

# The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment

David A. Moran\*

## I. Introduction

I have found through experience that when one argues a case in the United States Supreme Court, it can be more than a bit difficult to put the resulting decision in perspective. Depending on whether one wins or loses (and I've had both experiences), it is all too easy to think of the case as either the most important breakthrough in years or the death of the law as we know it.

I hope the reader will apply the appropriate degree of skepticism, therefore, when I say that my 5-4 loss in *Hudson v. Michigan*<sup>1</sup> signals the end of the Fourth Amendment as we know it. In *Hudson*, the Court held that when the police violate the Fourth Amendment "knock and announce requirement" the normal Fourth Amendment remedy, exclusion of the evidence found after the violation, does not apply. While that result is remarkable enough given that the rule had been otherwise in every state except one<sup>2</sup> and in every

\*Associate Dean, Wayne State University Law School. I gratefully acknowledge the help I received from Timothy O'Toole and Corinne Beckwith, both of the Public Defender Service of the District of Columbia, in clarifying my thinking throughout the *Hudson* litigation. I also thank the Cato Institute and the National Association of Criminal Defense Lawyers for filing a superb amicus brief on my side in *Hudson*, and I thank Professor Tracey Maclin of Boston University Law School for writing that brief. After receiving that help from Cato, agreeing to write this article was the least I could do.

<sup>1</sup>126 S. Ct. 2159 (2006).

<sup>2</sup>See *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999). The *Stevens* reasoning had been specifically rejected by appellate courts in at least nine states, see Brief for the Petitioner at 17, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360) (collecting cases from eight states) [hereinafter Petitioner's Brief]; Supplemental Brief for the Petitioner at 1, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360) (citing case from additional state), while courts in the remaining 40 states apparently suppressed evidence found following knock and announce violations without even entertaining

federal circuit except one,<sup>3</sup> what makes *Hudson* truly exceptional is the reasoning in Justice Antonin Scalia's opinion for the Court. As many observers have noted, that opinion calls into question the entire rationale of the exclusionary rule, not just in the knock-and-announce context, but for all types of Fourth Amendment violations.<sup>4</sup> Given that the Court had not seriously questioned the vitality of the exclusionary rule in federal court for nearly a century and had extended the rule to the states forty-five years ago, it is difficult to overstate the importance of *Hudson* and what it suggests the Court is likely to do to the Fourth Amendment in the next few years.

But enough about my case. In this article, I will survey all of the Court's 2005 term Fourth Amendment cases, of which *Hudson* was but one of five. I will begin by discussing the Court's four other Fourth Amendment decisions before turning back to *Hudson* and what it means for the right of the people to be free from unreasonable searches and seizures.

## II. Consent, Anticipatory Warrants, Parolees, and a Truly Strange Exigency Case: The Term's Other Fourth Amendment Cases.

Of the Court's five Fourth Amendment cases this term, *Hudson* attracted by the far the most public attention, and rightly so because the result in *Hudson* portends a major shift in the Court's jurisprudence. By contrast, two of the other four cases, *United States v. Grubbs*<sup>5</sup> and *Brigham City v. Stuart*,<sup>6</sup> produced completely unsurprising unanimous opinions in favor of the government, while a third, *Georgia*

arguments such as those accepted in *Stevens*, see Petitioner's Brief, *supra*, at 17 (collecting cases from 12 states).

<sup>3</sup>See *United States v. Langford*, 314 F.3d 892, 894–95 (7th Cir. 2002). The reasoning in *Langford* had been specifically rejected by two other circuits. See *United States v. Dice*, 200 F.3d 978, 984–86 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993), while courts in all of the remaining circuits suppressed evidence found following knock and announce violations without considering the arguments accepted in *Langford*. See Petitioner's Brief, *supra* note 2, at 17 (collecting cases from two circuits).

<sup>4</sup>See, e.g., Akhil Reed Amar, *The Battle of Hudson Heights: A Small Case Portends Big Changes for the Exclusionary Rule*, *Slate* (June 19, 2006), at <http://www.slate.com/id/2143983>.

<sup>5</sup>126 S. Ct. 1494 (2006).

<sup>6</sup>126 S. Ct. 1943 (2006).

*v. Randolph*,<sup>7</sup> bitterly divided the Court but resulted in a holding so narrow as to make the case of almost no precedential value. The Court's final case of the term, *Samson v. California*,<sup>8</sup> was an important case that split the Court 6-3, but the result, a further restriction on the already severely limited rights of parolees, should not have been a shock to anyone. In this section, I will discuss each of these four cases in turn.

A. Grubbs: *Anticipatory Warrants and Some Fuzzy Math*

From a purely theoretical point of view, the most interesting of the term's other Fourth Amendment cases is *Grubbs*. The Warrants Clause of the Fourth Amendment provides, in relevant part, that "no Warrants shall issue, but upon probable cause." The phrasing seems to suggest that there must be probable cause *at the moment a magistrate issues a search warrant*. In other words, the plain language appears to require that at the moment the magistrate signs the warrant, there must be a "fair probability that contraband or evidence of crime will be found in a particular place."<sup>9</sup>

The problem in *Grubbs* was that there was no such fair probability of finding contraband or evidence in Grubbs' house at the moment the magistrate signed the warrant because the warrant was of the "anticipatory" variety. That is, the warrant was issued on the anticipation that there would be contraband or evidence found in Grubbs' home at some future time. In Grubbs' case, that anticipation was very well-founded since he had ordered a videotape containing child pornography from postal inspectors; as soon as the postal inspectors delivered the videotape, there would unquestionably be contraband in his home.<sup>10</sup> Nonetheless, Grubbs argued, the warrant was fatally defective because there was no probable cause that any contraband or evidence was in his home at the moment the magistrate signed the warrant.<sup>11</sup>

The Court thus had to squarely confront, for the first time, the issue of whether anticipatory warrants are per se violative of the Warrants Clause. The Court had never had occasion to answer the

<sup>7</sup>126 S. Ct. 1515 (2006).

