconduct*

Defense attorneys are supposed to be advocates for their clients. Prosecutors, on the other hand, are supposed to represent society as advocates for justice.[204] But too often, prosecutors become focused solely on attaining convictions. Researchers who have studied why prosecutors lie or why they coach law enforcement officers to commit perjury have found that prosecutors share some of the same motivations as police officers who commit misconduct. "Some prosecutors lied out of personal ambition, some out of a zeal to protect society, but most lied because they had gotten caught up in the competition to win."[205] This fixation on obtaining "wins" is fed by the fact that many government agencies that employ prosecutors, on both the state and the federal level, measure their prosecutors' effectiveness by the percentage of cases filed that lead to convictions.

As fiduciaries of the public trust, prosecutors have higher ethical obligations than other attorneys.[206] Under ABA Model Rule 3.8(d), prosecutors must disclose "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense" in a timely fashion.[207] Furthermore, additional obligations are imposed by the ABA's Criminal Justice Standards on the Prosecution Function, such as Standard 3-1.2(c) which states, "The duty of the prosecutor is to seek justice, not merely to convict."[208]

Even more pertinent in addressing the issue of law enforcement misconduct, Standard 3-3.1(a) dictates that the prosecutor "has an affirmative responsibility to investigate suspected illegal activities when it is not adequately dealt with by other agencies."[209] Furthermore, under Standard 3-3.1(c), prosecutors must not "knowingly . . . use illegal means to obtain evidence or to employ or instruct or encourage others to use such means."[210] This provision clearly addresses situations where prosecutors coach police to commit misconduct such as "fluffing up the evidence" in

203. *See* Kirschman, *supra* note 168, at 153.

204. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2 (2005).

205. *See* SEYMOUR WISHMAN, CONFESSIONS OF A CRIMINAL LAWYER 52-53 (1981).

206. *See id.* at 9-10.

207. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

208. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c) (2007).

209. *Id.* at 3-3.1(a).

210. *Id.* at 3-3.1(c).

order to gather sufficient probable cause for a search warrant.[211] In addition, ABA Standards 3-3.11(a) and (c) instruct that prosecutors should promptly disclose exculpatory evidence to the defense, and forbid prosecutors from intentionally avoiding "pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused."[212]

The prosecutor has an additional obligation to report misconduct that has occurred or that may occur under ABA Standards 3-1.5(a), which provides,

> Where a prosecutor knows that another person associated with the prosecutor's office is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the prosecutor's office or a violation of the law, the prosecutor should follow the policies of the prosecutor's office . . . .[213]

Standard 3-1.5(b) imposes an affirmative reporting duty on the prosecutor.

> If, despite the prosecutor's efforts in accordance with section (a), the chief prosecutor insists upon action, or a refusal to act, that is clearly a violation of the law, the prosecutor may take further remedial action, including *revealing the information necessary to remedy this violation to other appropriate governmental officials not in the prosecutor's office.*[214]

In addition to the above obligations, prosecutors have further obligations to disclose misconduct under the National Prosecution Standards 25.4, "The prosecutor should disclose the existence or nature of exculpatory evidence pertinent to the defense,"[215] and through the ABA Model Rules of Professional Conduct Rule 3.8 Special Responsibilities of a Prosecutor and Rule 3.4 Fairness to Opposing Party and Counsel. Furthermore, the holdings in *Brady v. Maryland*,[216] *Kyles v. Whitley*,[217] *United States v. Bagley*[218] and *People v. Benard*[219] discuss the importance of prosecutors' duties to disclose material favorable evidence to the defense.

Although defense attorneys do not have to observe all of the ethical obligations imposed on prosecutors, defense attorneys are also obligated to report misconduct to the courts.

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211. *See id.*

212. *Id.* at 3-3.11(a) and (c).

213. *Id.* at 3-1.5(a).

214. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.5(b) (2007) (emphasis added).

215. NAT'L PROSECUTION STANDARDS § 25.4 (Nat'l Dist. Attorneys Ass'n 2d ed. 1997).

216. Brady v. Maryland, 373 U.S. 83 (1963).

217. Kyles v. Whitley, 514 U.S. 419 (1995).

218. United States v. Bagley, 473 U.S. 667 (1985).

219. People v. Benard, 620 N.Y.S.2d 242 (1994).

All attorneys are prohibited from "knowingly mak[ing] a false statement of material fact or law to a tribunal."[220] Furthermore, under the ABA Model Rules of Professional Conduct, an attorney shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[221] And all attorneys shall not "fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[222]

Similarly, in the context of civil litigation, the Supreme Court of Illinois has held that an attorney's failure to report another attorney's misconduct may warrant suspension from practice.[223] The above cases and regulations support holding prosecutors to the affirmative duty to disclose law enforcement misconduct to the courts, and to defense counsel. If a prosecutor fails to observe these duties, the prosecutor can be sanctioned.

In the past, one of the perhaps unintended effects of the exclusionary rule was to offer a convenient solution to the prosecutor's ethical dilemma. As long as defense counsel was aware that law enforcement officers had violated the defendant's rights, the prosecutor in practice might have relied upon defense counsel to enforce the knock-and-announce rule by seeking to exclude the evidence at trial. Under the *Hudson* decision, illegally obtained evidence will likely be admitted, placing the prosecutor in an ethical conflict. Unless the prosecutor acts to remedy the police misconduct, the prosecutor is arguably complicit in their misconduct, could perpetuate the injury to the person whose rights were violated and may encourage officers to commit future acts of misconduct.

Reporting the misconduct to the court that issued the search warrant is the most direct and obvious means for a prosecutor to satisfy her ethical obligation. The court can use its inherent power to sanction the rogue officers who conducted the illegal search and prohibit them from executing warrants in the future. The prosecutor can use the evidence to obtain a just criminal conviction, and future acts of police misconduct will be deterred.

XIV. CONCLUSION

The Supreme Court's decision in *Hudson v. Michigan* is an opportunity to re-examine the sanctions and remedies for enforcing the knock-and-announce rule. The courts and law enforcement agencies should take advantage of this opportunity to adopt a new approach that addresses directly the offending conduct and prevents its recurrence.

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220. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007).

221. *Id.* at 3.4(b).

222. *Id.* at 4.1(b).

223. *See In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988) (suspending attorney for failure to report misconduct of another attorney).