

The Knock-and-Announce Rule and Police Arrests: Evaluating Alternative Deterrents to Exclusion for Rule Violations

By DR. CHRISTOPHER TOTTEN[†] &
DR. SUTHAM COBKIT(CHEURPRAKOBKIT)[‡] *

Introduction

IN ARRIVING AT THE DETERMINATION that the exclusionary rule no longer applies to knock-and-announce violations,¹ the Supreme Court's rationale in *Hudson v. Michigan*² included the idea that factors other than exclusion exist to prevent police misconduct concerning the knock-and-announce rule.³ Particular examples of these alternative factors relied upon by the Court are improved training, education, and internal discipline of police:

[†] Dr. Christopher Totten is an Associate Professor of Criminal Justice (Law) in the Department of Sociology and Criminal Justice at Kennesaw State University. He has a JD and LLM from Georgetown University Law Center and an AB from Princeton University. He is the criminal law commentator for Volumes 46 through 50 of the Criminal Law Bulletin.

[‡] Dr. Sutham Cobkit (Cheurprakobkit) is a Professor of Criminal Justice and Director of the Master of Science in Criminal Justice Program in the Department of Sociology and Criminal Justice at Kennesaw State University. He has a PhD in Criminal Justice from Sam Houston State University.

* Both authors would like to thank the College of Humanities and Social Sciences at Kennesaw State University for providing a grant that partially funded the study described in this Article.

1. The knock-and-announce rule usually requires police to knock and to give notice to occupants of the officer's presence and authority prior to entering a residence to make an arrest or conduct a search. 18 U.S.C. § 3109 (2012). If the police comply with the rule, but the occupants refuse to grant admittance, the police may break into the residence by, for example, destroying a door or window. *Id.* During a trial, the exclusionary rule generally prohibits the admission of evidence against a defendant if the police obtained the evidence while violating the defendant's constitutional rights (e.g., during an illegal search or arrest). *See* *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (directing the states to apply the exclusionary rule).

2. 547 U.S. 586 (2005).

3. *Id.* at 597–99.

Another development over the past half-century that deters civil-rights violations [such as a knock-and-announce violation] is the increasing professionalism of police forces, including a new emphasis on internal police discipline. . . . [W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been “wide-ranging reforms in the education, training, and supervision of police officers.”⁴

For example, according to the Supreme Court in *Hudson*, if officers fail to adhere to constitutional norms such as the knock-and-announce rule, they can be disciplined in a way that will impede them from advancing in their occupation.⁵ Additionally, the Supreme Court in *Hudson* noted that “various forms of citizen review” can prevent police misconduct concerning the knock-and-announce rule.⁶ In fact, the majority of Justices in *Hudson* suggested that the growing presence and power of the alternative deterrence factors (police training, education, internal discipline, and citizen review mechanisms) since the time of *Mapp v. Ohio*⁷ may mean that exclusion of evidence following all Fourth Amendment errors by police may no longer be required (though the majority refrained from adopting this approach as a matter of Fourth Amendment search-and-seizure law—at least for the time being).⁸

4. See *id.* at 598–99 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 51 (1993)). However, criminologist Samuel Walker explained that Justice Scalia, who wrote the majority opinion in *Hudson*, misquoted him on the idea that police education, training, and supervision (e.g., discipline) can serve as substitutes for exclusion as deterrents for constitutional misbehavior by police. See Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at M5 available at <http://articles.latimes.com/2006/jun/25/opinion/oe-walker25> (“[Justice Scalia] twisted my main argument to reach a conclusion the exact opposite of what I spelled out in this and other studies. . . . My argument, based on the historical evidence of the last 40 years, is that the Warren court in the 1960s played a pivotal role in stimulating these reforms. For more than 100 years, police departments had failed to curb misuse of authority by officers on the street while the courts took a hands-off attitude. The Warren court’s interventions (*Mapp* [concerning the application of the exclusionary rule in state courts to deter Fourth Amendment violations by police] and *Miranda* being the most famous) set new standards for lawful conduct, forcing the police to reform and strengthening community demands for curbs on abuse.”) (italics added).

5. *Hudson*, 547 U.S. at 599. For example, police may be suspended or dismissed from their jobs, or they may receive a demotion in rank or decrease in pay. *Id.*

6. *Id.*

7. 367 U.S. 643 (1961) (directing the states to apply the exclusionary rule).

8. Justice Scalia, who wrote the majority opinion in *Hudson*, stated:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.

Moreover, though in *Hudson* the relevant knock-and-announce violation occurred during a police search at premises, lower federal and state courts since *Hudson* have applied its ruling to knock-and-announce violations by police in the arrest context.⁹ Thus, these courts have effectively determined that the exclusion of evidence in court is no longer warranted following police knock-and-announce violations during arrests of suspects at premises.¹⁰

The basis of this Article is a study consisting of a detailed survey of police chiefs in large United States cities. Given both the *Hudson* decision's rationale and implications and the subsequent application of *Hudson* by the lower courts, the objectives of this study are three-fold: (1) to examine the chiefs' knowledge concerning the knock-and-announce rule in the context of police arrests at premises; (2) to evaluate how the chiefs perceive officer training concerning knock-and-announce procedures in the context of police arrests at premises; and (3) to analyze how the chiefs perceive the value of exclusion versus the various, alternative factors to prevent police misconduct during arrests at premises implicating the knock-and-announce rule, including the factors of police training, education, internal discipline, and citizen review mechanisms.

This is the first significant study since Orfield's studies of the late 1980s¹¹ and Perrin's work of the 1990s¹² to empirically evaluate the

Id. at 597. Justice Scalia posited that today, as compared to the 1960s when *Mapp* was decided, there are alternative deterrents to police misconduct in the search and seizure area, such as civil lawsuits, internal police discipline/supervision, training, and education, which have the potential to effectively replace exclusion. *Id.* at 597–99. Three other Justices seemed to agree with Scalia's reasoning in this regard; however, Justice Kennedy, who joined the majority decision, drafted a separate concurring opinion in which he commented that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt." *See id.* at 603 (Kennedy, J., concurring).

9. *See* United States v. Pelletier, 469 F.3d 194 (1st Cir. 2006); State v. Marcum, No. 04-CO-66, 2006 WL 3849861 (Ohio Ct. App. Dec. 28, 2006).

10. *See Pelletier*, 469 F.3d 194; *Marcum*, 2006 WL 3849861.

11. For a lengthier explanation of the studies by Orfield and Perrin on the exclusionary rule, see *infra* Part I.D. Orfield, in his two studies in the late 1980s and 1990s, concentrated mostly on the alternative deterrent factor of civil lawsuits. *See* Myron Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017–18 (1987) [hereinafter Orfield, *The Exclusionary Rule and Deterrence*]; *see* Myron Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992) [hereinafter Orfield, *Deterrence, Perjury, and the Heater Factor*]. The study discussed in this Article will evaluate alternative deterrent factors, aside from the exclusion of evidence, for police misconduct during arrests that implicate the knock-and-announce rule. These factors include internal police discipline, police education and training, and community oversight, such as citizen review boards. In addition, the respondents in Orfield's study included police officers and detectives, while

efficacy of alternative factors to exclusion for police misconduct in the Fourth Amendment arrest area, and this is the first known empirical study to assess the value of various alternatives to exclusion in the knock-and-announce arrest area in light of *Hudson's* emphasis on these alternatives.¹³ No other known study has examined police chief knowledge of the knock-and-announce rule in the arrest context or police chief perception of officer training in this context. Additionally, in contrast to the earlier studies that focused more on patrol officers and investigators, this study examines police chiefs. Finally, this study covers all cities throughout the United States consisting of more than 100,000 residents. This geographical coverage is more expansive than previous studies.¹⁴

the respondents in this Article's study are police chiefs. See Orfield, *The Exclusionary Rule and Deterrence*, *supra*, at 1024–25.

12. Apart from Orfield's work, the study by Perrin in the late 1990s is the only other significant scholarly work evaluating alternative deterrent factors to exclusion for police misconduct in the search and seizure area. See L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 701 (1998). Perrin's study concentrated mostly on police officers' perceptions of the various deterrents (and, to a lesser extent, the perception of detectives and other ranking officers), while the study in this Article concentrates on the perceptions of police chiefs. See *id.* at 719 ("Close to half of those participating in the study held the rank of officer at the time they responded to the questionnaire, about one-fifth held the rank of detective, and the remainder, about one-third, held a rank above detective.").

13. Though the Supreme Court has referred to the results of empirical studies on the exclusionary rule in several decisions, it has exhibited less confidence toward the findings of these studies, generally affording them only cursory treatment. See *United States v. Janis*, 428 U.S. 433, 453 (1976) ("Empirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. Since as a practical matter, it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.") (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960)); *Stone v. Powell*, 428 U.S. 465, 492, n.32 (1976); 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, 619 (1983) (noting that the "inadequacies of research design and the measurement problems" lead to the conclusion that "it is quite unlikely that there will be any rigorous measurement of the rule's specific deterrent effect in terms of how often illegal searches have been prevented"). For the cursory treatment afforded scholarly studies of the exclusionary rule by the Court, see *Hudson*, 547 U.S. at 598–99 (asserting, without any supporting data, that "[t]here is also evidence that increasing use of various forms of citizen review can enhance police accountability"). *Hudson's* choice and reliance on earlier studies to support the idea that police today are better disciplined, trained, and educated is weak at best. See *id.* For a lower court's interpretation of *Hudson*, see *infra* Part I.C.

14. This study also includes greater geographical diversity and scope than the earlier studies by Perrin and Orfield, which were generally restricted to either one city or county. See Perrin, *supra* note 12, at 712–13 (study participants mostly from Ventura County, California); Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1024–25 (studying drug officers in Chicago).

Part I of this Article explains the knock-and-announce rule, the Supreme Court decision in *Hudson v. Michigan*, related Supreme Court case law on the exclusionary rule, and lower court cases interpreting *Hudson*. Part I also includes an examination of other empirical studies regarding the exclusionary rule.

Part II describes the research methods utilized in the current study's methodological approach, including information about the sample and survey instrument. Part III discusses the study's findings as well as the conclusions that can be derived from those findings. Overall, the study finds that a majority of police chiefs are knowledgeable about the knock-and-announce rule in the context of police arrests at premises. In addition, the majority of chiefs perceive that officers receive enough training on the knock-and-announce rule in the arrest context. Finally, the police chiefs perceive that training, education, and internal discipline have a greater deterrent impact on police misconduct related to this rule in the arrest context than exclusion of evidence and community oversight (though a majority do perceive exclusion as a "helpful" deterrent in this context).

Part IV explores the study's numerous implications for judicial and law enforcement policy.