<sup>8</sup>126 S. Ct. 2193 (2006).

<sup>9</sup>*Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>10</sup>126 S. Ct. at 1497.

<sup>11</sup>*Id.* at 1498.

question before because every circuit to consider the question (including the Ninth Circuit, which had ruled in Grubbs' favor on other grounds)<sup>12</sup> had held that anticipatory warrants are constitutional.<sup>13</sup>

Writing for all eight justices,<sup>14</sup> Justice Scalia made short work of Grubbs' argument. According to Scalia, *all* search warrants are anticipatory because the magistrate's probable cause determination in an ordinary case amounts to nothing more or less than a "prediction that the item will still be there when the warrant is executed."<sup>15</sup> When, for example, a warrant issues to tap a telephone, the magistrate is anticipating that the subject of the warrant will use the phone to discuss a crime, not that the subject is discussing a crime over the phone at the very moment the magistrate is signing the warrant. An anticipatory warrant, like ordinary warrants, simply requires the magistrate to determine that it is currently probable that contraband or criminal evidence will be present when the warrant is executed.<sup>16</sup>

The Court went on to reject Grubbs' claim that this theory would allow the government to obtain anticipatory warrants for every home in America by simply claiming that there will be probable cause if contraband or criminal evidence is delivered to that home at some time in the future. According to the Court, the magistrate may issue an anticipatory warrant only if he or she concludes both that there is probable cause that the triggering condition (in Grubbs' case, the controlled delivery of the videotape) will occur and that the fulfillment of this triggering condition will result in a fair probability that contraband or criminal evidence will be found at the specified place.<sup>17</sup> Since there was clearly probable cause that the controlled delivery to Grubbs' house would occur and that such a delivery would result in contraband being found in that house, the Court

<sup>12</sup>United States v. Grubbs, 377 F.3d 1072 (9th Cir. 2004), amended, 389 F.3d 1306 (9th Cir. 2004).

<sup>13</sup>126 S. Ct. at 1499. It also appears that no state appellate court has ever held that anticipatory warrants violate the Fourth Amendment.

<sup>14</sup>Justice Alito did not participate in *Grubbs* because it was argued before he was confirmed.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 1500.

<sup>17</sup>*Id.*

concluded that the magistrate properly issued the anticipatory warrant.<sup>18</sup> Finally, the Court reversed the Ninth Circuit's conclusion that the magistrate's failure to explicitly list the triggering condition in the warrant violated the particularity requirement.<sup>19</sup>

I find it difficult to argue with almost anything in Justice Scalia's opinion for the Court. My one minor quibble is purely mathematical. While the Court has always resisted quantifying the level of certainty required for probable cause, the term is widely understood to mean a quantum of proof approximately equal to "as likely as not."<sup>20</sup> By holding that the magistrate must find that "there is a fair probability that contraband or evidence of a crime will be found in a particular place [and] that there is probable cause to believe the triggering condition will occur,"<sup>21</sup> the Court has actually (and, almost certainly, unknowingly) reduced the level of proof required for probable cause. Applying this test to *Grubbs*' case, the Court concluded that the warrant was properly issued because "the occurrence of the triggering condition—successful delivery of the videotape to *Grubbs*' residence—would plainly establish probable cause for the search" and "the affidavit established probable cause to believe the triggering condition would be satisfied."<sup>22</sup>

To illustrate how this method of analysis actually reduces the proof required for probable cause, suppose a magistrate concludes that there is a 60% chance that the subject will accept delivery of a suspicious package and that there is a 60% chance that the package contains child pornography. The magistrate would then conclude, applying the Court's test, that there is probable cause to expect

<sup>18</sup>*Id.*

<sup>19</sup>*Id.* at 1500–01. Although the eight justices who participated in *Grubbs* unanimously rejected the Ninth Circuit's holding that an anticipatory warrant must explicitly state the triggering condition, Justice Souter, joined by Justices Stevens and Ginsburg, did not join Justice Scalia's opinion for the Court on this point and instead wrote a separate concurring opinion in which he argued that the failure to list the triggering condition could result in "untoward consequences with constitutional significance." *Id.* at 1502.

<sup>20</sup>See, e.g., 2 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 66–91 (4th ed. 2004) (observing that question remains open whether probable cause is "more probable than not, or [if] something short of this suffice[s]").

<sup>21</sup>126 S. Ct. at 1500 (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)) (internal citation, quotation marks, and emphasis omitted).

<sup>22</sup>*Id.*

the occurrence of the triggering condition and to believe that the occurrence would result in the presence of contraband in the home, even though the probability that *both* conditions would be met is a mere 36%, significantly less than the normal level of proof required for probable cause. The proper test should be whether, after considering the probability that the triggering condition will be met and the probability that the occurrence of this triggering condition will result in the physical presence of contraband or criminal evidence at the location, there is a fair probability that contraband or criminal evidence will be found at the location when the warrant is executed.

This error in the Court's opinion is, I concede, a minor one of mostly theoretical significance. In *Grubbs*' case, as in almost all controlled delivery cases, the Court's method of analysis and the correct test will produce the same result because the contents of the package are known to a very high degree of certainty. Therefore, even if the likelihood that *Grubbs* would accept delivery was only 60%, the likelihood that such acceptance would result in contraband in his home was essentially 100% (because the postal inspectors knew that the tape contained child pornography) and, therefore, the likelihood that the two conditions would result in contraband in his home would still be 60%, that is, more probable than not. Nevertheless, one might have hoped that someone on the Court with a more mathematical bent would have spotted this issue.

