

POLICE CULTURE IN THE TWENTY-FIRST CENTURY:
A CRITIQUE OF THE PRESIDENT'S TASK FORCE'S
FINAL REPORT

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[A] lot of our work is going to involve local police chiefs, local elected officials, states recognizing that the moment is now for us to make these changes. We have a great opportunity, coming out of some great conflict and tragedy, to really transform how we think about community law enforcement relations so that everybody feels safer and our law enforcement officers feel, rather than being embattled, feel fully supported.

—President Barack Obama¹

In response to a series of events involving police-citizen encounters, including those in Ferguson, Missouri, and Staten Island, New York, that have strained relations between law enforcement and the communities (primarily minority) that they serve, President Barack Obama established a task force charged with developing a set of recommendations designed to improve police practices and enhance public trust.² Headed by Charles Ramsey, Commissioner of the Philadelphia Police Department, and Laurie Robinson, former Assistant Attorney General for the U.S. Department of Justice Office of Justice Programs, and currently a Professor of Criminology, Law, and Society at George Mason University,³ the eleven-member task force submitted its documented recommendations in May

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¹ Press Release, The White House, Remarks by the President After Meeting with Task Force on 21st Century Policing (Mar. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/03/02/remarks-president-after-meeting-task-force-21st-century-policing>.

² Exec. Order No. 13,684, 3 C.F.R. 312 (2014).

³ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 81 (2015) [hereinafter Report].

2015. In a report entitled the *Final Report of the President's Task Force on 21st Century Policing* (the Report), the task force sets forth in excess of sixty recommendations, which address, among other things: building community trust, police policies, employment of technologies, officer training, and officer wellness and safety.⁴

The Report suggests that effective policing and improved community relations can be achieved through redirected police policies, enhanced communication with—and involvement of—local communities in public safety matters, as well as improved and sensitized law enforcement training.⁵ Rather than engage in a comprehensive examination of the Report's proposals, this Essay will address an important theme highlighted by the task force—the importance of reforming police culture—and explain why the well-intentioned recommendations proffered in the report associated with addressing cultural change will face substantial hurdles to successful implementation.

I. REPORT RECOMMENDATIONS

The Report correctly identifies police culture as a principal underlying cause for the strained relations existent between the police and many local communities. It observes that while police investigative practices have become increasingly effective, the public's confidence in the police has either “remained flat” or, particularly in minority communities, has declined.⁶ Recognizing that obedience to the law increases when a

4 *Id.* at i.

5 *See id.* at 1–4. The Report has also generated criticism. *E.g.*, Stephen Dinan & Ben Wolfgang, *Obama Seeks to End Immigration Enforcement by Local, State Police*, WASHINGTON TIMES (May 18, 2015), <http://www.washingtontimes.com/news/2015/may/18/obama-seeks-to-end-immigration-enforcement-by-locat/?page=all> (arguing that the Report's recommendation that the federal government “decouple” itself from state and local law enforcement authorities in immigration enforcement is misplaced); Stuart Schrader, *The Liberal Solution to Police Violence: Restoring Trust Will Ensure More Obedience*, THE INDEPENDENT (June 30, 2015) <https://independent.org/2015/06/30/liberal-solution-police-violence-restoring-trust-will-ensure-more-obedience> (arguing that the Report's recommendations will ultimately enhance police powers, and that it pays too little attention to the disparity among white and minority communities regarding perceptions of police legitimacy); Alex S. Vitale, *Obama's Police Reforms Ignore the Most Important Cause of Police Misconduct*, THE NATION (Mar. 6, 2015), <http://www.thenation.com/article/obamas-police-reforms-ignore-most-important-cause-police-misconduct/> (arguing that that the task force paid insufficient attention to structural realities which work to maintain racial inequality and failed to recommend a redirection from alleged harmful police priorities, such as the war on drugs and “broken windows” police practices).

