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## **The Roberts Court and the Future of the Exclusionary Rule**

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# The Roberts Court and the Future of the Exclusionary Rule

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## I. Introduction

Sixty years ago, the Supreme Court held that the Fourth Amendment places limits not only on the federal government, but on state and local governments as well. The decision was a significant advance toward safeguarding the right of every person to be free from unreasonable searches and seizures. However, the Court's broad expansion of Fourth Amendment protection ignited a heated debate over the proper remedy for violations of the right – a debate that continues to this day. The exclusionary rule, which prohibits the use in court of unconstitutionally acquired evidence, has always been a controversial remedy for the violation of Fourth Amendment rights. Yet over the years it has become apparent that the exclusionary rule is an essential means of ensuring that law enforcement officers respect the limits the Fourth Amendment imposes on their power.

The critics of the exclusionary rule point to its costs, although the costs they refer to are the costs imposed by the Fourth Amendment itself. The exclusionary rule excludes evidence that would never have been acquired if the police had obeyed the Fourth Amendment in the first place.<sup>1</sup> Thus the controversial nature of the remedy has much to do with the controversial nature of the underlying right. The Fourth Amendment imposes constraints on law enforcement officials in order to protect individual autonomy and dignity. The debate over the proper balance between the police power and individual privacy is contentious and longstanding.

Justice Cardozo famously lamented that, under the exclusionary rule, “the criminal is to go free because the constable has blundered.”<sup>2</sup> In *Mapp v. Ohio*, the Court responded “the criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”<sup>3</sup> The Court reasoned that the government should neither profit from its own illegal activity nor model disrespect for the law through its own actions.

The Reagan-era Justice Department, led by Attorney General Edwin Meese, spearheaded the first frontal attack on the exclusionary rule. Under the current Supreme Court, these efforts may finally come to fruition. Chief Justice John Roberts and Justice Samuel Alito, both of whom served in the Meese Justice Department,<sup>4</sup> are now part of a four-member voting block

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<sup>1</sup> Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392-93 (1983).

<sup>2</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926), cited in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

<sup>3</sup> *Mapp*, 367 U.S. at 659.

<sup>4</sup> In 1983, (now) Chief Justice Roberts worked on a memorandum about what he called “the campaign to amend or abolish the exclusionary rule.” In 1985, (now) Justice Alito, in applying for a job in the Reagan Justice Department, wrote that his interest in the law had been motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, religious freedom, and voting rights. Adam Liptak, *Supreme Court Edging Closer To Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009.

(with Justices Antonin Scalia and Clarence Thomas) that, to all appearances, is busily laying the groundwork for abandoning the exclusionary rule. They lack only a reliable fifth vote.

## II. The Exclusionary Rule: The Essential Remedy for Fourth Amendment Violations

The objection to the exclusionary rule has never been that it is ineffective at enforcing the Fourth Amendment. The objection has been that it imposes too high a price. When evidence is excluded, criminals may go free. Studies show that very few criminals in fact go free because evidence is excluded, and that criminals accused of violent crime almost never do.<sup>5</sup> Nevertheless, the rule does lead to loss of evidence and sometimes to lost convictions, and thus it is deeply unpopular, not only with law enforcement but with the general public. Despite this unpopularity, which has made it a target of heated criticism since its inception, the exclusionary rule has remained the central method of enforcing the Fourth Amendment. It has survived all these years because it has proved essential. Without it, the Fourth Amendment's guarantee against unreasonable search and seizure is "an empty promise."<sup>6</sup>

In 1949, the Supreme Court held that the Fourth Amendment constrains state and local officials as well as federal officials. Although the exclusionary rule then applied in federal cases, the Court was reluctant to foist it on the states. In *Wolf v. Colorado*,<sup>7</sup> the Court directed the states to come up with alternative ways to enforce the Fourth Amendment. By the time it decided *Mapp* 12 years later, the Court saw no choice but to impose the exclusionary rule on the states, noting that the trend among the states had been to adopt the rule on their own, and that experience had shown other alternatives to be ineffective.