#### *B. Brigham City: A Wacky Little "Flyspeck" of a Case*

The Court's unanimous decision in *Brigham City* upholding a warrantless entry and search was nothing but an easy application of the well-settled doctrine that the existence of a genuine emergency excuses the need for a warrant. In fact, the law is so well-settled in this area and the lower courts' decision in this case was so obviously wrong that it is difficult to understand why the Court chose to take the case and perform an exercise in pure error-correction. As Justice Stevens aptly put it in his brief concurring opinion, "This is an odd flyspeck of a case."<sup>23</sup>

<sup>23</sup>*Brigham City v. Stuart*, 126 S. Ct. 1943, 1949 (2006) (Stevens, J., concurring). In his concurrence, Justice Stevens noted that the state courts' decision suppressing the evidence was so obviously wrong as a matter of Fourth Amendment law that he wondered whether those courts might actually have meant to suppress the evidence as a matter of Utah law (which grants citizens more protection against searches and seizure than the Fourth Amendment does), even though those courts never cited Utah law. *Id.* at 1950.

My hypothesis is that the Court took the case because the facts were entertaining.<sup>24</sup> Responding to a complaint about a loud party early one morning, police officers from the small town of Brigham City, Utah, watched through a screen door as five people, one of whom was a juvenile, engaged in a wild, bloody brawl inside the kitchen of the home.<sup>25</sup> The officers did exactly what one would expect them to do: they entered the kitchen, restored order, and arrested the brawlers.<sup>26</sup>

When the brawlers subsequently moved to suppress the evidence obtained from the home, the state courts did exactly the opposite of what one would expect them to do: they suppressed all of the evidence on the ground that the officers should have obtained a warrant before entering the kitchen.<sup>27</sup> The Court, of course, unanimously reversed, finding that the officers acted perfectly reasonably in immediately entering the kitchen given that one of the brawlers was spitting up blood and that the altercation was still ongoing.<sup>28</sup>

Perhaps the only noteworthy aspect of *Brigham City* is that it allowed Chief Justice Roberts one of his first opportunities to display his sense of humor in an opinion. In rejecting the defendants' claim that the officers should have waited for more serious injuries to be

<sup>24</sup>*Id.* at 1947. Chief Justice Roberts, in his unanimous opinion for the Court, claimed that the Court took the case "in light of differences among state courts and the Court of Appeals concerning the appropriate Fourth Amendment standard governing warrantless entry by law enforcement in an emergency situation." *Id.* (citing cases differing as to whether inquiry is purely objective or whether the court should consider officers' subjective motivations for warrantless entry). However, it is difficult to see how this case presented that issue at all since the Utah Supreme Court applied the same objective test that the Court has long endorsed for such inquiries and applied again here. Compare *id.* at 1946 (citing Utah Supreme Court's statement of test as whether "a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons") with *id.* at 1949 (concluding "officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning").

<sup>25</sup>See *id.* at 1946 (describing juvenile punching one of the adult brawlers, causing him or her to spit up blood, before other combatants pushed juvenile against refrigerator with enough force to cause refrigerator to move across floor).

<sup>26</sup>*Id.* The defendants were charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. As Justice Stevens pointed out in his discussion of the petty nature of this case, the maximum sentence for the most serious of these charges was six months in jail. *Id.* at 1949–50 (Stevens, J. concurring).

<sup>27</sup>*Id.* at 1946–47.

<sup>28</sup>*Id.* at 1949.

inflicted before intervening, he wrote, “The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.”<sup>29</sup>

### C. Randolph: *Consent and the Betraying Spouse*

Unlike *Brigham City, Georgia v. Randolph* clearly presented an unsettled Fourth Amendment question: whether the police could rely on the consent of one person with authority over premises to perform a warrantless entry and search when another person with equal authority over the premises objects. This question had been an open one ever since 1974 when the Court held that “the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared.”<sup>30</sup> In *Randolph*, a sharply-divided Court held that such consent is not valid as against a *present*, nonconsenting person with whom authority is shared.

The person doing the consenting in *Randolph* was the defendant’s estranged wife, Janet Randolph. After calling the police during a custody dispute with her husband, Mrs. Randolph volunteered to the responding officers that Mr. Randolph was a drug user and that there was evidence of his drug use in the marital home.<sup>31</sup> Mrs. Randolph, not surprisingly, “readily gave” her consent for a search of the home, but Mr. Randolph (an attorney) “unequivocally refused.”<sup>32</sup> The officer, apparently preferring Mrs. Randolph’s answer over Mr. Randolph’s, accepted her invitation to search the home, where he found a straw with cocaine residue.<sup>33</sup> *Randolph* is thus the latest in a series of Fourth Amendment cases in which the police have used all-too-willing wives and girlfriends to gather incriminating evidence against husbands and boyfriends.<sup>34</sup>

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

<sup>30</sup>*United States v. Matlock*, 415 U.S. 164, 170 (1974) (emphasis added).

<sup>31</sup>*Georgia v. Randolph*, 126 S. Ct. 1515, 1519 (2006).

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* Mrs. Randolph subsequently withdrew her consent, but the officer used the straw to get a search warrant, which resulted in the discovery of more evidence of Mr. Randolph’s drug use.