6 Report, *supra* note 3, at 9.

community supports the legitimacy of those employed to enforce it,⁷ the Report identifies four procedural prerequisites to achieving this objective: (1) extending dignity and respect to individuals; (2) allowing individuals the opportunity to express themselves during encounters; (3) decision making that is fair and transparent; and (4) conveying motives that the public deems to be “trustworthy.”⁸

To this end, the Report proffers several recommendations designed to improve the culture of policing. The recommendations, which are distributed throughout the ninety-nine page report and are contained in five of the six principal topical areas (or “pillars”) identified in the document, focus overwhelmingly upon police practices and procedures. For example, the task force suggests that law enforcement “embrace a guardian mindset to build public trust and legitimacy,” and that it adopt internal and external procedural polices consistent with this approach.⁹ The Report also recommends that police departments become more transparent with respect to their policies, as well as their data reflecting detentions, arrests, and other demographic information.¹⁰ It further suggests that law enforcement agencies develop policies regarding the employment of force that are “clear [and] concise,” that are available for public review,¹¹ and that emphasize the exercise of restraint in appropriate circumstances.¹²

The Report also urges the adoption of community policing policies, which emphasize positive, collaborative relationships between the police and various community members and groups.¹³ It states that the “infus[ion]” of a community policing approach “throughout the culture and organizational structure of law enforcement agencies” would help “transform culture within the police department as well as in the community.”¹⁴ Significant emphasis is also placed upon training and education, which the Report declares is the “starting point for changing the culture of policing.”¹⁵ Finally, the Report delineates an array of measures that it suggests would promote officer wellness and safety. Referencing testimony by Dr. Alexander Eastman during one of the seven “listening sessions” sponsored by the task force, the Report notes that the

7 *Id.* at 9–10.

8 *Id.* at 10.

9 *Id.* at 11 (Recommendation 1.1).

10 *Id.* at 13 (Action Item 1.3.1).

11 *Id.* at 20 (Recommendation 2.2).

12 *Id.* at 20–21.

13 *Id.* at 41–42.

14 *Id.* at 43 (Recommendation 4.2).

15 *Id.* at 53 (Recommendation 5.1). The task force recommends a more active federal involvement in local and state training initiatives. *Id.* at 53–60.

transformation of police organizational culture is “the most important factor to consider when discussing [officer] wellness and safety.”¹⁶

Individually and collectively, the proffered police organizational reforms are laudable objectives. Embracing a guardian mindset, increasing law enforcement policy and practice transparency, adopting community policing practices, and improving officer training and education are reasoned approaches to the issue of police malfeasance. The problem, however, has less to do with the proffered recommendations than with the incentives on the part of the police to pursue such goals and to retain any successes that are achieved. Without more, successful implementation and permanence of the proffered recommendations are dependent, in large part, upon the initiative and good faith of law enforcement entities across the country. Some departments with problematic cultures might refuse to implement corrective measures. Others might take corrective action with vigor. Yet, even the most willing actor must have sufficient motivation to maintain its successes.

II. SUPREME COURT INFLUENCES

Unfortunately, there exists a heavy wave of influences that run counter to successful organizational reforms. Chief among them are the steady and powerful signals that have been consistently delivered to law enforcement agencies from the Supreme Court since the close of the Warren Court era in 1969. The Warren Court was characterized, in large part, by its comparatively liberal construction of individual constitutional safeguards. It was during this period that the Court rendered the historic *Miranda v. Arizona* decision, which afforded individuals in police custody the right to be informed of their rights to counsel and to remain silent prior to the commencement of interrogation,¹⁷ that the right to counsel was extended to individuals charged with felonies¹⁸ and to certain forms of out-of-court identification procedures,¹⁹ and that a privacy safeguard was recognized in telephonic conversations that occur outside the home.²⁰

And it was the Warren Court that decided *Mapp v. Ohio*,²¹ the landmark case which extended the reach of the exclusionary rule to the states. In general terms, the exclusionary rule provides that, in the event of a Fourth Amendment breach, the derivative evidence cannot be used at trial. In language that was forceful and clear, the Court found that the rule

16 *Id.* at 62.