I. Background

Part I begins by explaining the knock-and-announce rule and *Hudson v. Michigan*, a landmark 2006 decision by the Supreme Court regarding the exclusionary rule. It then describes related Supreme Court exclusionary rule jurisprudence, in particular jurisprudence suggesting that alternative factors can replace exclusion as a deterrent to police search-and seizure-misconduct. Next, it explains relevant lower court case law interpreting *Hudson*, including case law examining *Hudson's* application in the police arrest context. Finally, it describes previous, related empirical studies on the exclusionary rule.

A. The Knock-and-Announce Rule and *Hudson v. Michigan*¹⁵

Despite the Supreme Court's incorporation of the knock-and-announce rule into the Fourth Amendment reasonableness inquiry and the rule's long-standing history within our Common Law, the rule may

15. This Article includes an excerpt from *The Exclusionary Rule After Hudson v. Michigan: Mourning the Death of the Knock and Announce Rule*, which originally appeared in *Criminal Law Bulletin*, Volume 46, Issue 5, with permission. © 2010 Thomson Reuters. Part I.A has been substantially excerpted with additional edits for clarity and content.

have recently suffered a fatal blow in the Supreme Court's decision in *Hudson v. Michigan*. The rule requires police to give notice of their presence and their authority before entering a dwelling.¹⁶ If the police comply with the rule but are subsequently refused admittance by the dwelling's occupants, they may break into the dwelling by, for example, destroying a door or window.¹⁷

The origins of the knock-and-announce rule can be traced to a 1604 English court decision known as *Semayne's Case*.¹⁸ In that case, the English court required law enforcement officers to announce their purpose before entering a dwelling.¹⁹ In the United States, the knock-and-announce rule has been made part of both the country's statutory and case law. The first United States case to incorporate the knock-and-announce rule into its decision was *Read v. Case*²⁰ in 1822.²¹ In 1917, the United States Congress first codified the rule into what is currently 18 U.S.C. § 3109.²² The rule states:

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 the warrant.²³

In *Miller v. United States*,²⁴ the Supreme Court determined that this statute applied to arrests and searches both with and without warrants.²⁵ The Court found that the police violated the knock-and-announce rule because they failed to announce their authority before breaking the door to Miller's apartment.²⁶ Though the Supreme Court interpreted the knock-and-announce rule in other decisions after *Miller*,²⁷ not until the 1995 case of *Wilson v. Arkansas*²⁸ did the

16. 8 U.S.C. § 3109 (2012).

17. *Id.*

18. *Semayne's Case*, (1604) 77 Eng. Rep. 194 (K.B.); 5 Co. Rep. 91 a.

19. *Id.* at 195; 91 b.

20. 4 Conn. 166 (1822).

21. *See id.*

22. Act of June 15, 1917, ch. 30, Title XI, §§ 8-9, 40 Stat. 229.

23. 18 U.S.C. § 3109.

24. 357 U.S. 301 (1958).

25. *Id.* at 309.

26. *Id.* at 313-14.

27. *See, e.g., Sabbath v. United States*, 391 U.S. 585 (1968) (finding that a "breaking" under 18 U.S.C. § 3109 occurred when police opened a closed, but unlocked, door without first announcing their authority and presence).

28. 514 U.S. 927 (1995).

Court incorporate the rule into the reasonableness inquiry of Fourth Amendment jurisprudence.²⁹

Significantly, the Court in *Wilson* alluded to particular exigent circumstances when law enforcement officials do not need to comply with the knock-and-announce rule.³⁰ These circumstances may include the threat of harm to law enforcement officials or third parties, the possible destruction of relevant evidence, or the potential escape of the suspect(s).³¹ In *Richards v. Wisconsin*,³² the Court clarified these exceptions to the knock-and-announce rule by indicating that police must knock-and-announce unless they have a reasonable suspicion that their action “would be dangerous or futile, or that it would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence.”³³ More recently, the Supreme Court has found that the Fourth Amendment does not require a more heightened standard than reasonable suspicion for the issuance of “no-knock” warrants³⁴ and that, under the same Amendment, a period of fifteen to twenty seconds is a reasonable time for law enforcement officials to wait after knocking and announcing but before breaking into a home.³⁵

In its June 2006 decision in *Hudson*, authored by Justice Scalia, the Supreme Court significantly undercut the viability of the knock-and-announce rule by specifically holding that exclusionary rule principles do not apply to knock-and-announce violations.³⁶ Furthermore, the decision arguably portends the end of the exclusionary rule for other Fourth Amendment violations.

Justice Scalia’s majority opinion in *Hudson* began by acknowledging that *Hudson* involves a clear violation by police of the knock-and-announce rule.³⁷ The police in *Hudson* entered a home pursuant to a

29. *Id.* at 934.

30. *Id.* at 934–36.

31. *Id.*

32. 520 U.S. 385 (1995).

33. *Id.* at 394.

34. *United States v. Ramirez*, 523 U.S. 65, 69–71 (1998). In dicta, however, the Court stated that excessive property damage caused by police during a search may implicate the Fourth Amendment’s reasonableness requirement. *Id.* at 71.

35. *United States v. Banks*, 540 U.S. 31, 33 (2003) (ruling that the potential for disposal of drug evidence by occupants, under an overall totality of the circumstances analysis, warranted a Fourth Amendment reasonableness finding). Note that the Court in *Banks* recognized that the determination of reasonableness was a “close one.” *Id.* at 38.

36. 547 U.S. 586, 599 (2006).

37. *Id.* at 590 (“From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation.”).

valid warrant authorizing a search for drugs and guns and discovered both items of contraband.³⁸ The police announced their presence prior to entering and waited only “‘three to five seconds’ before turning the knob of the unlocked front door and entering Hudson’s home.”³⁹ Hudson challenged the quick entry into his home as unreasonable, and the state conceded from the start of the case that the entry constituted a knock-and-announce violation.⁴⁰ The Court held that the exclusionary rule was not the proper remedy for this constitutional error.⁴¹

Scalia began his analysis of why the exclusionary rule is not an appropriate remedy in the knock-and-announce context by arguing that insufficient causation exists between a violation of the knock-and-announce rule and subsequently discovered evidence.⁴² The necessary “but-for” causation was absent because “[w]hether that preliminary misstep [of violating the knock-and-announce rule] had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the [evidence] inside the house.”⁴³

Another reason Justice Scalia offered in support of *Hudson’s* holding was that the societal interests protected by applying the knock-and-announce rule are not served by applying the exclusionary rule.⁴⁴ The exclusionary rule is generally applied because unless and until “a valid warrant has issued, citizens are entitled to shield ‘their persons, houses, papers, and effects’ from the government’s scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement.”⁴⁵ But the purpose of the knock-and-announce rule does “not include the shielding of potential evidence from the government’s eyes.”⁴⁶ Rather, it serves three purposes that Justice Scalia found qualitatively different: (1) preventing harm to police and others “because an unannounced entry may provoke violence in supposed self-defense by the surprised resident”;⁴⁷ (2) protecting property from unnecessary damage by knock-and-announce rule gives individuals “the opportunity to comply with the law and to avoid the

38. *Id.* at 588.

39. *Id.*

40. *Id.* at 588, 590.

41. *Id.* at 590, 599.

42. *Id.* at 592.

43. *Id.*

44. *Id.* at 593.

45. *Id.* (quoting U.S. CONST. amend. IV).

46. *Id.*

47. *Id.*

destruction of property occasioned by a forcible entry”;⁴⁸ and (3) protecting “those elements of privacy and dignity that can be destroyed by a sudden entrance,” such as giving someone an opportunity to put on clothing.⁴⁹ Scalia reasoned that none of these three purposes would have been served by excluding the evidence of the guns and drugs found in *Hudson*.⁵⁰

Scalia then applied the Court’s typical balancing test when deciding whether to apply the exclusionary rule in any given context.⁵¹ He determined that the social costs of applying the exclusionary rule to knock-and-announce violations outweighed the deterrence benefits.⁵² In addition to the usual “grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society),”⁵³ Scalia identified two additional social costs associated with applying the exclusionary rule in the knock-and-announce context.⁵⁴ The first was that such a remedy would generate constant litigation to determine whether the rule applied and, if so, whether it was violated.⁵⁵ The second was a concern that the application of the exclusionary rule to knock-and-announce violations could lead to unnecessary over-deterrence.⁵⁶ This latter concern arose because officers might wait longer than desired after knocking and announcing both to ensure compliance with the knock-and-announce rule and to avoid the exclusion of probative evidence.⁵⁷ This, in turn, has the potential to produce “preventable violence against officers in some cases, and the destruction of evidence in many others.”⁵⁸

In terms of the deterrence benefits from applying the exclusionary rule to knock-and-announce violations, Scalia concluded that such benefits would be minimal.⁵⁹ The threat of civil lawsuits for violations of the knock-and-announce rule, rather than the “[m]assive deter-

48. *Id.* at 594 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

49. *Id.*

50. *Id.* (“What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”).

51. *Id.*

52. *Id.* at 599.

53. *Id.* at 595.

54. *Id.* at 595–96.

55. *Id.* at 595 (citing *Penn. Bd. of Prob. & Parole v. Scott*, 523 U.S. 357, 366 (1998)).

56. *Id.* at 595–96.

57. *Id.* at 595.

58. *Id.*

59. *Id.* at 596.

rence” of the exclusionary rule, should be a sufficient deterrent to police misconduct.⁶⁰ This is because “ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even ‘reasonable suspicion’ of their existence, *suspend the knock-and-announce requirement anyway*.”⁶¹

Scalia’s remaining reasons for finding minimal benefits in applying the exclusionary rule are especially noteworthy. This is because Scalia’s comments may portend an end to the Court’s use of the exclusionary rule in other contexts outside the knock-and-announce area.⁶² Scalia commented that:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.⁶³

According to Scalia, since 1961, when the Court first applied the exclusionary rule to the states in *Mapp v. Ohio* to deter Fourth Amendment violations by police, civil rights lawsuits for Fourth Amendment violations have become both more available and more frequent.⁶⁴ For Scalia, these suits provide an effective, alternative remedy to the exclusionary rule for Fourth Amendment violations such as knock-and-announce violations.

According to Scalia, another effective remedy against Fourth Amendment violations that has developed since the days of *Mapp v. Ohio* includes the “increasing professionalism of police forces, including a new emphasis on internal police discipline.”⁶⁵ Law enforcement officials today, better trained and educated than they were in the 1960s, understand the permissible, constitutional boundaries for their conduct under the Fourth Amendment.⁶⁶ As an example of how increased police discipline will deter Fourth Amendment violations, Scalia mentioned that officers who do not comply with Fourth

60. *Id.* at 596–97.

61. *Id.* at 596.

62. The dissent recognized this possibility, as well: “The majority’s ‘substantial social costs’ argument is an argument against the Fourth Amendment’s exclusionary principle itself.” *Id.* at 614 (Breyer, J., dissenting).

63. *Id.* at 597.

64. *Id.* at 597–98.

65. *Id.* at 598.