<sup>34</sup>See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 485–489 (1971) (upholding use of guns and other evidence retrieved from marital home by defendant’s wife); *Massachusetts v. Upton*, 466 U.S. 727, 729 (1984) (upholding search warrant based on tip from defendant’s ex-girlfriend, who admitted to detective that she “wanted to



Unlike the previous cases, however, the defendant in *Randolph* prevailed. Writing for five members of the Court, Justice David Souter concluded in a lengthy opinion that under “widely shared social expectations,” reasonable people would not believe they have effective consent to enter a dwelling when one person who lives there is vocally objecting to that entry and that, therefore, the police also could not reasonably rely on such consent to perform a warrantless entry.<sup>35</sup> Chief Justice Roberts wrote a sharp dissent in which he ridiculed the majority’s “social expectations” theory.<sup>36</sup> Justices Scalia and Thomas joined Chief Justice Roberts’ dissent and filed additional dissenting opinions,<sup>37</sup> while Justices Breyer and Stevens joined Justice Souter’s majority opinion and filed additional concurring opinions.<sup>38</sup>

One might think that *Randolph* marked a major expansion in Fourth Amendment rights, given that six of the eight participating justices felt compelled to write opinions. Such thinking would be bolstered by the expressions of mutual hostility contained in the majority opinion and Chief Justice Roberts’ opinion.<sup>39</sup>

Such thinking would, however, be wrong. The holding of Justice Souter’s majority opinion is so narrowly drawn that it will apply to only a tiny handful of cases every year: “a warrantless search of a shared *dwelling* for evidence over the *express* refusal of consent by a *physically present* resident cannot be justified as reasonable *as to him* on the basis of consent given to the police by another resident.”<sup>40</sup> The emphasized words illustrate how rare such cases will be. Only a search of a *dwelling* will trigger the *Randolph* rule. Searches of

burn him”); *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (upholding entry to defendant’s apartment based on “consent” of girlfriend who called police to complain that defendant had assaulted her and who falsely claimed that she had common authority over apartment); *Illinois v. McArthur*, 531 U.S. 326, 328–29 (2001) (upholding evidence seized after defendant’s wife, who was moving out of home, volunteered to police that defendant had “dope” hidden under couch).

<sup>35</sup>*Randolph*, 126 S. Ct. at 1521–28.

<sup>36</sup>*Id.* at 1531–39 (Roberts, C.J., dissenting).

<sup>37</sup>*Id.* at 1539 (Scalia, J., dissenting); *id.* at 1541 (Thomas, J., dissenting).

<sup>38</sup>*Id.* at 1528 (Stevens, J., concurring); *id.* at 1529 (Breyer, J., concurring).

<sup>39</sup>See, e.g., *id.* at 1524 n.4 (accusing dissenters of harboring “deliberate intent to devalue the importance of the privacy of a dwelling place”); *id.* at 1535 n.1 (Roberts, C.J., dissenting) (characterizing majority’s accusation as “a bit overwrought”).

<sup>40</sup>*Id.* at 1526 (emphasis added, footnote omitted).

businesses, cars, and other places might be allowed based on the consent of one person over the objection of someone else who would otherwise have the right to complain. Only an *express* refusal by a *physically present* resident will suffice to defeat the consent of another resident. Thus, officers may rely on the consent of a resident even if any reasonable person would assume that another resident would object if asked, unless that other resident is there and actually does object in clear terms.<sup>41</sup> If that other resident is there and does expressly object, that refusal is only effective *as to him*, not to the resident who did consent or a third resident who is not present.<sup>42</sup> Therefore, police officers faced with such a refusal might well decide that they should go ahead and search the dwelling in the hope of turning up evidence that can be used against the consenting resident and all of the absent residents.

The real-world impact of *Randolph* is exceedingly slight for two additional reasons. First, as the majority recognized, an officer can always enter over the objection of a resident in an emergency, as when the officer suspects that someone in the house is in danger.<sup>43</sup>

Second, an officer faced with an objecting co-resident will almost never be thwarted in his desire to obtain evidence from inside the home because two constitutional options remain open. In *Illinois v. McArthur*, on facts essentially identical to those in *Randolph* (an angry wife told the police that her husband had narcotics evidence hidden in the home), the Court held that the officer could keep the husband from entering the house while the police sought a search warrant.<sup>44</sup> Alternatively, the officer can simply ask the consenting resident to go inside, retrieve the evidence, and bring it back out for the officer,

<sup>41</sup>Thus, the Court in *Randolph* explained, the officers in *United States v. Matlock* could rely on the consent of the resident who authorized the search of the shared residence without having to consult with Matlock, who was handcuffed in a squad car parked in front of the house. *Randolph*, 126 S. Ct. at 1534 (Roberts, C.J., dissenting) (citing *United States v. Matlock*, 415 U.S. 164, 166 (1974)). Similarly, the officers in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), could rely on the apparent consent of Rodriguez's girlfriend to enter the apartment without consulting Rodriguez, who was sleeping inside the apartment. See, e.g., *Randolph*, 126 S. Ct. at 1534 (Roberts, C.J., dissenting).

<sup>42</sup>The Court did not expressly decide whether such a third resident would be able to piggyback on the refusal of his or her co-tenant. 126 S. Ct. at 1526 n.8.

<sup>43</sup>*Id.* at 1526.

<sup>44</sup>531 U.S. 326, 331–37 (2001).

as the officers did in *Coolidge v. New Hampshire*.<sup>45</sup> Indeed, the majority in *Randolph* specifically noted that both alternatives will usually be open to officers in such situations.<sup>46</sup>

*Randolph*, then, is an interesting case primarily because it was the first case to reveal deep divisions among the justices in the Fourth Amendment context. Those deep divisions resurfaced in an even stronger fashion a few months later in *Hudson*. But *Randolph* is far too fact-bound and narrow to count as a truly important Fourth Amendment case.