The reaction to *Mapp* by law enforcement officials is perhaps the best evidence of how urgently the exclusionary rule was needed. As Professor Yale Kamisar recounts, the New York City Police Commissioner said the decision created "tidal waves and earthquakes" in the law enforcement community. It required retraining his entire department "from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily law enforcement function." As Kamisar asked, "Why did it necessitate 'retraining' from top to bottom? What was the *old* search and seizure training like? *Was there any?*" There was reason to think there had been no training at all in search and seizure before the threat of

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<sup>5</sup> Exactly how many go free is a matter of controversy. One study, described by Professor Wayne LaFare as "the most careful and balanced assessment of all available empirical data," found that the vast majority of cases in which exclusion of evidence occurred during the period studied were drug cases. Very little evidence was excluded in cases involving violent crimes. Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Cost" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611. Another study found an overall suppression rate of slightly less than five percent in warrant-related prosecutions. It also concluded that even in 70% of the cases in which evidence was suppressed, convictions were obtained. Overall, the rule prevented conviction in no more than 1.4% of the cases studied. RICHARD VAN DUIZEND ET AL., NAT'L CTR. FOR STATE COURTS, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, AND PRACTICES* 21 (1984), cited in JOSHUA DRESSLER & ALAN C. MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 381 (4th ed. 2006).

<sup>6</sup> *Mapp*, 367 U.S. at 660.

<sup>7</sup> 338 U.S. 25 (1949).

exclusion was imposed.<sup>8</sup> Police departments behaved as if the Fourth Amendment had just been adopted – and as if this was very bad news indeed.

Of course it is possible that police departments have changed so much in the nearly 50 years since *Mapp*, or that alternative enforcement mechanisms have become so much more effective, that the exclusionary rule is no longer necessary. Chief Justice Roberts has advanced these very arguments. But before turning to the evidence that the rule is still essential, it will be helpful to consider the changes in the interpretation of the exclusionary rule that have led to its current precarious position.

### III. Rationales for the Exclusionary Rule: From Judicial Integrity to Deterrence

Exclusion of unlawfully seized evidence has never been viewed as a personal right of the victim of an unlawful search or seizure. It is a means of achieving broader societal objectives. Originally, the exclusionary rule was regarded as a way to preserve judicial integrity. The rationale was that the government should not profit from its own wrongdoing, and should not traffic in tainted evidence. As Justice Brandeis famously argued, “Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law.”<sup>9</sup>

But as early as the *Mapp* decision, the Court adopted an additional rationale: that the purpose of excluding evidence is to deter future police misconduct. Under this rationale, illegally obtained evidence is excluded to increase the likelihood that in the future, law enforcement agents will abide by constitutional rules, thus protecting all of us from unwarranted intrusions into our privacy. “Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.”<sup>10</sup>

The judicial integrity rationale was soon entirely supplanted by the deterrence rationale. When determining the scope of the exclusionary rule, the Court began focusing solely on whether exclusion of evidence is likely to deter future police misconduct. The deterrence analysis became an invitation for the Court to engage in unsupported speculation about police behavior, and specifically, about whether suppressing evidence in various circumstances would provide an incentive for police to obey the law. In case after case, the Court has concluded that even if the evidence was suppressed, the police would be unlikely to change their behavior. In each case, the Court has weighed this “speculative” likelihood of deterrence against the “substantial”<sup>11</sup> costs of exclusion, and found that the exclusionary rule should not apply.

*Herring v. United States*<sup>12</sup> is the latest in the line of cases carving out exceptions to the exclusionary rule. In previous cases, illegal searches or seizures took place because police relied on the illegal actions of third parties, and the Court concluded that since the fault lay with the

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<sup>8</sup> Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court’s Criminal Procedure “Revolution,”* in *CRIMINAL PROCEDURE STORIES* 76-77 (Carol S. Steiker ed. 2006).

<sup>9</sup> *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

<sup>10</sup> *Brinegar v. United States*, 338 U.S. 160, 181 (1949).

<sup>11</sup> *See, e.g., United States v. Leon*, 468 U.S. 897, 907 (1984); *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>12</sup> 129 S. Ct. 695 (2009).

third parties, excluding the evidence was unlikely to deter the police. In *United States v. Leon*,<sup>13</sup> the Court assumed that police would not be deterred by exclusion of evidence obtained under an illegal warrant. It reasoned that the illegality was the fault of the magistrate who issued the warrant, and that excluding evidence found in reliance on such a warrant would have no effect on the police, who would simply continue to defer to the magistrate's judgment. (As the dissents pointed out, the Fourth Amendment is directed not just at the police, but at the government as a whole, and excluding the evidence might well create an incentive for both police and magistrates to beef up their compliance with Fourth Amendment law.) Subsequent cases declined to exclude illegal searches based on clerical errors by court employees<sup>14</sup> and illegal searches made in reliance on unconstitutional statutes.<sup>15</sup>