66. *Id.* at 599. For Justice Scalia, “[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability.” *Id.*

Amendment principles will not advance in their careers.⁶⁷ Lastly, the decision in *Hudson* posited that “various forms of citizen review” may prevent police from violating the knock-and-announce rule.⁶⁸

Justice Kennedy wrote a short concurring opinion in which he joined the majority in all but one section of the decision.⁶⁹ Kennedy stated, somewhat mysteriously, that the “Court’s decision should not be interpreted as suggesting that violations of the [knock-and-announce] rule are trivial or beyond the law’s concern.”⁷⁰ He also commented that the majority opinion in *Hudson* should not be read as casting doubt on the exclusionary rule in general.⁷¹ Kennedy’s opinion reflected his belief that the Court’s holding is based principally on a causation argument; that is, there is an insufficient causal link between knock-and-announce violations and subsequent discoveries of evidence to justify exclusion.⁷² Finally, Justice Kennedy pointed out that, had the record in *Hudson* reflected a widespread pattern of knock-and-announce violations, the decision may have been different.⁷³

According to Justice Breyer in the dissent, precedent, logic, and policy considerations all dictate the contrary result from that reached by the majority in *Hudson*.⁷⁴ In terms of clear logic supported by precedent, Breyer argued that since a violation of the knock-and-announce principle translates into a violation of the Fourth Amendment’s reasonableness requirement, evidence obtained after an unannounced entry must be excluded because “‘the use of evidence secured through an illegal search and seizure’ is ‘barred’ in criminal trials.”⁷⁵ Justice Breyer also clearly believed that not applying the exclusionary rule in this context would undermine deterrence of unlawful police conduct.⁷⁶ Civil rights lawsuits would not provide an adequate deterrent effect because damages in such lawsuits are nomi-

67. *Id.* at 598.

68. *Id.* at 599.

69. This final part of Justice Scalia’s opinion discusses three cases that he felt bolstered his conclusion that the exclusionary rule should not apply to knock-and-announce violations. *Id.* at 599–602. Justice Kennedy did not join in this part of the opinion. *Id.* at 604 (Kennedy, J., concurring). Kennedy’s only stated reason for doing so was that the cases mentioned in the last part of the majority opinion did not “have as much relevance . . . as Justice Scalia appears to [have] conclude[d].” *Id.*

70. *Id.* at 602–03.

71. *Id.* at 603.

72. *Id.*

73. *Id.* at 604.

74. *Id.* at 608, 611, 614 (Breyer, J., dissenting).

75. *Id.* at 608 (quoting *Wolf v. Colorado*, 338 U.S. 25, 28 (1949)).

76. *Id.* at 610–11.

nal⁷⁷ and civil immunities to effective suits frequently exist in this area.⁷⁸

Returning to precedent, Justice Breyer pointed out that the knock-and-announce rule does not fit squarely into either of two categories of exceptions the Court had already created in the Fourth Amendment / exclusionary rule context: “(1) where there is a specific reason to believe that application of the rule would ‘not result in appreciable deterrence’”;⁷⁹ and “(2) where admissibility in proceedings other than criminal trials was at issue.”⁸⁰ Breyer found that there were no *special* social costs associated with applying the exclusionary rule in the knock-and-announce context.⁸¹

In response to the majority’s finding of attenuation from “but-for” causation, Justice Breyer believed there was indeed a sufficient causal link between the illegal entry and the discovered evidence.⁸² The majority opinion, by separating the illegal entry from the subsequent search, both “slice[d] the violation too finely” and misconstrued the inevitable discovery doctrine.⁸³ With respect to the former point, Breyer reasoned that without the unlawful conduct, the police would not have been in the house and able to discover the probative evidence of the guns and drugs.⁸⁴ With respect to the latter point, he reasoned that the inevitable discovery doctrine would not apply to the facts in *Hudson*:

The doctrine does not treat as critical what *hypothetically could have* happened had the police acted lawfully in the first place. Rather, “independent” or “inevitable” discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently of* that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one. Instead, it must show that the same evidence “inevitably would have been discovered *by lawful means*.”⁸⁵

77. *Id.*

78. *Id.*

79. *Id.* at 611 (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976)).

80. *Id.* at 612.

81. Of course, the dissent admitted that the costs normally associated with exclusion would apply in the knock-and-announce context if the exclusionary rule were applied. *Id.* at 614.

82. *Id.* at 615.

83. *Id.* at 615–16.

84. *Id.*

85. *Id.* at 616 (citations omitted) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)).

Since there had been no “independent chain of events that would have inevitably led to the discovery and seizure of the evidence despite, and independent of,” the knock-and-announce violation in *Hudson*, Breyer concluded that the inevitable discovery doctrine was inapplicable to the case.⁸⁶

Justice Breyer took issue with the majority’s public policy conclusions and concluded that the majority had failed to recognize the extent of the privacy interests underlying the knock-and-announce rule.⁸⁷ For Breyer, the knock-and-announce rule does more than protect property from unnecessary damage or people from sudden startle; it “protects the occupants’ privacy by assuring them that government agents will not enter their home without complying with those requirements (among others) that diminish the offensive nature of any such intrusion.”⁸⁸

Justice Breyer also pointed out that it is immaterial whether the interests underlying the knock-and-announce rule are implicated by excluding particular evidence.⁸⁹ For example, the “Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search.”⁹⁰ Thus, contraband can both be private and protected even when, as in *Hudson*, the items have little or nothing to do with the interests implicated by a particular constitutional rule.⁹¹ Therefore, the analysis can proceed more simply: If a violation of knock-and-announce occurs, the ensuing search is unlawful and the discovered evidence should be excluded.⁹²

Finally, Justice Breyer attempted to recast the majority’s argument that excluding evidence after knock-and-announce violations would lead to otherwise preventable violence against officers and the unnecessary destruction of evidence (“overdeterrence”).⁹³ For example, the majority believed that officers might be needlessly harmed because they might wait too long after knocking and announcing, but before forcibly entering a home, in order to ensure their compliance with the rule and avoid the exclusion of evidence.⁹⁴ Breyer recast this

86. *Id.* at 618.

87. *Id.* at 620.

88. *Id.*

89. *Id.* at 621.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 622–23.

94. *Id.* at 622.

argument by explaining that the majority was really attacking the knock-and-announce rule itself, and not the exclusion principle.⁹⁵ He claimed that the knock-and-announce rule adequately takes into account the majority's concerns by allowing officers to enter a dwelling immediately and unannounced when they harbor a reasonable suspicion that others may harm them or evidence will be destroyed.⁹⁶ According to Breyer, officers can also avoid uncertainty in the application of the exclusionary rule and the accompanying danger that results from waiting longer than necessary to enter a dwelling by obtaining a no-knock warrant from a magistrate or judge.⁹⁷

B. Related Supreme Court Exclusionary Rule Case Law

The Supreme Court first applied the exclusionary rule to federal courts for search-and-seizure violations by police in its 1914 decision in *Weeks v. United States*.⁹⁸ It later applied the rule in 1961 to state courts in the now well-known case of *Mapp v. Ohio*.⁹⁹ In particular, *Mapp* found that evidence seized following Fourth Amendment search-and-seizure violations by police shall be excluded in state courts in order to deter police from committing these violations.¹⁰⁰ In other contexts outside the knock-and-announce area, the Supreme Court has relied upon the rationale that alternative deterrent factors such as police training and internal discipline can replace exclusion to deter police and other criminal justice professionals from illegal conduct prohibited by the Fourth Amendment. In particular, in *Pennsylvania Board of Probation v. Scott*,¹⁰¹ the Supreme Court held that evidence found as a result of illegal searches and seizures by parole officers in violation of the parolee's Fourth Amendment rights should not be suppressed at parole revocation hearings in light of these other deterrent factors:

Although this [supervisory] relationship [between parole officer and parolee] does not prevent parole officers from *ever* violating the Fourth Amendment rights of their parolees, it does mean that the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of [civil] damages actions.¹⁰²

95. *Id.* at 622–23.

96. *Id.* at 623.

97. *Id.* at 624.

98. 232 U.S. 383 (1914).

99. 367 U.S. 643 (1961) (applying the exclusionary rule to the states).

100. *Id.*

101. 524 U.S. 357 (1998).

102. *Id.* at 368–69.

Moreover, in *INS v. Lopez-Mendoza*,¹⁰³ the Supreme Court, in part, rejected the application of the exclusionary rule in the context of civil deportation hearings to evidence unconstitutionally seized by immigration officers because “[t]he INS also has in place a [disciplinary] procedure for investigating and punishing immigration officers who commit Fourth Amendment violations.”¹⁰⁴

Finally, the Supreme Court believed that alternative deterrent factors could play a prominent role in deterring police from committing constitutional misdeeds in other contexts. For example, in crafting the inevitable discovery exception to the Fourth Amendment, one of the main doctrinal exceptions to the exclusionary rule,¹⁰⁵ the Court stated that “[s]ignificant disincentives to obtaining evidence illegally—including the possibility of departmental discipline and civil liability—also lessen the likelihood that [this] exception will promote police misconduct.”¹⁰⁶

C. Lower Court Case Law Interpreting *Hudson*

Although state and lower federal courts are required to abide by the *Hudson* decision as a matter of federal constitutional law—and in fact these courts have broadly interpreted *Hudson*—they have been split on the issue of whether the alternative factors mentioned in *Hudson* are effective in deterring police search-and-seizure misconduct. Significant to the study presented here, and as evidence of the broad interpretation of *Hudson*, the First Circuit applied the *Hudson* rule to police knock-and-announce violations during the execution of an arrest warrant.¹⁰⁷

At least one state court has agreed with the First Circuit concerning this specific application of *Hudson*.¹⁰⁸ Moreover, as evidence of the expansive interpretation of *Hudson*, the Fifth Circuit extended the *Hudson* holding of non-exclusion to evidence seized by police following knock-and-announce violations under federal statutory law.¹⁰⁹ In

103. 468 U.S. 1032 (1984).

104. *Id.* at 1045 (citing INS, U.S. DEPT. OF JUSTICE, THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS 35 (1983)).

105. JOHN N. FERDICO, HENRY F., FRADELLA & CHRISTOPHER D. TOTTEN, CRIMINAL PROCEDURE FOR THE CRIMINAL JUSTICE PROFESSIONAL 81–85 (11th ed. 2012).

106. *Nix v. Williams*, 467 U.S. 431, 446 (1984) (citing *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397 (1971)).

107. *United States v. Pelletier*, 469 F.3d 194, 201 (1st Cir. 2006).

108. *See State v. Marcum*, No. 04-CO-66, 2006 WL 3849861 (Ohio Ct. App. Dec. 28, 2006).