*D. Samson: No Fourth Amendment Rights for Parolees*

*Samson v. California*, the Court's last Fourth Amendment case of the term did result in a very important, but utterly predictable, 6-3 decision that will soon result in the elimination, in *toto*, of the Fourth Amendment rights of those hundreds of thousands of Americans who are currently on parole.<sup>47</sup> Five years ago, in *United States v. Knights*,<sup>48</sup> the Court had held that a search of a probationer on reasonable suspicion (as opposed to probable cause) was a reasonable search within the meaning of the Fourth Amendment.<sup>49</sup> In *Samson*, the defendant was on parole, not probation, and the police officer who searched him on the street had no basis for any suspicion at all (aside from the fact that the officer knew that Samson was on parole), much less reasonable suspicion.<sup>50</sup> The question, then, in *Samson* was whether a completely suspicionless search of a parolee is reasonable given that a search on reasonable suspicion of a probationer is reasonable.

In an opinion by Justice Clarence Thomas, the Court answered that question in the affirmative. In reaching that conclusion, the Court applied a simple but obviously faulty syllogism. First, the Court pointed out, a parolee is subject to more restrictions on his

<sup>45</sup>403 U.S. 443, 487-89 (1971).

<sup>46</sup>*Randolph*, 126 S. Ct. at 1524-25 & n.6.

<sup>47</sup>According to the Department of Justice, there were approximately 765,400 adults on parole in the United States at the end of 2004. U.S. Department of Justice, Bureau of Justice Statistics: Probation and Parole Statistics (Dec. 22, 2005), available at <http://www.ojp.usdoj.gov/bjs/pandp.htm>.

<sup>48</sup>534 U.S. 112 (2001).

<sup>49</sup>*Id.* at 121-22.

<sup>50</sup>*Samson v. California*, 126 S. Ct. 2193, 2196 (2006).

or her freedom than a probationer.<sup>51</sup> Next, the Court reasoned, since *Knights* teaches that a probationer has a diminished expectation of privacy against police searches, a parolee must enjoy no expectation of privacy at all, at least in a state, such as California, that has set up a system permitting suspicionless searches of parolees.<sup>52</sup> Thus, the Court held that a parolee enjoys the same Fourth Amendment rights, none whatsoever, as a prisoner.<sup>53</sup>

The flaw in this reasoning is apparent, as Justice Stevens recognized for the three dissenters. Just because a parolee is subject to more restrictive conditions than a probationer, it does not follow that a parolee enjoys no expectation of privacy at all, as if he or she were still in prison.<sup>54</sup> The dissent also rejected as “entirely circular” the majority’s reasoning that California’s law requiring parolees to submit to suspicionless searches eliminates a parolee’s expectation of privacy, comparing such reasoning to an argument that the government could eliminate the expectation of privacy in homes simply by “announc[ing] on nationwide television that all homes henceforth would be subject to warrantless entry.”<sup>55</sup>

Justice Stevens assumed that it might well have been constitutional, under the “special needs” exception to the warrant requirement, to require Samson to submit to suspicionless searches conducted by his parole officer because such a search would have been for a purpose other than generalized crime control and because his parole officer would presumably know whether there were good

<sup>51</sup>See *id.* at 2198–99 (describing restrictive conditions imposed on parolees in general and in California in particular).

<sup>52</sup>See *id.* at 2199 (concluding that parole restrictions “clearly demonstrate that parolees like petitioner have severely diminished expectations of privacy by virtue of their status alone”); *id.* (observing that California law required petitioner to submit to suspicionless searches as condition of parole and concluding, because of his status as parolee and the parole condition, “petitioner did not have an expectation of privacy that society would recognize as legitimate”) (footnote omitted).

<sup>53</sup>See *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that a prisoner enjoys no Fourth Amendment protection in his cell).

<sup>54</sup>See *Samson*, 126 S. Ct. at 2204–05 (Stevens, J., dissenting) (criticizing majority’s “faulty syllogism” and arguing “that it is simply not true that a parolee’s status . . . is tantamount to that of a prisoner or even materially distinct from that of a probationer”).

<sup>55</sup>*Id.* at 2206 (Stevens, J., dissenting) (quoting *Smith v. Maryland*, 442 U.S. 735, 740–41 n.5 (1979)).

reasons to search Samson.<sup>56</sup> But the effect of the majority's holding, Justice Stevens pointed out, is to allow any police officer to search any parolee at any time without any suspicion, or even a reason, at all.<sup>57</sup>

The effect of *Samson* is indeed sweeping. We can expect every, or virtually every, state to soon pass California-type legislation requiring all parolees to submit to suspicionless searches at any time. Once that happens (and it surely will, just as sex offender registration swept across the country in only a few years), we will see as Justice Stevens put it, "an unprecedented curtailment of liberty"<sup>58</sup> for nearly a million of our fellow citizens. While this result is disturbing, it is hardly surprising given *Knights*.