#### IV. The *Herring* Case: Raising the Bar for Exclusion of Illegally Obtained Evidence

Some commentators describe *Herring* as just another case in this line, almost identical to *Arizona v. Evans*, the case involving a clerical error by a court employee.<sup>16</sup> But *Herring* is a far more serious assault on the exclusionary rule for two reasons. First, the case involved reliance by police officers on an error, not by a court or a legislature, but by *other police officers*. Second, the case introduced an entirely new requirement for application of the exclusionary rule: the police mistakes must be the result of "systemic error or reckless disregard of constitutional requirements,"<sup>17</sup> rather than of mere negligence. It premised this holding on the unsupported assertion that exclusion of evidence obtained through negligent violation of the Fourth Amendment has a reduced deterrent effect.

Bennie Dean Herring was arrested in Coffee County, Alabama. Investigator Mark Anderson, who "knew Herring from prior interactions,"<sup>18</sup> one day spotted Herring at the Sheriff's Department and looked for a way to arrest him.<sup>19</sup> Anderson consulted the Coffee County records to see whether there were any warrants outstanding that would allow him to do so. There were not, but he had more luck when he called over to neighboring Dale County. The Dale County database did contain an open arrest warrant for Herring. Unfortunately, the warrant had been recalled five months earlier, but the Dale County database had never been updated to reflect this change. Thus Herring was arrested without probable cause or a valid warrant. He was then subjected to a search incident to arrest, which led to the discovery of contraband and a weapon on his person.<sup>20</sup> Because the arrest was illegal, the fruits of the search incident to the arrest would have been suppressed under the law as it stood prior to *Herring*.

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<sup>13</sup> 468 U.S. 897 (1984).

<sup>14</sup> *Arizona v. Evans*, 514 U.S. 1 (1995).

<sup>15</sup> *Illinois v. Krull*, 480 U.S. 340 (1987).

<sup>16</sup> See, e.g., Matthew J. Franck, *Hyperventilating About the Exclusionary Rule*, NAT'L REV. ONLINE, Feb. 16, 2009, available at

<http://bench.nationalreview.com/post/?q=YjNiYjNkMTQ0ZjM4Y2YzOGNlZWY5NDk4M2JmOWEyNjA=>.

<sup>17</sup> *Herring*, 129 S. Ct. at 704.

<sup>18</sup> *Id.* at 705 (Ginsburg, J., dissenting).

<sup>19</sup> *Id.* at 709 (Ginsburg, J., dissenting). "Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations." *Id.* at 705 (Ginsburg, J., dissenting).

<sup>20</sup> *Id.* at 705-06.

## V. For the First Time, Police Can Use Evidence Illegally Obtained By Other Police

In refusing to exclude the fruits of the illegal search, the Court rejected the notion that cases like *Evans* had been premised on police reliance on the mistakes of *other* branches of government.<sup>21</sup> But until *Herring*, the good faith of a police officer engaging in an illegal search was relevant only when the officer conducted an illegal search in reasonable<sup>22</sup> good faith reliance on the mistake of an authoritative governmental source *other than* another law enforcement agent. The good faith exception to the exclusionary rule prior to *Herring* was based on two related rationales. The first was that the exclusionary rule is directed at deterring police officers, not judges, court clerks, or legislators, so it provides no grounds for suppressing the fruits of mistakes by government officials other than police officers. The second was that police officers who reasonably believe they are correctly relying on the judgments of authoritative officials are unlikely to be deterred from making the same error again.