109. *See United States v. Bruno*, 487 F.3d 304 (5th Cir. 2007).

addition, the Sixth Circuit has applied the *Hudson* holding to knock-and-announce violations by police during warrantless entries.¹¹⁰ At least one state court has followed the Sixth Circuit in this application.¹¹¹ Finally, other state courts have applied the *Hudson* rule to verbal statements made by the defendant following the execution of a search warrant in violation of the knock-and-announce rule.¹¹²

Certain lower courts have been unreceptive to the argument in *Hudson* that alternative factors such as police discipline and civil suits can effectively replace the exclusionary rule as a successful deterrent to police misconduct in the search-and-seizure area.¹¹³ For example, the Third Circuit held that the exclusionary rule should remain the remedy for evidence seized by police during an illegal traffic stop because alternative factors such as improved police education, training, and discipline have not necessarily been successful in deterring police search-and-seizure misconduct.¹¹⁴ In addition, one district court has found that the exclusionary rule should remain the chief mechanism for preventing Fourth Amendment warrant violations by police because exclusion leads police to adopt better training, supervision, and review procedures.¹¹⁵

Other lower courts, however, have been more willing to consider the argument in *Hudson* that alternative factors can replace exclusion as a remedy for police violations in the Fourth Amendment search-and-seizure area. Specifically, certain federal courts agree with *Hudson* that civil lawsuits can adequately deter Fourth Amendment search-and-seizure violations.¹¹⁶

D. Literature Review: Empirical Studies Regarding the Exclusionary Rule

This section explains other significant scholarly studies on the exclusionary rule since the rule's adoption in the 1960s. In various

110. See *United States v. Smith*, 526 F.3d 306 (6th Cir. 2008).

111. See *In re Frank S.*, 47 Cal. Rptr. 3d 320 (Ct. App. 2006).

112. See *United States v. Kearns*, No. 1:05-CR-146-WSD, 2006 WL 2668535 (N.D. Ga. Sept. 15, 2006).

113. See *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006); *United States v. Ryan*, No. 2:07-CR-35, 2008 WL 901538 (D. Vt. Mar. 31, 2008).

114. See *Mosley*, 454 F.3d at 268–69.

115. *Ryan*, 2008 WL 901538, at *5.

116. See, e.g., *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009) (regarding an illegal seizure of identifying information); *United States v. Qing Li*, No. 07-CR-2915-JM, 2008 WL 789899, at *5 n.3 (S.D. Cal. Mar. 20, 2008) (regarding an illegal seizure of electronic information); *United States v. Wellman*, No. 1:08-CR-00043, 2009 WL 37184, at *7 n.8 (S.D. W. Va. Jan. 7, 2009) (regarding a Fourth Amendment violation).

Fourth Amendment contexts, these studies have all attempted to examine empirically the deterrent value of the exclusionary rule using social scientific techniques.

One of the early, foundational studies on the value of the exclusionary rule is the 1970 study by Dallin Oaks.¹¹⁷ Oaks analyzed arrest and conviction numbers in Cincinnati, Ohio, for weapons and narcotics offenses, both prior and subsequent to the Supreme Court decision in *Mapp*.¹¹⁸ Oaks found that the *Mapp* decision's exclusionary rule had no significant deterrent effect on police misconduct during searches related to these offenses in Cincinnati.¹¹⁹ In particular, the study showed that the rule had no measureable effect on the number of overall arrests and convictions by Cincinnati police for these of-

117. See Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 681–89 (1970). Before Oaks's study, there were several studies concerning the exclusionary rule in the period immediately following the 1961 Supreme Court case of *Mapp v. Ohio* in which the Court first applied the exclusionary rule to state courts for evidence discovered during illegal police searches. See *id.* at 678–709 (discussing previously published research on the effect of the exclusionary rule).

In 1963, Stuart Nagel surveyed police chiefs, prosecutors, judges, defense attorneys, and ACLU officers in forty-seven states. The overwhelming majority agreed that the exclusion of unlawfully obtained evidence reduced illegal searches. *Mapp* had been decided in 1961, and Nagel asked whether police compliance with the Fourth Amendment had increased or decreased between 1960 and 1963. Seventy-five percent of the respondents in states without an exclusionary rule prior to *Mapp* said that compliance had increased, but only 57% of the respondents in the states that had an exclusionary rule prior to *Mapp* said so. Similarly, Michael Katz reported that 64% of the prosecutors, 62% of the defense attorneys, and 78% of the judges surveyed in North Carolina agreed that the “[e]xclusion of evidence is an effective way of reducing the number of illegal searches.”

Albert Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1373 (2008) (citations omitted). When Katz inquired if “[c]ivil and criminal proceedings against law enforcement officers should be the sole means of enforcing the requirements of legal search,” 15% of the prosecutors agreed while only 5% of defense lawyers and 3% of the judges did so. Michael Katz, *The Supreme Court and the States: An Inquiry Into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C. L. REV. 119, 134 (1966). Lastly, in the 1960s, Columbia University law students studied arrest information for minor drug crimes in New York City criminal courts immediately before and after *Mapp*. Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 87 (1968). Among specialized drug officers in New York City, arrests for minor drug offenses subsequent to *Mapp* fell by over 50%. *Id.* at 92. The authors noted that more than half of the arrests for these offenses prior to *Mapp* resulted from unconstitutional searches under the Fourth Amendment. *Id.*

118. In addition, Oaks found a drop in the number of gambling convictions. Oaks, *supra*, note 117, at 690–91. However, since police gambling raids fell initially in 1959—two years prior to *Mapp*—Oaks did not believe the decrease was due to any deterrence effects from *Mapp*, or from the exclusionary rule. *Id.*

119. *Id.*

fenses.¹²⁰ Oaks had posited that if the exclusionary rule was exerting an effect on police behavior, both arrest and conviction numbers might reveal this effect.¹²¹ Moreover, regarding stolen property, Oaks hypothesized that since police had reported that they violate search-and-seizure laws to retrieve stolen property, the deterrent effect of the exclusionary rule related to this type of violation could be shown if police were recovering less stolen property in the aftermath of *Mapp*.¹²² However, Oaks found no immediate decrease in the amount of stolen property recovered by Cincinnati police following *Mapp*.¹²³

In another preliminary study on the exclusionary rule in the 1970s, James Spiotto examined changes in the number of motions to suppress evidence filed between 1950 and 1971 in Chicago criminal courts involving narcotics, gambling, and weapons crimes.¹²⁴ Spiotto hypothesized that a decline in the number of motions filed would suggest that the exclusionary rule was functioning as an adequate deterrent of unconstitutional police searches.¹²⁵ Spiotto found that while the percentage of winning motions to suppress fell during this period in gambling cases, it rose significantly in weapons and narcotics cases.¹²⁶ Spiotto concluded that the increase in the number of these motions in narcotics cases had two primary sources: (1) Chicago judges' efforts to deal with their rapidly-rising narcotics caseloads by granting more motions to suppress in these particular cases;¹²⁷ and (2) the wider reliance on these motions as a flexible, discretionary tool for granting leniency for minor offenses, including certain drug crimes.¹²⁸ Regarding his findings for the gambling cases, Spiotto posited that the decline in motions was due to the fact that most of the gambling cases were not being handled by Chicago police and courts but instead were being addressed by federal law enforcement and

120. *Id.*

121. *Id.* at 689.

122. *Id.* at 692.

123. *Id.* at 692–93. Oaks did point out that there was a “gradual decrease” in the amount of stolen property recovered in the years following *Mapp*, and this decrease “may reflect a long range [sic] effect of the *Mapp* decision, with decreased recoveries of stolen property as police officers begin to accept and conform to the search and seizure [sic] requirements.” *Id.* at 693. However, “[t]his evidence by itself is inconclusive.” *Id.*

124. James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 246–48, 252 (1973).

125. *Id.* at 248.

126. *Id.* at 246.

127. *See id.* at 252 (explaining that granting preliminary motions to suppress serves a screening function).

128. *Id.* at 248 n.24. For additional discussion of the increasing narcotics caseloads in Chicago during this period, see Oaks, *supra* note 117, at 685.

courts.¹²⁹ In conclusion, Spiotto's research did not necessarily show that the exclusionary rule was a successful deterrent to unconstitutional police behavior.¹³⁰

Bradley Canon led a major study on the exclusionary rule, and he expanded the Oaks Cincinnati study to fourteen other United States cities.¹³¹ Canon's study found that Oaks's conclusions regarding the exclusionary rule in Cincinnati were not necessarily typical. Specifically, in certain other cities the amount of arrests had significantly declined since *Mapp*; this is in direct contrast to Oaks's finding that there was no measureable change in the number of arrests in Cincinnati.¹³² This decrease may indicate that the exclusionary rule was having a deterrent effect on police searches and arrests outside Cincinnati (i.e., the number of illegal searches revealing evidence for illegal arrests was declining).¹³³

Furthermore, Canon surveyed prosecutors and police administrators regarding their beliefs on the number of search warrants applied for by police as well as the number of motions to suppress awarded by judges subsequent to *Mapp*.¹³⁴ Canon discovered that prosecutors and police officials believed there had been a significant increase in the number of search warrant applications; however, the number of awarded motions to suppress was reported as relatively low following *Mapp*.¹³⁵ In addition, these officials believed that in the aftermath of *Mapp*, police policies restricted the carrying out of searches incident to arrest.¹³⁶

In sum, Canon concluded that his findings may support the notion that the exclusionary rule was deterring police misconduct re-

129. Spiotto, *supra* note 124, at 246–48.

130. *Id.* at 276–77.

131. Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 703 (1973).

132. *Id.* at 704.

133. *See id.* at 704, 706–07. Like Oaks, Canon examined the amount of police arrests for narcotics, gambling, weapons, and stolen property crimes, focusing on the arrest rates in fourteen cities prior and subsequent to *Mapp*. *Id.* at 703–04. Canon noted a substantial decline in the amount of arrests in Baltimore subsequent to *Mapp*. *Id.* at 704–05.

134. *Id.* at 711, 721.

135. *See id.* at 714, 721. Regarding the low number of awarded motions to suppress, Canon pointed out that this may indicate the exclusionary rule's effectiveness. *Id.* at 718. In other words, the finding suggests that police are abiding by constitutional norms, including those related to the Fourth Amendment. *See id.* Finally, Canon believed that the increase in search warrant applications may also reflect the fact that more officers are following constitutional norms since the application of the exclusionary rule after *Mapp*. *Id.* at 715–16.

136. *Id.* at 715–17, 719.

lated to arrests and searches: “[O]ur argument is negative rather than positive; . . . the evidence from the 14 cities certainly does not support a conclusion that the exclusionary rule had no impact upon arrests in search-and-seizure type crimes in the years following its imposition.”¹³⁷

A significant issue left unresolved by Canon’s study, however, was the determination of the influence, if any, that the adoption of the exclusionary rule by the Supreme Court in *Mapp* had on his findings.¹³⁸ Another point involved the low response rate for Canon’s questionnaire, which may have adversely impacted his findings.¹³⁹

In a police study regarding the exclusionary rule, Myron Orfield interviewed twenty-six Chicago narcotics officers, including police officers and detectives, through a survey questionnaire.¹⁴⁰ Orfield discovered that: (1) when courts exclude evidence, police officers understand why; (2) this understanding led the officers “to use warrants more often and to exercise more care when conducting warrantless searches;”¹⁴¹ (3) the exclusion of evidence, and particular measures taken by police officials as a result of this exclusion, “punish” the officers for their misbehavior during searches;¹⁴² (4) officers

137. *Id.* at 707.