### **III. *Hudson*: The Court Kills the Knock-and-Announce Rule and Puts the Exclusionary Rule on Life Support**

I must confess that I really never saw it coming. When an attorney named Richard Korn telephoned me out of the blue in February 2005 to ask if I would take a look at a case, *People v. Hudson*,<sup>59</sup> that he had just lost in the Michigan courts and assess whether it would make a good vehicle for challenging the Michigan Supreme Court's 1999 decision in *People v. Stevens*,<sup>60</sup> I did not hesitate. After all, I had long been critical of *Stevens*, which had held that exclusion of evidence was not an appropriate remedy for a Fourth Amendment knock-and-announce violation.<sup>61</sup> *Stevens*, in effect, gave the Michigan

<sup>56</sup>*Id.* at 2207 (Stevens, J., dissenting). Compare *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (holding "special needs" exception inapplicable to warrantless drug program because programmatic purpose of searches was not "divorced from the State's general interest in law enforcement"), with *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987) (upholding search of probationer under special needs exception since state's interest was in supervising probationer's rehabilitation, not in generalized crime control).

<sup>57</sup>*Samson*, 126 S. Ct. at 2207 (Stevens, J., dissenting).

<sup>58</sup>*Id.* at 2202 (Stevens, J., dissenting).

<sup>59</sup>No. 246403, 2004 WL 1366947 (Mich. Ct. App. June 17, 2004), lv. app. den., 692 N.W.2d 385 (Mich. 2006).

<sup>60</sup>597 N.W.2d 53 (Mich. 1999).

<sup>61</sup>In fact, whenever I was invited to speak to groups that included Michigan criminal defense attorneys, I always took the opportunity to criticize *Stevens* and to make a gratuitous offer to write a certiorari petition in an appropriate case. Mr. Korn called me because he had attended one of those talks four years earlier and had remembered my offer.

police carte blanche to violate the knock-and-announce rule, the ancient common law requirement that the police must knock and generally allow residents to open their doors, thereby sparing residents a forcible and terrifying police entry.<sup>62</sup> The Michigan Supreme Court's decision seemed especially vulnerable given that the United States Supreme Court had twice suppressed evidence seized after knock-and-announce violations,<sup>63</sup> and had, just eleven years ago, unanimously held that the knock-and-announce rule was part of the Fourth Amendment in *Wilson v. Arkansas*.<sup>64</sup>

Since the Michigan Supreme Court's refusal to suppress evidence seized after a knock-and-announce violation was out of step with the U.S. Supreme Court's ruling in *Wilson* and with the rule followed in every other state and federal circuit, except one,<sup>65</sup> I felt confident that the Court, if it granted certiorari, would pull Michigan back into line. My confidence was enhanced even further when the Court granted my certiorari petition just four days after it issued *Halbert v. Michigan*,<sup>66</sup> in which the Court reversed another Michigan Supreme Court decision that was radically out of line with the position taken by other state and federal courts. While I certainly realized that it was possible I could somehow lose *Hudson*, it never occurred to me that I could effectively kill an 800-year-old rule protecting personal privacy and simultaneously put the entire exclusionary rule at risk.

But that is exactly what happened. Now that I have recovered from the shock, it is time to do the post-mortem. I will begin by discussing the case itself and the opinions it produced. I will then

<sup>62</sup>See *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603). In *Wilson v. Arkansas*, 514 U.S. 927, 932 n.2 (1995), the Court observed that the rule actually may date to the era of the Magna Carta.

<sup>63</sup>See *Miller v. United States*, 357 U.S. 301 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968). In both *Miller* and *Sabbath*, the Court suppressed evidence found after violations of 18 U.S.C. § 3109, the federal statute that codified the common-law knock-and-announce rule.

<sup>64</sup>*Wilson*, 514 U.S. at 934, 936.

<sup>65</sup>See *supra* notes 2–3.

<sup>66</sup>125 S. Ct. 2582 (2005). In *Halbert*, the Court overruled the Michigan Supreme Court's decision in *People v. Bulger*, 614 N.W.2d 103 (Mich. 2000), which held that Michigan need not appoint appellate counsel for indigent criminal defendants who plead guilty or nolo contendere and wish to file an application for leave to appeal from their pleas and/or sentences to the Michigan Court of Appeals. I represented Mr. Halbert in the United States Supreme Court.

turn to what the decision means for the knock-and-announce rule. Finally, I will discuss the implications for the exclusionary rule.

*A. The Case and Justice Scalia's Majority Opinion*

After reviewing the case file, I immediately recognized that *Hudson* was an ideal vehicle for challenging *Stevens*. First, there was never any dispute that a knock-and-announce violation had occurred when police officers with a search warrant raided the home that Booker T. Hudson, Jr., shared with his wife in Detroit. Indeed, the police officer in charge of the raid candidly testified at a suppression hearing that, despite having no grounds to dispense with the knock-and-announce requirement, he and the other six officers burst through the front door only three to five seconds after yelling, "Police, search warrant!"<sup>67</sup> This testimony clearly established a knock-and-announce violation because the Court had earlier held in *Richards v. Wisconsin*<sup>68</sup> that the police may force their way inside only after announcing their presence and waiting a reasonable amount of time, unless they have specific reasons to believe that the delay would frustrate the purpose of the search or endanger them. Faced with this testimony, the prosecutor at Hudson's suppression hearing conceded that the officers had violated the knock-and-announce rule.<sup>69</sup> That concession was justified because, even though it is not clear exactly how long the police are supposed to wait before performing a forcible entry, three to five seconds is clearly not enough.<sup>70</sup>

The second reason why *Hudson* struck me as a good vehicle to challenge *Stevens* was that Hudson had been convicted of a relatively minor crime. The police found some seven people in the house who had, between them, approximately twenty rocks of crack cocaine.<sup>71</sup> At his bench trial, the judge, finding no reason to believe that all, or even most, of the cocaine rocks belonged to Hudson, convicted him of possessing only the five rocks that the police found in his

<sup>67</sup>See Appendix to Cert. Pet. at 7–9, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360) (testimony of Officer Jamal Good) [hereinafter Pet. App.].