17 384 U.S. 436 (1966).

18 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

19 *United States v. Wade*, 388 U.S. 218 (1967).

20 *Katz v. United States*, 389 U.S. 347 (1967).

21 367 U.S. 643 (1961).

of exclusion was a constitutional mandate.²² It unequivocally considered the exclusionary component an “essential part of the right to privacy.”²³ A different interpretation, the Court explained, would render the safeguards against unreasonable searches and seizures a guarantee in word only.²⁴ The Court reasoned that it was “logically and constitutionally necessary” to extend this mandate to the states in order to give substance to the constitutional guarantees, to incentivize the government to respect these safeguards, and to prevent prosecutorial forum shopping.²⁵ Yet, during the post–Warren Court era the Court has steadily, and significantly, departed from *Mapp*.

No longer considered part and parcel of the Fourth Amendment, the rule of exclusion is now viewed by a majority of the Court as a remedy of “last resort.”²⁶ It is a remedy that is applied only when appreciable deterrence to purposeful, reckless, or grossly negligent police misconduct can be achieved.²⁷ Though the exclusionary rule as a principle remains intact, various exceptions to the rule have developed which together have significantly circumscribed the circumstances under which a claimant can avail himself of exclusion.²⁸ Unquestionably, the most notable exception has been the “good faith” rule, which has operated to exclude Fourth Amendment violations in instances where the police have acted in good faith reliance upon their authorization to conduct a search.²⁹ By any measure, the exclusionary rule is now a shell of its former self.

In addition, the landscape of individuals eligible to pursue constitutional challenges to police conduct has narrowed significantly since the Warren Court. Consider that in 1960, the Supreme Court in *Jones v.*

22 *Id.* at 655 (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

23 *Id.* at 656.

24 *Id.* at 655.

25 *Id.* at 655–58.

26 *Herring v. United States*, 555 U.S. 135, 140 (2009) (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)).

27 *Id.* at 144.

28 *See Segura v. United States*, 468 U.S. 796 (1984) (the independent source doctrine); *Nix v. Williams*, 467 U.S. 431 (1984) (the inevitable discovery doctrine); *Wong Sun v. United States*, 371 U.S. 471 (1963) (the attenuated circumstances doctrine).

29 *E.g. Herring*, 555 U.S. at 137 (officer reasonably relied on a “negligent bookkeeping error by another police employee”); *Arizona v. Evans*, 514 U.S. 1 (1995) (officer reasonably relied on court clerk’s determination, later found to be erroneous, that the defendant had an outstanding warrant for arrest); *Illinois v. Krull*, 480 U.S. 340 (1987) (in conducting a warrantless administrative search, officer reasonably relied upon a state statute later found to be unconstitutional); *United States v. Leon*, 468 U.S. 897 (1984) (officer reasonably relied upon a search warrant later found to be lacking in probable cause).

*United States*³⁰ identified four possible bases upon which standing to pursue a constitutional challenge could be established: (1) legitimate presence on the premises of a search; (2) establishment of a privacy interest; (3) a possessory interest in the evidence searched or seized; or (4) being a target of a government search.³¹ Of the four, only the privacy test remains, and it represents the predominant standard through which standing can be established.³² The privacy test threshold requires an infringement upon a claimant's personal Fourth Amendment protections and does not recognize the assertion of third-party claims.³³

The Court's diminishment of the right of exclusion and its meaningful narrowing of the class of eligible claimants conveys a powerful signal to law enforcement—not to mention society in general—that the constitutional misdeeds of the police will frequently be overlooked. Simultaneously, the Court conveys that individual constitutional safeguards are not fully guaranteed. As a result, police organizations become emboldened by their expanded investigative latitude, and an aggressive culture of policing is often an accompanying byproduct. No doubt, police work is dangerous, unpredictable, reactive, and riddled with risks.³⁴ A seemingly innocent encounter can become violent or even deadly with little or no notice. Yet police practices that are overly aggressive can fragment a police-community relationship and destroy the trust necessary for an effectual coexistence.