138. *Id.* at 714, 728 (noting that *Mapp* was one of many decisions of the Warren Court that could affect the behavior of law enforcement agencies).

139. For an explanation of several of the problems concerning Canon’s sample, see Steven R. Schlesinger, *The Exclusionary Rule: Have Proponents Proven That It Is a Deterrent to Police?*, 62 JUDICATURE 404, 406–08 (1979) (cited in Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1021 n.27). Canon did a follow-up study in 1977 in which he compared arrest rates for gambling, narcotics, and weapons offenses prior and subsequent to *Mapp* in states that possessed an exclusionary rule at the time of *Mapp* (“own rule” states) with states that adopted the exclusionary rule after or because of *Mapp* (“imposed rule” states). Perrin, *supra* note 12, at 701 (citing Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels*, 5 AM. POL. Q. 57 (1977)). Canon’s findings were as follows:

Based on the relative increases or decreases in the arrest rates after *Mapp*, Canon concluded that *Mapp* had a significant impact on 34.8% of the “imposed rule states” and no significant impact on the remaining 65.2% of those states. In comparison, Canon found that *Mapp* significantly impacted arrest rates in 43.5% of the “own rule” states, but not the remaining 56.5% of the “own rule” states. This surprising finding, which at first blush appears to be upside down, led Canon to speculate that the only way *Mapp* has a strong impact is if it reinforces an already existing exclusionary rule policy.

Id.

140. See Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1017–18, 1024–30, 1053–54.

141. *Id.* at 1017–18.

142. *Id.* at 1046–48. Punishment included transfers to less favorable positions, demotions, and elimination of opportunities for promotion. *Id.*

R

R

R

generally believed that the exclusionary rule should be retained but that an exception should be created for police mistakes committed in good faith;¹⁴³ (5) officers generally perceived the rule in a positive light and thought that an alternative remedy such as a civil lawsuit “would ‘overdeter’ the police in [conducting] their search and seizure [sic] activities;”¹⁴⁴ and (6) police officials and prosecutors responded to the exclusion of evidence by initiating programs and policies to ensure greater police compliance with search-and-seizure norms.¹⁴⁵ In conclusion, officers in Orfield’s Chicago study perceived that the exclusionary rule had significant deterrent effects.¹⁴⁶

In a 1992 courts study on the exclusionary rule, Myron Orfield interviewed judges, public defenders, and prosecutors (the “subjects”) from fourteen felony trial courtrooms in Cook County, Illinois, using a questionnaire.¹⁴⁷ Orfield discovered that the subjects believed police officers “experience adverse personal reactions” and “change their behavior” in response to the suppression of evidence in their cases.¹⁴⁸ In addition, the subjects agreed that the exclusionary rule is effective in instructing officers on the legal rules dealing with searches, and that these rules do not prevent officers from fulfilling their responsibilities.¹⁴⁹ According to Orfield’s study, the deterrent impact of the rule is enhanced when officers are tasked with “big or important cases” or when they are employed in specialized law enforcement units.¹⁵⁰

Moreover, “the Court’s [subjects] outlined a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment,” including the exclusionary remedy.¹⁵¹ The study indicated that judges knowingly permit this perjury to continue.¹⁵² Despite the perjury issue, however, the subjects perceived that the exclusionary rule promotes “police professionalism” and adherence to search-and-seizure norms.¹⁵³ In general, the subjects agreed with retaining the rule, which they perceived to be a more effective remedy

143. *Id.* at 1051.

144. *Id.* at 1018.

145. *Id.* at 1027–29. Such programs and policies include increased training of officers in the field of search-and-seizure law, better record keeping of successful motions to exclude, and internal review of cases involving these motions. *Id.*

146. *Id.* at 1017.

147. See Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 11, at 81–84.

148. *Id.* at 80, 82.

149. *Id.* at 82.

150. *Id.*

151. *Id.* at 82–83.

152. *Id.*

153. *Id.* at 83.

for police misconduct in the search-and-seizure area than civil lawsuits (e.g., against police).¹⁵⁴

Near the time of Orfield's studies, other researchers examined police compliance with Fourth Amendment law to gain additional insight into the exclusionary rule's potential to deter misconduct. For example, Heffernan and Lovely surveyed police officers regarding their knowledge and perceptions of Fourth Amendment law, as well as to better assess officer perceptions concerning compliance with this law.¹⁵⁵ They discovered that unintentional mistakes were committed by nearly one-third of the officers surveyed in decisions dealing with search-and-seizure law.¹⁵⁶ Moreover, 15% of the officers intentionally committed at least one mistake.¹⁵⁷

Another survey by Akers and Lanza-Kaduce of over two hundred police officers from two southeastern cities found that 19% admitted to conducting searches of "questionable constitutionality" at least once a month, and 4% of the officers stated that they conducted searches they knew to be illegal at least once a month.¹⁵⁸

More recently, in 1998, Perrin, Caldwell, Chase and Fagan surveyed 1144 officers in Ventura County, California.¹⁵⁹ Perrin discovered that 19.7% of the officers who responded that the exclusionary rule affected their behavior on the job were "primarily concerned" with the risk of exclusion of evidence while 59.3% perceived exclusion as an "important concern."¹⁶⁰ However, over 18.7% of the officers perceived that the threat of exclusion was only a "minor concern" or "no concern at all" when searching for evidence.¹⁶¹ In addition, almost

154. *Id.* Professor Kenworthy Bilz recently examined the effect of the exclusionary rule in court by designing a study consisting of participants who were presented with various situations requiring the application of the exclusionary rule. Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 149 (2012). Bilz discovered that the participants were selective about applying the exclusionary rule when the law required it. *Id.* For example, the participants were more likely to exclude evidence obtained as a result of racial profiling rather than as a result of more innocent errors. *Id.* at 158.

155. William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance With the Law*, 24 U. MICH. J.L. REFORM 311, 311-12 (1991).

156. *See id.* at 348.

157. *Id.*

158. *See* Ronald L. Akers & Lonn Lanza-Kaduce, *The Exclusionary Rule: Legal Doctrine and Social Research on Constitutional Norms*, 2 SAM HOUSTON ST. U. CRIM. JUST. CENT. RES. BULL. 1, 3-4 (1986).

159. Perrin, *supra* note 12, at 713.

160. *Id.* at 721.

161. *Id.*

60% of the officers stated that evidence they seized was never suppressed from court, and almost half of the remaining officers indicated having evidence suppressed on only one occasion.¹⁶² Officers in the survey answered questions addressing search-and-seizure law correctly 50% of the time.¹⁶³

Perrin questioned officers regarding their preference for the exclusionary rule compared to other alternative deterrent mechanisms and found that 57% of officers perceived that exclusion served best the interests of the criminal justice system.¹⁶⁴ Over 36% of the officers perceived that increased officer education could serve as an effective alternative deterrent remedy to exclusion.¹⁶⁵ Approximately 20% of the officers agreed with applying internal police discipline as an alternative deterrent for officer misconduct.¹⁶⁶ Only about 1% of the officers indicated support for the alternative deterrent of criminal prosecution, including prison time.¹⁶⁷ Perrin concluded that the exclusionary rule is not successful in deterring police misconduct, in part because officers fail to comprehend the rule as a result of unsatisfactory knowledge, education, and training about the rule's operation and implications.¹⁶⁸

Professors Totten and Cobkit found that chiefs in large United States cities perceive that training, education, and internal discipline have a greater deterrent impact on police misconduct related to knock-and-announce procedures during *searches* than do exclusion of evidence and community oversight.¹⁶⁹ The majority of chiefs, however, perceive that the exclusion of evidence is "helpful" in deterring

162. *Id.* at 722.

163. *Id.* at 735. Studies conducted prior to Perrin's have also shown that police knowledge and training regarding search and seizure law is rather poor. *See, e.g.*, Eugene Michael Hyman, *In Pursuit of a More Workable Exclusionary Rule: A Police Officer's Perspective*, 10 PAC. L.J. 33, 47 (1979) ("[T]he average officer did not know or understand proper search and seizure rules and . . . supervisors or senior officers only achieved slightly improved scores."); Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POL'Y STUD. J. 461, 464, 466 (1978) ("Recruit training is sadly lacking in criminal procedure content" and "[t]he spirit and tone of communication about the law, particularly when the law is favorable to defendants' rights, is often negative, with the need for compliance stressed only infrequently.").

164. Perrin, *supra* note 12, at 732.

165. *Id.* at 732-33.

166. *Id.*

167. *Id.*

168. *Id.* at 734-36.

169. Christopher D. Totten & Sutham Cobkit (Cheurprakobkit), *The Knock-and-Announce Rule and Police Searches After Hudson v. Michigan: Can Alternative Deterrents Effectively Replace Exclusion for Rule Violations?*, 15 NEW CRIM. L. REV. 414, 419, 441-43 (2012).

police misconduct related to these procedures.¹⁷⁰ In addition, police chiefs are knowledgeable regarding the application of the knock-and-announce rule during searches and of the *Hudson* decision in general.¹⁷¹ Finally, most chiefs report that their departments do not have disciplinary policies on officer knock-and-announce misconduct.¹⁷²

Raymond Atkins and Paul Rubin, utilizing two panel data sets and advanced statistical methods from economics, determined that crime rates may have risen in the United States, specifically in suburban cities, in the wake of *Mapp*.¹⁷³ In particular, *Mapp* may have led to an increase in crime rates without causing a significant number of case dismissals.¹⁷⁴ Atkins and Rubin determined that *Mapp* may have led to a 3.9% rise in larceny crimes, 4.4% in auto thefts, 6.3% in burglaries, 7.7% in robberies, and 18% in assaults.¹⁷⁵ In addition, in suburban cities, *Mapp* may have caused a 27% increase in violent crimes and a 20% increase in property crimes.¹⁷⁶ Atkins and Rubin concluded that these rises in crime rates may occur because when the exclusionary rule is present, police may decide to use alternative approaches to crime solving that they perceive as less useful than searches.¹⁷⁷

Mialon and Mialon arrived at similar conclusions by utilizing statistical methods and modeling from economics.¹⁷⁸ They discovered that the exclusionary rule not only causes a rise in crime but also has two contradictory effects on searches.¹⁷⁹ In particular, the rule directly decreases the number of police searches by lowering the odds that these searches result in successful convictions (i.e., police will not undertake searches they know are likely to result in exclusion), but also indirectly leads to more searches by police as a result of increasing crime.¹⁸⁰ If the indirect effect of the rule operates, the rule leads to an increase in searches and has an ambiguous effect on unconstitutional police searches.¹⁸¹ If the direct effect of the rule operates, it causes a

170. *Id.* at 448.