In *Herring*, the mistake in question was made by the police themselves – precisely the group the Court claims the exclusionary rule is meant to deter. The *Herring* decision deviates from 50 years of precedent in permitting one unit of law enforcement to benefit from the illegal acts of another. A year before the decision in *Mapp v Ohio*, the Court rejected the “silver platter” doctrine, which allowed federal officers to use evidence illegally obtained by state officers. It found that the doctrine implicitly invited federal officers to tacitly “encourage state [law enforcement] officers in the disregard of constitutionally protected freedom.”<sup>23</sup>

Now that the Court has excused mistakes by police officers relying on other police officers, the stage is set for much broader incursions into the exclusionary rule. Professor Richard McAdams observed, “if a police officer can act in good faith on the error of a police clerk, she can likely act in good faith on the error of a fellow detective. Second, if we don’t exclude evidence when Detective A relies on a negligent but isolated error by Detective B, then ... why [would we] exclude evidence when Detective B relies on *her own* negligent but isolated error?”<sup>24</sup>

Moreover, although all the cases in this line concern searches based on invalid warrants (or, in the case of *Krull*, an invalid statute), the same reasoning seems to apply to negligent errors about other Fourth Amendment requirements. In other words, if a police officer wrongly but negligently believes she has both probable cause for a search and exigent circumstances excusing a warrant, the *Herring* reasoning seems applicable: there is no reason to exclude the evidence obtained in that illegal search.

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<sup>21</sup> It claimed that the cases stood for the proposition that only evidence obtained in flagrant violation of the Constitution should be suppressed.

<sup>22</sup> That is, the actual intent of the officer was irrelevant. The question was whether a reasonable officer would have been likely to make the same mistake.

<sup>23</sup> *Elkins v. United States*, 364 U.S. 206, 221-22 (1960).

<sup>24</sup> Posting of Richard McAdams, to The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com/faculty/2008/10/wither-the-excl.html> (Oct. 29, 2008, 17:23 EST).

## VI. The Fruits of Illegal Searches and Seizures Are Admissible if the Illegal Conduct was Negligent Rather than Flagrant

The *Herring* majority declined to suppress the fruits of illegal searches and seizures if the police acted negligently rather than flagrantly.<sup>25</sup> The Court premised this holding on the assertion that isolated instances of negligent wrongdoing are unlikely to be deterred by exclusion, an assertion unsupported by even “an iota of supporting analysis or evidence.”<sup>26</sup> As Justice Ginsburg observed in dissent, “the suggestion runs counter to a foundational premise of tort law – that liability for negligence ... creates an incentive to act with greater care.”<sup>27</sup> Suppression of illegally obtained evidence, even where the illegality was the result of police negligence, provides police with “an incentive to err on the side of constitutional behavior.”<sup>28</sup> It also “demonstrates that our society attaches serious consequences to violations of constitutional rights.”<sup>29</sup>

As Professor Wayne LaFave notes, “many more violations of the Fourth Amendment are the result of carelessness than are attributable to deliberate misconduct.”<sup>30</sup> Warrant checks like the one at issue in *Herring* are a case in point. Warrant checks are routinely run, not only on those suspected of violating criminal laws, but on drivers and passengers of cars pulled over for minor traffic infractions. Negligent errors in recordkeeping can lead to false arrests and other serious incursions on liberty and privacy. Penalizing these errors creates an effective incentive for law enforcement agencies to maintain accurate records.

Since the exclusionary rule is not meant to punish police, but to encourage them to abide by the law, the deliberateness of their conduct ought to be irrelevant to the question of exclusion, particularly in the absence of any evidence that negligent misconduct is undeterrable. And prior to the *Herring* case, with few exceptions, the applicability of the exclusionary rule did not turn on whether the police conduct was flagrant, deliberate, or intentional – only on whether it was illegal.

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<sup>25</sup> The Court in its holding states the new rule more narrowly, as permitting the admission of evidence that is the result of isolated negligence “attenuated from” the illegal search or arrest. *Herring*, 129 S. Ct. at 698. The Court fails to explain the attenuation limitation, and commentators have expressed puzzlement over its meaning. For example, in the *Herring* case, it might refer to the fact that the invalid warrant was five months old (though the fact that an invalid warrant had been left in the database for five months would seem to exacerbate rather than attenuate the wrongdoing) or to the fact that the invalid warrant was in the database of one county and the arresting officer who relied on it was in another (for discussion of this distinction see Part V above). For a lengthy analysis of the various possible meanings of the attenuation language, see Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009). McAdams predicts that the attenuation requirement will soon be abandoned. McAdams, *supra* note 24.

<sup>26</sup> LaFave, *supra* note 25.

<sup>27</sup> *Herring*, 129 S. Ct. at 708 (Ginsburg, J., dissenting).