How to tame aggressive and unconstitutional police practices within the context of effective policing is the ultimate question. It is, however, unrealistic to expect meaningful and sustained cultural change absent sufficient incentives. The reforms detailed in the Report are directed primarily at police organizations and are dependent upon the initiatives of state and local agencies. But goodwill alone will produce little measureable benefit unless accompanied by legislative or judicial mandates

30 362 U.S. 257 (1960).

31 *See id.* at 261, 263–67.

32 *Rakas v. Illinois*, 439 U.S. 128 (1978). *Rakas* is part of a series of cases in which the Court substantially narrowed the range of individuals capable of pursuing constitutional challenges. *See United States v. Salvucci*, 448 U.S. 83, 90–91 (1980) (finding that “a prosecutor may simultaneously maintain that a defendant criminally possessed the seized good, but was not subject to a Fourth Amendment deprivation, without legal contradiction”); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (despite owning the narcotics discovered during a search by law enforcement officers, defendant lacked standing to challenge the constitutionality of that search); *United States v. Payner*, 447 U.S. 727, 734 (1980) (stating that the Court's precedents “do not command the exclusion of evidence in every case of illegality [by law enforcement officials]”).

33 *Rakas*, 439 U.S. at 137–38.

34 *See Report, supra* note 3, at 61–62 (describing the “physical, mental, and emotional injuries [that] plague many law enforcement agencies”).

that penalize police misdeeds. The police are not going to relinquish investigative authority granted by the Supreme Court through voluntary election.

Indeed, a few proffered reforms recommend that the police ignore longstanding Supreme Court precedent. One such proposal suggests that “[l]aw enforcement officers should be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause.”³⁵ But in 1973, the Supreme Court in *Schneckloth v. Bustamonte*³⁶ held “that knowledge of a right to refuse is not a prerequisite of a voluntary consent.”³⁷ And another proposal recommends that “[l]aw enforcement agencies and municipalities . . . refrain from . . . initiat[ing] investigative contacts with citizens for reasons not directly related to improving public safety, such as generating revenue.”³⁸ Yet the Supreme Court has plainly granted law enforcement plenary authority to approach and follow individuals irrespective of the officer’s underlying motivation, and this unrestrained freedom exists up until the moment that a seizure occurs within the meaning of the Fourth Amendment.³⁹

The answer to the problem of twenty-first century policing is no doubt complex. There is no silver-bullet answer. But the ultimate solution must include a reversal of much of the Supreme Court’s jurisprudence in the exclusionary rule context. The diminishment of the right to exclusion has helped foster the problem of aggressive policing, and a reinvigoration of this principle would help reverse this trend. And the natural place to start is by expanding the base of individuals eligible to challenge unconstitutional police practices. A meaningful expansion of this base, in particular the allowance of third-party standing, will not only allow for more widespread challenges to unconstitutional and aggressive police behaviors, but also incentivize police organizations to adapt to this new environment. An expanded landscape of challengers to their practices will motivate police organizations to alter their culture and engage in more constitutionally compliant behaviors. Persistent challenges to police organization practices, coupled with strictly enforced exclusionary rules, are among the big sticks that can help effectuate the changes sought in the Report.

35 Report, *supra* note 3, at 27 (Recommendation 2.10).

36 412 U.S. 218 (1973).

37 *Id.* at 234.

38 Report, *supra* note 3, at 26 (Recommendation 2.9).

39 See *Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (plurality opinion) (first citing *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979); then citing *Terry v. Ohio*, 392 U.S. 1, 31, 32–33 (1967) (Harlan J., concurring); and then citing *Terry*, 392 U.S. at 34 (White, J., concurring)).