171. *Id.* at 446.

172. *Id.* at 449.

173. See Raymond Atkins & Paul Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 164, 174 (2003).

174. *Id.* at 164.

175. *Id.* at 174.

176. *Id.*

177. See *id.*

178. See Hugo Mialon & Sue Mialon, *The Effects of the Fourth Amendment: An Economic Analysis*, 24 J.L. ECON. & ORG. 22 (2008).

179. See *id.* at 39–40.

180. *Id.* at 22.

181. *Id.* at 39.

decline in unconstitutional police searches, thereby promoting citizen privacy.¹⁸² The direct effect applies more frequently when the number of police officers per capita rises, when police incentive to close cases declines, and the concern of police toward error in their own behavior rises.¹⁸³

Professor Jacobi also recently used a law and economics approach (specifically, a game theory model), to show that the exclusionary rule is generally ineffective at deterring illegal police searches, and that its costs too often fall on innocent defendants by decreasing opportunities at trial to prove reasonable doubt.¹⁸⁴ In particular, the exclusionary rule prevents trials from distinguishing between factually innocent and guilty defendants.¹⁸⁵ Because of the drawbacks of the exclusionary rule and judges' attempts to avoid its application—which itself “twist[s] and subvert[s] the secondary doctrines” of search-and-seizure law—Jacobi proposes that future Fourth Amendment jurisprudence be crafted so as to ensure clearer divisions between innocent and guilty defendants.¹⁸⁶

Finally, there have been recent efforts to evaluate the exclusionary rule through field observation. In 2004, Gould and Mastrofski evaluated reports from experienced field observers who had joined metropolitan police officers on more than one hundred searches.¹⁸⁷ One-third of these searches violated search-and-seizure laws.¹⁸⁸ In addition, Jerome Skolnick's field observations found that the exclusionary rule led police to falsify arrest reports and generally not comply with procedural rules.¹⁸⁹ Skolnick concluded that there were particular aspects of the police work culture that prevented the exclusionary rule from being a successful deterrent to illegal police activity.¹⁹⁰

182. *Id.*

183. *Id.*

184. Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 587, 589 (2011).

185. *Id.* at 587–92.

186. *Id.* at 592.

187. Jon B. Gould & Stephan D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 325–26 (2004).

188. *Id.* at 316. The vast majority of unconstitutional searches were of suspects who were *not* later arrested, which may show that the exclusionary rule deters arrests more than it does unconstitutional searches. *Id.* at 332, 347.

189. JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY* 209 (Macmillan College Publishing Co., Inc. 3d ed. 1994) (1966).

190. *See id.* at 221–23.

II. Methodology

In this Part, the characteristics and demographics of the survey samples, who are police chiefs, are discussed first followed by an explanation of the relevant survey questions posed to the chiefs.

A. Samples

The samples of the survey study included police chiefs from 250 large cities with a population of at least 100,000, whose names and addresses were obtained from the 2010 National Directory of Law Enforcement Administrators. These large cities were chosen because police officers in large cities, in comparison to those in smaller cities, confront more criminal suspects and handle more crime problems and crime-related activities, including police seizures or arrests. In May of 2010, a postcard announcement regarding the study was mailed to each chief, and the cover letters and the survey questionnaires with a return, self-addressed stamped envelope were mailed a week later. There were two additional follow-up surveys mailed to the chiefs in July of 2010. The survey achieved a response rate of 53.2%, with one hundred and thirty-three usable surveys returned.¹⁹¹

One hundred and eighteen respondents (94.4%) were males, and seven (5.6%) were females. The large majority, ninety-seven respondents, were White (77.6%), followed by eighteen African-American (14.4%), six Hispanic (4.8%), and four other (3.2%). Sixty-two of the respondents were fifty years old or younger (approximately 50%), fifty-six were between fifty-one and sixty years old (45%), and seven were sixty-one years old or older (5%).

Fifty-nine respondents (48%) earned a master's degree or above, and fifty-four (44%) indicated they obtained a bachelor's degree.

Concerning the length of service in law enforcement, only seventeen respondents had been in service fewer than twenty years, while the remaining 108 (86%) had been in service for longer than twenty years. One hundred and three of the respondents (96.1%, the large majority) reported that during their police career they made an arrest while applying the knock-and-announce rule. On average, the respondents' departments conducted 2581 arrests annually.

191. Of the 133 surveys received, forty-one surveys noted that they were completed by the chief's designee, who is generally a ranking officer (e.g., captain, lieutenant, sergeant, etc.).

B. Survey Instrument

The study's data is derived from a detailed survey distributed in 2010 regarding police policies and practices implicating the knock-and-announce rule. The researchers designed fourteen questions to measure police chiefs' perceptions concerning knock-and-announce activity, including: (1) police knowledge regarding the knock-and-announce rule in the arrest context; (2) training support on the knock-and-announce rule in the arrest context; and (3) deterrent factors dealing with the knock-and-announce violation. The researchers pre-tested the survey questionnaire with five potential samples (police chiefs and police administrators) for their input and revised the questionnaire accordingly.

The "police knowledge" category examined whether survey respondents were knowledgeable regarding the knock-and-announce rule in the arrest context. The respondents were questioned about whether: (1) assuming no emergency, the police should wait a reasonable amount of time before entering a home or a building to make an arrest; and (2) it is acceptable for the police to enter a home to make an arrest after knocking and announcing their presence and authority and waiting less than fifteen seconds.

The "training support" category measured the amount of training support officers receive pertaining to arrests implicating the knock-and-announce rule by asking the respondents whether they believed police officers receive sufficient training on how to make an arrest applying the knock-and-announce rule. The scale was one to five, with one being "strongly disagree" and five being "strongly agree."

The "deterrent factors" category evaluated the degree to which the respondents perceived various deterrent factors for police knock-and-announce misconduct, including misconduct during arrests at premises, as "helpful." The survey questioned the respondents about whether they thought the following factors could assist in deterring police misconduct related to the knock-and-announce rule: (1) improved police training; (2) greater numbers of better-educated police officers; (3) the actual use and application of internal police disciplinary measures; (4) the presence of internal disciplinary measures; (5) suppression of evidence in court subsequent to a police violation of the knock-and-announce rule; and (6) community oversight (e.g., citizen review board). Each factor received a rating on a four-point scale where "1" indicated the respondent believed the factor "helped very little," and "4" indicated the respondent thought the factor "helped

the most.” Analysis showed low reliability coefficients (alpha) for each category; thus, each item was evaluated individually.¹⁹²

Finally, the respondents were asked to describe the acceptable amount of time that the police should wait after knocking and announcing before entering a home or building to make an arrest.

III. Findings and Conclusions

A. Study’s Findings

Table 1, *infra*, displays the data on chiefs’ knowledge concerning knock-and-announce activity as well as training practices related to this activity in the arrest context. According to the data in Table 1, a large majority, 107 of respondents (82.3%), either agreed or strongly agreed that under normal circumstances, after knocking and announcing their presence and authority, police must wait a reasonable amount of time prior to entering a home or other building to make an arrest. However, when questioned if that reasonable amount of waiting time could be fewer than fifteen seconds, fifty-one respondents (38.9%) agreed with the statement. The data also showed that eighty-five respondents (63.9%) either agreed or strongly agreed that police officers received enough training on how to make an arrest, including arrests involving the knock-and-announce rule.

Table 2, *infra*, shows the amount of time the respondents believed the police should wait after they knock and announce their presence and authority at a home or building but before they enter those premises to make an arrest. Based on the responses, it appears that the large majority of police chiefs (96.9%) was knowledgeable about the knock-and-announce rule. Thirty-four respondents (26%) indicated that the waiting time in a normal knock-and-announce situation should be a minimum of fifteen seconds (which is the federal common law standard established in *Banks*),¹⁹³ while only twelve respondents (9%) indicated that the waiting time should be fewer than fifteen seconds. The other eighty-three respondents (65%) believed that the amount of time the police should wait after knocking and announcing but prior to entering premises to make an arrest hinged upon the particular facts and circumstances of the individual case. According to the respondents, the two principal contributing factors af-

192. Reliability coefficient is a measure of internal consistency that determines whether a number of items make up an index designed to measure a single construct. BRIAN C. CRONK, *HOW TO USE SPSS 118* (7th ed. 2012).

193. *See supra* note 35 and accompanying text.

fecting the police decision were the size of the arrest location and the degree of risk of evidence being destroyed.

Table 3, *infra*, reflects respondents' perceptions concerning the effect of certain deterrent factors on police misconduct related to the knock-and-announce rule. Among the six deterrent factors, improved police training was perceived by respondents to help the most in deterring police misconduct (mean = 3.68),¹⁹⁴ followed by greater numbers of better educated police officers (mean = 3.27), followed by the actual use and application of internal police disciplinary measures (mean = 3.11). The presence of internal police disciplinary measures (mean = 2.85) and the suppression of evidence in court following a knock-and-announce rule violation (mean = 2.81) were the two factors that reflected a similar but *relatively* weaker deterrent impact on illegal police conduct. Nonetheless, the majority of respondents perceived that these two factors "help the most" or "help somewhat" in preventing illegal police conduct related to the knock-and-announce rule (e.g., 71.5% of respondents for the factor addressing the presence of internal disciplinary measures and 64.6% of respondents for the factor addressing the suppression of evidence in court following a knock-and-announce violation). Finally, the respondents perceived community oversight (i.e., citizen review boards) as being the least effective of the six deterrent factors (mean = 1.56). A mere 14.3% of respondents perceived community oversight as "helping the most" or "helping somewhat" in preventing illegal police misconduct related to the knock-and-announce rule.

B. Study's Conclusions

1. Chiefs' Knowledge of the Knock-and-Announce Rule During Arrests at Premises

Concerning chiefs' knowledge of the knock-and-announce rule and arrests, the majority has a general understanding of the operation of the knock-and-announce rule in the arrest context. In particular, 82.3% of the chiefs understand the basic knock-and-announce rule; that is, these chiefs comprehend that unless there is some exigency, police officers must knock and announce their presence and authority and then wait a reasonable amount of time prior to entering a home or other building to conduct an arrest. Finally, regarding comprehension of the knock-and-announce rule, most chiefs appear to understand the correct amount of wait time between knocking and

194. The arithmetic mean was used for the current study.

announcing at premises, on the one hand, and entering those premises to affect an arrest, if refused admittance, on the other hand. For example, 83 out of 129 (64.3%) of the chiefs acknowledged that the correct amount of wait time depends on the facts of the particular case involving the knock-and-announce rule during a home arrest (i.e., whether there is an exigent circumstance such as impending destruction of evidence). Moreover, thirty-four chiefs (26.4%) stated that the wait time under a normal, non-exigent circumstance should be a minimum of fifteen seconds (which is the federal common law standard established in *Banks*),¹⁹⁵ while just twelve (9.3%) respondents indicated that the wait time should be fewer than fifteen seconds.