<sup>68</sup>520 U.S. 385, 394 (1997).

<sup>69</sup>Pet. App., *supra* note 67, at 10.

<sup>70</sup>Cf. *United States v. Banks*, 540 U.S. 31, 40–41 (2003) (holding that 15 to 20 seconds was enough time to wait before forcing entry to serve a narcotics search warrant).

<sup>71</sup>Remarkably, Justice Scalia's majority opinion characterizes this handful of rocks of cocaine as "[l]arge quantities of drugs." *Hudson*, 126 S. Ct. at 2162.

pants.<sup>72</sup> For this minor offense, the judge sentenced Hudson to probation.<sup>73</sup>

The legal issue in the case was straightforward, or so I thought. According to the Michigan Supreme Court, evidence found inside a home following a knock-and-announce violation should not be suppressed because such evidence should always be regarded as “inevitably discovered”; that is, the police still would have discovered the same evidence had they complied with the knock and announce requirement.<sup>74</sup> The Court had adopted the inevitable discovery doctrine as an exception to the exclusionary rule in *Nix v. Williams*,<sup>75</sup> but the Michigan Supreme Court’s approach amounted to a massive expansion of the doctrine for two interrelated reasons. First, the Court had stressed that the inevitable discovery doctrine applies only when the prosecution can demonstrate that evidence would have been discovered by means “wholly independent” of the unconstitutional police conduct.<sup>76</sup> *Stevens*, however, did not require the existence of any independent means of discovery at all. Second, the Court in *Nix* specifically recognized that the inevitable discovery doctrine would not undermine the deterrence rationale of the exclusionary rule because the officer who engaged in the violation would not normally know whether the same evidence would inevitably be found by independent means.<sup>77</sup> By contrast, after *Stevens*, police in Michigan knew to a certainty that any evidence they found after knock-and-announce violations would always be regarded as “inevitably” discovered. For these reasons, every state and federal court to consider the argument that the inevitable discovery doctrine created a per se exception to the exclusionary rule for

<sup>72</sup>Joint Appendix at 22–23, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360). The judge also acquitted Hudson of a firearms charge because there was no evidence that he possessed the pistol found under a cushion in the chair on which he was sitting.

<sup>73</sup>*Id.* at 23–24.

<sup>74</sup>See *People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999) (holding evidence admissible because “it would have been inevitably discovered . . . had the police adhered to the knock-and-announce requirement”).

<sup>75</sup>467 U.S. 431 (1984).

<sup>76</sup>*Murray v. United States*, 487 U.S. 533, 542 (1988).

<sup>77</sup>*Nix*, 467 U.S. at 443–44.



knock-and-announce violations, except the Michigan Supreme Court and the Seventh Circuit, had rejected it.

Therefore, I thought *Hudson* was about two things: the importance of maintaining an effective deterrent so that police would respect the knock-and-announce rule; and, more abstractly, the proper scope of the inevitable discovery exception to the exclusionary rule. What I did not realize was that the case would put the exclusionary rule itself into play.

But for some bad timing, my understanding of the case almost certainly would have prevailed. When the case was first argued on January 9, 2006, it seemed clear that at least five members of the Court agreed that *Stevens* represented an indefensible extension of the inevitable discovery doctrine that would, if accepted, render the knock-and-announce rule meaningless. Unfortunately, one of those five justices was Sandra Day O'Connor, who was replaced by Samuel Alito in February.<sup>78</sup> Two months later, the Court ordered the case reargued.

At the re-argument on May 18, 2006, it became clear to me for the first time that the case was no longer about the knock-and-announce rule or the inevitable discovery doctrine when Justice Scalia asked me, in a series of questions, why the threat of internal police discipline would not convince officers to comply with the

<sup>78</sup>See, e.g., Charles Lane, Court Eases "No Knock" Search Ban, *Wash. Post*, June 16, 2006, at A1 ("[O'Connor's] comments at argument suggested she favored Breyer's view"). During that first oral argument, Justice O'Connor remarked to the assistant solicitor general who was arguing for the United States as amicus curiae on behalf of Michigan, "So, if the rule you propose is followed, then every police officer in America can follow the same policy [of ignoring the knock-and-announce rule]. Is there no policy of protecting the homeowner a little bit and the sanctity of the home from this immediate entry?" Transcript of Oral Argument at 59, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360) (Jan. 9, 2006). There is further evidence that a majority of the Court was prepared to rule in favor of *Hudson* after the first argument. Chief Justice Roberts has apparently followed his predecessors' policy of assigning at least one majority opinion to each member of the Court during each sitting. Since Justice Breyer did not author a majority opinion from the January sitting, it is a fair inference that he was initially assigned the majority opinion in *Hudson*, especially since he authored the dissent on behalf of four justices after the case was reargued. See also Linda Greenhouse, Court Limits Protection Against Improper Entry, *N.Y. Times*, June 16, 2006, at A28 ("Justice Breyer's dissenting opinion was clearly drafted to speak for a majority that was lost when Justice Sandra Day O'Connor left the court shortly after the first argument in January").

knock-and-announce rule.<sup>79</sup> When I responded that such a notion contradicts the very premise of *Mapp v. Ohio*,<sup>80</sup> the seminal 1961 case in which the Court extended the exclusionary rule to the states because other remedies had proven worthless at deterring Fourth Amendment violations, Justice Scalia replied, “*Mapp* was a long time ago. It was before section 1983 was being used, wasn’t it?”<sup>81</sup>