Notably, third-party standing is currently authorized in the criminal sphere in the context of jury selection. The Supreme Court in *Batson v. Kentucky*⁴⁰ held that a prosecutor violated the equal protection rights of a black defendant when he exercised his peremptory challenges to exclude potential black jurors.⁴¹ But it was the Court's decision in *Powers v. Ohio*⁴² that allowed for third-party enforcement of the *Batson* principle. In *Powers*, the Court held that a white defendant had third-party standing to assert the equal protection rights of the jurors who were wrongly excluded during jury selection.⁴³ In reaching this result, the Court reasoned, *inter alia*, that the defendant would be sufficiently motivated to pursue the equal protection rights of the excluded members of the venire, and that the latter group would be insufficiently motivated to seek legal redress.⁴⁴

The same rationales apply with equal force in the Fourth Amendment context. Defendants are aggrieved by unconstitutional police behaviors when evidence obtained as a byproduct of such actions is introduced against them at trial. Whether obtained in violation of their personal privacy protections or those of someone else, the injury and the motivation to seek vindication of the constitutional infringement is quite significant. When confronted with the prospect of a criminal conviction and possible incarceration, defendants become highly motivated actors to exclude evidence that can produce such undesirable outcomes. For the criminal defendant, it is immaterial whether the Fourth Amendment protections that have been violated belong to the defendant or a third-party. The impetus to exclude remains the same.

And like the wrongly stricken juror, the uncharged individual victimized by unconstitutional police behavior is highly unlikely to pursue a legal remedy. Structural barriers, such as qualified immunity, which largely shields law enforcement personnel from individual liability,⁴⁵ and the Eleventh Amendment, which protects the states against civil damages actions,⁴⁶ serve as meaningful disincentives to the pursuit of legal redress. In addition, there are practical barriers. Distrust of the legal system, particularly in minority communities, and access to lawyers willing to

40 476 U.S. 79 (1986).

41 *Id.* at 89.

42 499 U.S. 400 (1991).

43 *Id.* at 409.

44 *Id.* at 411, 414–15.

45 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (officers receive qualified immunity for their actions so long as they do not violate clearly established laws or constitutional rights of which a reasonable person would have been aware).

46 U.S. CONST. amend. XI.

assume a civil action against the police are notable impediments.⁴⁷ Furthermore, individuals aggrieved by unconstitutional government conduct are less likely than the juror populations at issue in the *Powers* line of cases to pursue legal action on account of financial hardships, childcare difficulties, and misgivings regarding the fairness of the criminal judicial process.⁴⁸

CONCLUSION

The spate of disturbing police-citizen contacts that have recently generated significant media attention has prompted renewed attention upon the propriety of police practices, particularly in minority communities. The comprehensive reforms set forth in the Report certainly provide a useful platform from which this discussion can take place. Yet meaningful reform is dependent less upon the establishment of task forces, the development of innovative ideas, and the art of persuasive argumentation than upon legislative and judicial dictates that mandate change. The Supreme Court's steady and significant diminishment of individual safeguards since the close of the Warren Court era—including the exclusionary rule and the related concept of standing—has contributed to a police organizational culture that has manifested itself in aggressive and unconstitutional behaviors that have seemingly become more pronounced in recent years. However, a robust exclusionary rule, coupled with a vastly expanded landscape of eligible challengers to police practices, can help effectuate a beneficial change in police culture and officer behavior on the ground. It is this sort of change—meaningful access to the enforcement arm of the judiciary, and the court's liberal authority to wield that influence—that are necessary prerequisites to consequential reform. And until these prerequisites are satisfied, I submit that it is doubtful that transformative change in police culture will occur.

47 MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 69–70 (2012) (arguing, inter alia, that many individuals—minorities in particular—who are victimized by police misconduct are unlikely to pursue legal action out of fear of police harassment and retaliation and distrust of the legal process).

48 Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 355–56 (1999) (noting that jury populations tend to underrepresent minority groups and that the community of non-jurors is, inter alia, more likely than juror populations to have financial resource and child care difficulties, English proficiency issues, and apathy toward the judicial process).