Compared to the previous, related empirical studies to date, the superior knowledge exhibited by the police chiefs in the current study about the knock-and-announce rule in the arrest context is in line with the previous finding by Orfield (1987) that police officers understand why evidence is excluded in their cases; that is, according to Orfield, these police employees understand general Fourth Amendment search-and-seizure norms.¹⁹⁶ However, the superior knowledge of the chiefs regarding the knock-and-announce rule in the arrest context is not in accord with the findings by Perrin (1998) and Heffernan and Lovely (1991) that officers have reduced knowledge of Fourth Amendment search-and-seizure norms.¹⁹⁷ This difference in knowledge may be because chiefs have undergone more training and education than the average officer, and they have had more opportunities to learn as a result of their longer career experience.

2. Chiefs' Perceptions of Officer Training on the Knock-and-Announce Rule During Arrests at Premises

Nearly two-thirds of the chiefs (63.9%) perceived that police officers receive enough training on how to conduct an arrest, including arrests at premises implicating the knock-and-announce rule.¹⁹⁸

195. See *supra* note 35 and accompanying text.

196. Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1017–18.

197. See Perrin, *supra* note 12, at 724–25, 735 (noting that approximately 50% of law enforcement officers successfully answered written questions on Fourth Amendment search and seizure law); Heffernan & Lovely, *supra* note 155, at 348 (noting that about one-third of surveyed officers committed unwitting errors in decisions related to Fourth Amendment law); *supra* note 163 and accompanying text (citing several academic works explaining the deficiencies in police academy training of officers in Fourth Amendment law and that law enforcement knowledge of this law is reduced).

198. See *infra* Table 1.

Though Orfield in his police study found that police receive training on search-and-seizure laws (in particular when evidence is excluded in their cases),¹⁹⁹ the current study's findings indicate that this training includes the specific area of application of the knock-and-announce rule during police arrests. In addition, this study's findings reflect a relatively high degree of agreement among chiefs on the sufficiency or adequacy of police training on the knock-and-announce rule during arrests. Nonetheless, a little over one-third (36.1%) of the chiefs in the current study are not sure or do *not* perceive that officers receive enough training in this area.²⁰⁰

3. Chiefs' Perceptions of the Impact of the Deterrence Factors on Police Knock-and-Announce Violations During Arrests at Premises

Regarding police chiefs' perceptions of the impact of the deterrent mechanisms on police misconduct during arrests at premises in the knock-and-announce area, these perceptions reflect what the *Hudson* Justices believed to be effective deterrent mechanisms for police misconduct in this area: training, education, and internal discipline.²⁰¹ Thus, most of the police chiefs perceive these three mechanisms as having a significant impact in helping to deter police misconduct during arrests in the knock-and-announce area (i.e., a majority of chiefs perceive each of these factors as "helping the most" or "helping somewhat"). Moreover, chiefs' perception of the helpfulness of these three mechanisms is relatively stronger than the other deterrent mechanisms examined in the study, such as community oversight and exclusion. However, police chiefs' perception of the helpfulness of community oversight in preventing misconduct during arrests in the knock-and-announce area is relatively lower than all of the other examined factors. Merely 14.3% of the chiefs perceive community oversight as having any substantial impact in preventing police misconduct during arrests in the knock-and-announce area. On a scale of "1" to "4" (where "1" indicates "helps very little" and "4" indicates "helps the most"), the mean score among police chiefs for the deterrence factor of community oversight (i.e., citizen review boards) for knock-and-announce rule violations by police was 1.56. Thus, chief perception on the mechanism of community oversight does not seem

199. Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1027–29.

200. *See infra* Table 1.

201. *Hudson v. Michigan*, 547 U.S. 586, 596–99 (2005).

to reflect the belief by the *Hudson* Justices that this mechanism can effectively prevent police knock-and-announce misconduct.

Perhaps most importantly, the study's findings concerning police chiefs' perceptions of the impact of exclusion of evidence as a deterrent for police misconduct during arrests in the knock-and-announce area may not reflect the Justices' belief in *Hudson* that exclusion is no longer an effective deterrent for knock-and-announce misconduct by police.²⁰² In particular, most police chiefs (64.6%) perceive the mechanism of exclusion of evidence as having a substantial impact (e.g., "help the most" or "help somewhat") in preventing knock-and-announce violations during police arrests. Though exclusion is perceived by chiefs as being a relatively stronger deterrent than community oversight for knock-and-announce misconduct during arrests, it is perceived as being relatively weaker as a deterrent mechanism than training, education, and discipline (albeit not substantially so).²⁰³

Regarding earlier related studies, the chiefs' perception of the deterrent mechanism of training, as well as the chiefs' perception that officers receive sufficient training on how to conduct a seizure or arrest implicating knock-and-announce procedures, is in line with Orfield's finding that Chicago police departments have existing policies and programs to train officers in Fourth Amendment law.²⁰⁴ Moreover, Orfield's finding that police officers perceive favorably the deterrent value of exclusion is in line with the current study's findings that most police chiefs perceive exclusion as helping to prevent police misconduct during arrests in the knock-and-announce context.²⁰⁵ In addition, Orfield's determination that narcotics officers and detectives are effectively punished or disciplined for search-and-seizure misconduct is in line with the current study's finding that most chiefs perceive discipline as a helpful deterrent for knock-and-announce misconduct by police during arrests.²⁰⁶

The current study's findings on chiefs' perception of the value of exclusion to prevent police misconduct during arrests at premises in

202. *Id.* at 599.

203. For example, the difference in mean score between "chief perception of exclusion" as a deterrent and the "presence of internal discipline" measured as a deterrent is 0.04. *See infra* Table 3.

204. Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1027–29.

205. *Id.* at 1051. *See also* Orfield, *Deterrence, Perjury, and the Heater Factor*, *supra* note 11, at 83 (finding that prosecutors, defense attorneys, and judges also favorably perceive the deterrent value of exclusion).

206. Orfield, *The Exclusionary Rule and Deterrence*, *supra* note 11, at 1046–48.

R

R

R

the knock-and-announce area do not agree with Perrin's conclusion on the effectiveness of exclusion in deterring police misconduct in general.²⁰⁷ Perrin concluded that exclusion was not an effective deterrent mechanism because: (1) officers did not subsequently discover from police personnel that evidence had been suppressed in their cases; and (2) officers who had experienced the exclusion of evidence in their own cases did not show greater knowledge, and hence *learning*, of search-and-seizure laws.²⁰⁸ However, Perrin's study focused mostly on police officers as opposed to chiefs.²⁰⁹ Chiefs may have superior knowledge about the value of the exclusionary rule in their departments. In addition, Perrin's study was restricted in scope to one geographical county or state as opposed to the more expansive, national coverage of the current study.²¹⁰ Lastly, Perrin's study concentrated on overall police misconduct as opposed to the particular area of police arrests at premises and the knock-and-announce rule.²¹¹

Nonetheless, several of the Perrin findings arguably do align with the current study. For example, most of the survey respondents in Perrin's study indicated that "the interests of the criminal justice system are well served by excluding unlawfully seized evidence."²¹² Similarly, in the present study, most of the chiefs perceived exclusion as a valuable law enforcement mechanism to prevent police misconduct during arrests at premises involving the application of the knock-and-announce rule.²¹³ In addition, just as the chiefs in the present study perceived education to be a useful deterrent for police misconduct during arrests, a significant number of police officers in Perrin's study perceived that education could be an effective, alternative remedy for search-and-seizure misconduct.²¹⁴

207. Perrin, *supra* note 12, at 734–35.

208. *Id.* at 734. Perrin recommended that officers be exposed to additional educational and training opportunities in Fourth Amendment search and seizure law. *Id.* at 735.

209. *Id.* at 719.

210. *Id.* at 712–13.

211. *Id.* at 673.

212. *Id.* at 732. Specifically, 57% of those surveyed concurred with this statement. *Id.* Moreover, Perrin found that most officers considered the potential exclusion of evidence to be an important, but not the primary, concern. *Id.* at 721. However, 18% of the respondents stated that suppression was only a minor concern, or no concern at all, in the search and seizure situation. *Id.* Thus, the majority of the officers surveyed perceived exclusion to be either an important or primary concern. *Id.*

213. *See infra* Table 3.

214. Perrin, *supra* note 12, at 732 (“[T]he most popular suggested alternative remedy was a requirement that officers attend educational courses on search and seizure or police interrogation with more than one-third of the respondents choosing that option.”).

R

R

Finally, the majority of officers in Perrin's study did not perceive that internal police discipline is a useful mechanism to prevent police search-and-seizure misconduct.²¹⁵ In the current study, most chiefs perceived internal discipline as a helpful deterrent for officer knock-and-announce misconduct during arrests at premises. This difference may be because chiefs will most likely not be the individuals to receive such discipline, and it may also be due to the increased experience and knowledge of a chief with a longer police career.

IV. Analysis/Policy Implications

A. Judicial Implications

While overall this study's results resonate with the decision in *Hudson* that certain alternative, non-exclusion mechanisms (e.g., police training, education, and discipline) can effectively prevent police misconduct in the particular search-and-seizure area of knock-and-announce, the study's findings cast doubt on *Hudson*'s assessment of the alternative mechanism of oversight by the community. Specifically, *Hudson* noted that citizen review boards have the ability to prevent police misbehavior in the knock-and-announce area;²¹⁶ however, an overwhelming majority (84%) of the police chiefs surveyed from large United States cities perceived citizen review to be of very little help in preventing knock-and-announce rule misbehavior by officers during arrests at premises.²¹⁷ Indeed, citizen review was perceived by chiefs as having the lowest "helpfulness" value among all of the deterrence factors included in the study.²¹⁸

The chiefs' perception of the deterrent value of citizen review calls perhaps most forcefully for a re-assessment by the Court of the application of this mechanism to prevent knock-and-announce violations. In light of both the study's findings concerning the chiefs' knowledge of the knock-and-announce rule in the arrest context and given the overall leadership role played by chiefs in law enforcement agencies, the chiefs themselves are in a unique position to evaluate how to deter violations of the rule by rank-and-file officers, including the use of citizen review procedures. If the Court itself were to re-assess the mechanisms for deterring knock-and-announce misconduct by officers, it may be sound policy to consider the perceptions of po-

215. *Id.* ("About two out of ten officers were willing to entertain the possibility of implementing internal police discipline as a consequence of misconduct.")

216. *Hudson v. Michigan*, 547 U.S. 586, 599 (2005).

217. *See infra* Table 3.