<sup>28</sup> LaFave, *supra* note 25 (citing *United States v. Johnson*, 457 U.S. 537, 561 (1982)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

In short, *Herring* is poised to convert the exclusionary rule from the ordinary remedy for Fourth Amendment violations to an extraordinary remedy available only when defendants can somehow prove police conduct was intentional,<sup>31</sup> flagrant,<sup>32</sup> or recurring.<sup>33</sup>

## VII. The *Hudson* Case: Suggesting the Exclusionary Rule is Obsolete

*Herring*'s new requirements are justified, according to the Court, by the high costs of the exclusionary rule. The case follows on the heels of another Roberts Court opinion, *Hudson v. Michigan*,<sup>34</sup> which also takes aim at the exclusionary rule, but from another angle. *Hudson* questions whether the rule continues to provide any benefit, and strongly suggests that it has outlived its usefulness.

The narrow question in *Hudson* was whether evidence obtained by police who illegally failed to knock and announce their entry into a suspect's home ought to be suppressed. The Court held that suppression was unnecessary, but the opinion goes much further. Justice Scalia's majority opinion rejects the notion that exclusion is the proper remedy "simply because we found that it was necessary deterrence in different contexts and long ago."<sup>35</sup> It claims two major changes since *Mapp* was decided. First, other effective remedies are available to victims of Fourth Amendment violations. Second, police forces are increasingly professional. Because of these changes, "resort to the massive remedy of suppressing evidence of guilt is unjustified."<sup>36</sup>

In some ways it is easier to sue the police than it was in 1961. Prior to 1961, civil rights suits against individual police officers were nearly impossible to bring.<sup>37</sup> Prior to 1971, suits against individual federal officers were unavailable.<sup>38</sup> Prior to 1978, police departments could not be sued.<sup>39</sup> Even with these changes to the law, high barriers still exist to suit against police officers and police departments, and in many respects, they are becoming higher. *Hudson* cites a widely used police misconduct litigation manual for the proposition that currently "citizens and

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<sup>31</sup> As Justice Ginsburg notes in dissent, the Court's new focus on intentional police conduct is hard to square with its prior refusal to inquire into subjective police intentions in order to regulate pretextual arrests. *Herring*, 129 S. Ct. at 710 n.7 (Ginsburg, J., dissenting). The Court claims that it is not requiring an inquiry into the subjective mental state of the officer but it is unclear how one would show that police "knowingly made false entries [into a database] to lay the groundwork for future false arrests" without inquiring into their subjective mental states. *Id.* at 703.

<sup>32</sup> As an example of flagrant conduct, the Court refers to the treatment of Dollre Mapp, in *Mapp v. Ohio*. The case involved not just the execution of a non-existent warrant, but police conduct that included brandishing the so-called warrant, grabbing it back from Mapp after she demanded to see it, and handcuffing Mapp to her stairway banister before searching her home from top to bottom. *Herring*, 129 S. Ct. at 702 (citing *Mapp v. Ohio*, 376 U.S. 643, 644-45 (1961)).

<sup>33</sup> The database at issue in *Herring* had a systemic flaw: it did not automatically update to reflect changes such as the withdrawal of arrest warrants. There is some disagreement about whether the clerk who was supposed to update the database manually had erred in other cases as well. But the Court would demand a showing of a "widespread pattern of violations" or a system that "routinely leads to false arrests." *Herring*, 129 S. Ct. at 704 (citing *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring)).

<sup>34</sup> 547 U.S. at 586.

<sup>35</sup> *Id.* at 597.

<sup>36</sup> *Id.* at 599.

<sup>37</sup> See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) (broadening the definition of "under color of state law").

<sup>38</sup> See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (permitting these suits).

<sup>39</sup> See *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (permitting these suits).

lawyers are much more willing to seek relief in the courts for police misconduct.”<sup>40</sup> It does not quote what the authors said next: that in some respects, it is now “far more difficult” to challenge police misconduct.<sup>41</sup>

It has always been challenging to sue individual police officers – it is difficult to find lawyers to bring suit against police, to convince juries to render verdicts against them, and to collect damage awards against officers who are often judgment proof. In *Hudson* itself, which involved the failure of police to knock and announce before entering the suspect’s home, the Court seemed unfazed by the lack of any evidence that victims of such conduct had been able to bring successful civil suits, declaring itself willing simply to assume that “as far as we know, civil liability is an effective deterrent here.”<sup>42</sup>