218. *See id.*

lice chiefs in this regard. Indeed, given this study's findings, courts may want to refrain from adopting community oversight as a mechanism to deter police from committing knock-and-announce violations (i.e., at least until there is additional empirical evidence showing this mechanism to be an effective deterrent).

In addition, a majority (64.6%) of the police chiefs perceived that the exclusion of evidence in court is helpful in preventing police misconduct during arrests implicating the knock-and-announce rule.²¹⁹ In *Hudson*, the majority eliminated exclusion as a deterrent for knock-and-announce rule misconduct by police (and many lower courts have continued this approach).²²⁰ Thus, based on the study's findings, the Supreme Court and lower courts may want to re-evaluate the role that exclusion can serve in the deterrence of knock-and-announce violations by police. Indeed, it may be prudent for courts to consider re-assessing exclusion as a deterrent mechanism because among all of the various mechanisms in the study perceived by chiefs as useful (e.g., training, education, discipline, and exclusion), courts have perhaps the greatest capacity to fashion and mold the exclusionary rule as they see fit.²²¹ For example, though courts could attempt to set a minimal standard for officer education and training concerning the knock-and-announce rule, or set certain disciplinary sanctions for rule violations, they would have to depend upon numerous and diverse

219. See *id.*

220. See *supra* notes 36, 107, and 108 and accompanying text. Recall that lower courts have applied the holding of *Hudson* to the specific context of a knock-and-announce violation by officers during an *arrest* on premises. *United States v. Pelletier*, 469 F.3d 194, 201 (1st Cir. 2006). *Hudson* involved such a violation by police while they *searched* a premise. *Hudson*, 547 U.S. at 588.

221. Additional remedies that the judiciary may have control over are civil rights lawsuits or torts lawsuits. However, scholars have consistently pointed out various deficiencies in civil suits as a mechanism to deter police misconduct. See *The Supreme Court, 2006 Term—Leading Cases*, 120 HARV. L. REV. 173, 180–183 (2006) [hereinafter *Leading Cases*]. Civil suits by inmates grounded in Fourth Amendment police violations typically lead to small monetary awards. *Id.* at 182. Since lawyers are permitted to recover only a portion of these awards as fees, many lawyers will be hesitant to take on such suits. See *id.* at 181–82; Perrin, *supra* note 12, at 740 (“[T]he monetary damages awarded [in civil rights lawsuits] for Fourth Amendment violations are usually quite small. The plaintiffs are seen as unworthy victims by the fact finders, who recoil at awarding these unworthy victims any significant monetary amount.”). Perrin also acknowledged that officers and law enforcement departments have numerous immunities against civil rights lawsuits, that these suits are costly to pursue, and that though such a suit could theoretically be successful, the officer may lack the means to pay any monetary award. See Perrin, *supra* note 12, at 739–40. Torts suits encounter similar problems. See *id.* at 737–39 (noting that these suits are costly, that police possess various immunities, and that juries lack sympathy toward plaintiffs). Perrin instead suggests a civil administrative remedy to supplant suppression of evidence for constitutional misconduct by officers in specific contexts. See *id.* at 743–55.

R

R

R

United States police agencies to carry out any such rulings. Further, without the external check of exclusion, police may be unwilling to impose internal discipline on their own, particularly discipline of a more grave nature.²²² As a result, courts may want to seriously consider the re-adoption of the exclusionary rule as a useful deterrent for knock-and-announce misconduct by police.

Moreover, regarding the mechanism of police training as a deterrent to police misbehavior in the knock-and-announce area, this study's findings indicate that less than two-thirds (63.9%) of police chiefs perceive that officers receive sufficient training in arrests implicating knock-and-announce procedures.²²³ This finding suggests that the deterrent mechanism of training may also possess certain limitations on its effectiveness. On the other hand, with the exclusion deterrent, because it is a judicially-created mechanism, courts can exert more influence over its development.

Finally, this study's findings may inform state courts considering adoption of particular mechanisms for knock-and-announce violations by officers during arrests at premises. For example, state courts are permitted to interpret state constitutions or statutes in ways that provide rights and protections beyond those contained in the Constitution as interpreted by the Supreme Court.²²⁴ This ability possessed by state courts allows them to consider other mechanisms apart from those adopted by the Supreme Court to deter police misconduct.²²⁵

222. See *Leading Cases*, *supra* note 221, at 182 (recognizing that the exclusionary rule may account for any noted increase in professionalism and discipline in police departments).

223. See *infra* Table 1.

224. See *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).

225. This ability—or authority—is sometimes referred to as “new federalism.” See Christopher D. Totten, Commentary, *New Federalism and Our Constitutional Rights in the Criminal Context*, 46 CRIM. L. BULL. 515, 515 (2010). For example, state courts may rely upon “adequate and independent” state law grounds in their decisions. *Long*, 463 U.S. at 1040–41. Through this specific reliance, state courts are able to protect particular rights of their (state) citizens to a larger degree than the protection provided federal citizens by the Supreme Court concerning those same rights. *Id.* at 1037–38. State court decisions made on these grounds are immune from Supreme Court review. See *id.* at 1040–41. In fact, certain state courts have been receptive to the notion of suppressing evidence in the wake of knock-and-announce misconduct on the part of their state’s law enforcement officers. See, e.g., *Berumen v. State*, 182 P.3d 635 (Alaska Ct. App. 2008) (refusing to apply *Hudson* ruling to grave misconduct by officers related to the knock-and-announce rule as it appears in Alaskan statutory law). In addition, New Jersey courts have suggested that evidence seized by police following a knock-and-announce violation might be suppressed under their state constitution. See *State v. Rodriguez*, 943 A.2d 901 (N.J. Super. Ct. App. Div. 2008); *State v. Robinson*, 944 A.2d 718, 728 (N.J. Super. Ct. App. Div. 2008), *overruled on other grounds by* 974 A.2d 1057 (N.J. 2009).

Such mechanisms could include the exclusionary remedy for knock-and-announce misconduct. In addition, this study's results have implications outside the knock-and-announce violation context. For example, since the alternative deterrent mechanisms could be applied by courts to other Fourth Amendment violations by police (e.g., unauthorized consent or vehicle searches), courts re-assessing deterrent options in their jurisdiction for these other violations may also draw upon the study's results regarding chiefs' perceptions of the various deterrent mechanisms.

B. Policy Implications for Law Enforcement

The study's findings suggest the overall value and effect of increasing police professionalism on practices by police implicating search-and-seizure law, including the knock-and-announce rule. According to the study's findings, chiefs are now generally knowledgeable regarding the operation of the knock-and-announce rule during arrests at premises, and officers receive enough training on how to apply the knock-and-announce rule during arrests at premises.²²⁶

Concerning specific policy implications based on the study's findings, police administrators must increase and intensify the application of the three internal factors (training, education, and actual use of internal disciplinary actions) to help respond to officer knock-and-announce rule violations during arrests at premises. For example, though chiefs perceive training as the most effective deterrent mechanism for officer misconduct in the knock-and-announce area, less than two-thirds (63.9%) of police chiefs think officers receive sufficient training on the use of the knock-and-announce rule during arrests at premises.²²⁷ Therefore, it will be beneficial for police administrators to offer officers even more training in this area.

Concerning police education, police departments must not only maintain incentives for officers to continue their education through tuition reimbursement policies and flexible scheduling options, but they must also foster open-door policies to permit officers to utilize their practical knowledge to offer insight and suggestions to management.

226. *See infra* Table 1.

227. *See id.*

Conclusion

Police chiefs are generally knowledgeable about the Fourth Amendment knock-and-announce rule in the context of arrests at premises. In addition, most chiefs perceive that officers receive sufficient training on the application of the knock-and-announce rule during such arrests. A majority of chiefs perceive education, discipline, training, and exclusion as being helpful in preventing officer knock-and-announce violations during home arrests of criminal suspects. However, most chiefs do not perceive community oversight (e.g., citizen review boards) to be helpful in preventing these types of violations. Police administrators must take further measures to strengthen the deterrent factors that chiefs perceive as “helpful,” including officer training on the operation of the knock-and-announce rule during arrests at premises. In addition, in light of the current study, courts may wish to re-examine the efficacy and value of exclusion and community oversight as deterrent mechanisms for officer knock-and-announce misconduct in the arrest context.

Table 1. Respondents' Knowledge and Police Training on Knock-and-Announce During Arrests (N = 133)

Question	Strongly Agree or Agree	Neutral	Strongly Disagree or Disagree	Mean Score
Unless there is some emergency, police must knock and announce their presence and authority, and then wait a reasonable amount of time, prior to entering a home or building to make an arrest.	107 (82.3%)	4 (3.1%)	19 (14.6%)	4.13
Assuming no emergency situation, it is acceptable for the police to enter a home or building to make an arrest after knocking and announcing their presence and authority, and waiting less than fifteen seconds.	51 (38.9%)	25 (19.1%)	55 (42.0%)	2.92
Police officers receive enough training on how to conduct an arrest at homes or buildings, including use of the knock-and-announce rule.	85 (63.9%)	29 (21.8%)	19 (14.3%)	3.56

Note: Scores ranged from 1 to 5, with 1 meaning strongly disagree and 5 meaning strongly agree.

Table 2. Respondents’ Comments on a Proper Amount of Time the Police Should Wait before Entering a Home or Building to Arrest

Amount of Time	Frequency
It varies based on the situation and circumstance	83
<i>Fifteen seconds or more:</i>	
15 seconds	9
20–30 seconds	8
15–20 seconds	6
15–30 seconds	2
30 seconds–1 minute	3
15 seconds–1.5 minutes	2
1 minute	2
1–2 minutes	2
<i>Less than 15 seconds:</i>	
5 seconds	1
5–10 seconds	3
10–15 seconds	5
Police should not wait	3

Note: Numbers may not add up to 133 because some participants declined to answer the question.

Table 3. Respondents’ Perceptions of Deterrent Factors Related to a Knock-and-Announce Violation (N = 133)

Deterrent Factor	Help the Most	Help Somewhat	Help Slightly	Help Very Little	Mean Score
Better police training	95 (71.4%)	33 (24.8%)	3 (2.3%)	1 (0.8%)	3.68
Better educated officers	59 (44.4%)	55 (41.4%)	13 (9.8%)	5 (3.8%)	3.27
Actual use of internal disciplinary measures	50 (37.6%)	55 (41.4%)	21 (15.8%)	7 (5.3%)	3.11
Presence of internal disciplinary measures	30 (22.6%)	65 (48.9%)	24 (18.0%)	13 (9.8%)	2.85
Exclusion of evidence	37 (27.8%)	49 (36.8%)	21 (15.8%)	20 (15.7%)	2.81
Oversight by community	3 (2.3%)	16 (12.0%)	32 (24.1%)	80 (60.2%)	1.56

Note: Scores ranged from 1 to 4, with 1 indicating help very little and 4 indicating help the most.