Suit against individual officers is now even more difficult due to the Court’s expanding immunity doctrines.<sup>43</sup> And the Court has erected increasingly high barriers to bringing suit against police departments for systemic wrongdoing, such as failure to screen, train, or discipline police officers.<sup>44</sup> There is no reason to believe that the civil remedies that have for so long been inadequate to replace the exclusionary rule have suddenly become adequate, and the Court offers no evidence to support this assertion. As Justice Breyer observed in dissent, the majority has “simply assumed that as far as it knows, civil liability is an effective deterrent, a support-free assumption....”<sup>45</sup>

In many ways, police departments are more professional than they were in 1961. In support of its claim that these changes have rendered the exclusionary rule unnecessary, the Court cites the work of criminologist Samuel Walker.<sup>46</sup> Walker, in an opinion piece in the *Los Angeles Times* called “Thanks for Nothing, Nino,” took Justice Scalia to task for misrepresenting his work. Walker regarded the positive changes in police work over the years as, in large part, *attributable* to the exclusionary rule, and not as an argument for doing away with the rule.<sup>47</sup>

Recent scandals in the Chicago, Oakland, and Atlanta police departments, among others, are reminders that even as policing becomes more professionalized, incentives to cut constitutional corners continue to exist – and that illegal police conduct affects the innocent as well as the guilty. In Atlanta, federal prosecutors have charged the Atlanta Police Department with regularly lying to obtain search warrants and fabricating documentation of drug purchases. One such case turned tragic when police raided the home of 92-year-old Kathryn Johnston on a

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<sup>40</sup> *Hudson*, 547 U.S. at 597-98.

<sup>41</sup> See David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 572 (2008) (citing MICHAEL AVERY ET AL., *POLICE MISCONDUCT LAW AND LITIGATION* (3d ed. 2007)). Avery et al. added a footnote to this text calling Justice Scalia’s quotation “highly misleading.” *Id.*

<sup>42</sup> *Hudson*, 547 U.S. at 598.

<sup>43</sup> Police officers have qualified immunity for their investigative conduct, *Anderson v. Creighton*, 483 U.S. 635 (1987), and absolute immunity for their in-court conduct, *Briscoe v. LaHue*, 460 U.S. 325 (1983).

<sup>44</sup> See, e.g., *Bd. of County Comm’rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (creating high barriers to suing municipal agencies for failure to screen employees); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (creating high barriers to establishing standing to seek injunctive relief).

<sup>45</sup> *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting) (citing *Dickerson v. US*, 530 U.S. 428, 441-442 (2000)).

<sup>46</sup> *Hudson*, 547 U.S. at 599 (citing S. WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990* 51 (1993)).

<sup>47</sup> Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5.

bad tip. Instead of building a case, police obtained a no-knock warrant based on false information and broke down Johnston's door. Frightened by the unidentified intruders, she fired a single shot, and they responded by killing her in a hail of bullets. They then planted drugs in her home and falsely claimed they had bought cocaine from her. In the ensuing investigation, federal investigators have uncovered a "culture of misconduct." United States Attorney David Nahmias had this to say about the officers indicted in the death of Johnston:

The officers charged today ... are not accused of seeking payoffs or trying to rob drug dealers or trying to protect gang members. Their goal was to arrest drug dealers and seize illegal drugs, and that's what we want our police officers to do for our community. But these officers pursued that goal by corrupting the justice system, because when it was hard to do their job the way the Constitution requires, they let the ends justify the means.<sup>48</sup>

### VIII. Conclusion

Incentives to violate constitutional protections are heightened in times when safety and security seem precarious, and they lead to tactics that are too often deployed against those with little access to the civil courts. There is no question that the exclusionary rule should be supplemented by better training, better internal discipline, broader access to civil rights suits, and other remedies. But until there is hard evidence that the lessons of the past 60 years are no longer applicable, and that these alternative remedies are truly adequate to enforce the Fourth Amendment, the exclusionary rule remains essential.

The future of the exclusionary rule became precarious when Chief Justice Roberts and Justice Alito were appointed to the Court and joined Justices Thomas and Scalia in targeting the rule for evisceration. The fate of the rule should be a primary consideration when the next candidate for the Supreme Court is under consideration.

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<sup>48</sup> Shaila Dewan & Brenda Goodman, *Prosecutors Say Corruption in Atlanta Police Department is Widespread*, N.Y. TIMES, Apr. 27, 2007.