Less than a month later, the Court issued its decision in *Hudson*. Writing for five members of the Court, Justice Scalia began his analysis with a lengthy discussion of the history of the exclusionary rule and its “costly toll upon truth-seeking and law enforcement objectives.”<sup>82</sup> Turning to the knock-and-announce rule, the Court noted that the rule protects residents and police from violence that may occur when residents mistake the police for criminals, preserves private property from unnecessary destruction, and allows residents an opportunity to compose themselves and prepare for a police entry.<sup>83</sup> After reciting these interests, however, Justice Scalia concluded, “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.”<sup>84</sup>

A moment’s thought should reveal just how jaw-dropping this statement is. *None* of the interests protected by the Fourth Amendment is about preventing the government from seizing one’s contraband or criminal evidence. Indeed, by definition, a person has no right to keep contraband or criminal evidence. Instead, the very point of the exclusionary rule is to safeguard the interests that are protected under the Fourth Amendment by taking away the incentive the police would have to violate those interests in order to obtain contraband or evidence. Thus, under Justice Scalia’s reasoning, drugs seized from a person who has been illegally detained

<sup>79</sup>Transcript of Oral Argument at 31–33, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360) (May 18, 2006).

<sup>80</sup>367 U.S. 643 (1961).

<sup>81</sup>Transcript of Oral Argument, *supra* note 79, at 32.

<sup>82</sup>*Hudson*, 126 S. Ct. at 2163 (internal quotation marks and citation omitted).

<sup>83</sup>*Id.* at 2165.

<sup>84</sup>*Id.* (emphasis in original).

and searched should not be suppressed because the rules governing lawful arrest are designed to protect people from the indignities and inconvenience of arrest, not to protect anyone's possessory interest in narcotics.<sup>85</sup> Similarly, obscene material seized from a home following a warrantless entry should not be suppressed because the warrant requirement protects a homeowner's right against unlawful intrusions, but not his right to possess obscenity.<sup>86</sup>

Having completely recast the exclusionary rule as a narrow remedy that applies only when the evidence seized is of the type that the constitutional protection was designed to protect, Justice Scalia then turned squarely to the argument that exclusion is necessary to deter officers from routinely violating the knock-and-announce rule. With a reference to *Mapp*, he wrote, "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 today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago."<sup>87</sup>

So, exactly how have times changed since 1961, when *Mapp* was decided? In two key respects, according to Justice Scalia. First, it is easier to sue the police than it was in those days because of the availability of statutory remedies such as 42 U.S.C. § 1983.<sup>88</sup> In response to the fact that none of the parties in *Hudson* had found a single case in either state or federal court in which anyone recovered anything other than nominal damages for a knock and announce violation, Justice Scalia wrote, "we do not know how many claims have been settled, or indeed how many violations have occurred that produced anything more than nominal injury."<sup>89</sup> Thus, having assumed away the inconvenient lack of evidence that the police have ever been successfully sued for a knock and announce violation,

<sup>85</sup>But see, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979) (suppressing narcotics found on bar patron illegally detained and searched).

<sup>86</sup>But see *Mapp*, 367 U.S. at 660 (suppressing obscene material seized from home following warrantless entry).

<sup>87</sup>126 S. Ct. at 2167.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

Justice Scalia concluded, “As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”<sup>90</sup>

Justice Scalia’s second important post-*Mapp* change “is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”<sup>91</sup> Without a trace of irony, Justice Scalia proceeded to cite a study from criminologist Samuel Walker for the proposition that there have been “wide-ranging reforms in the education, training, and supervision of police officers” since the days of *Mapp*.<sup>92</sup>

It was left to Professor Walker to point out in an op-ed article that Justice Scalia “twisted my main argument to reach a conclusion the exact opposite of what I spelled out in this and other studies.”<sup>93</sup> Professor Walker explained:

[T]he 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* 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. Scalia’s opinion suggests that the results I highlighted have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police. I have never said or even suggested such a thing. To the contrary, I have argued that the results reinforce the Supreme Court’s continuing importance in defining constitutional protections for individual rights and requiring the appropriate remedies for violations, including the exclusion of evidence.<sup>94</sup>

For the reasons stated by Professor Walker, Justice Scalia’s argument that increased police professionalism obviates the need for the exclusionary rule is equivalent to a claim that we should dismantle the

<sup>90</sup>*Id.* at 2167–68 (citations omitted).

<sup>91</sup>*Id.* at 2168.

<sup>92</sup>*Id.* (quoting S. Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950–1990*, at 51 (1993)).

<sup>93</sup>Samuel Walker, *Scalia Twisted My Words*, L.A. Times, June 25, 2006, available at <http://www.latimes.com/news/opinion/commentary/la-oe-walker25jun25,0,5718124.story?coll=la-news-comment-opinions> (last checked August 7, 2006).

<sup>94</sup>*Id.*

gun towers at the state prison because escape attempts have dropped dramatically since the towers were built.

Ultimately, then, the Court held that exclusion of evidence was unjustified for a knock and announce violation because the interests protected by that rule are not offended by the seizure of evidence found after a violation and because exclusion is no longer necessary to assure compliance with that rule.<sup>95</sup> Before returning to the question of what this holding portends for the knock-and-announce rule and the exclusionary rule, it is necessary to examine the concurring opinion of Anthony Kennedy, who provided the fifth vote for that holding.

*B. The Strange Concurrence of Anthony Kennedy*

The first paragraph of Justice Kennedy's concurring opinion contains two sentences that make me wonder, in all seriousness, whether he actually read Justice Scalia's majority opinion before he signed on to it. First, according to Justice Kennedy, "The Court's decision should not be interpreted as suggesting that violations of the [knock and announce] requirement are trivial or beyond the law's concern."<sup>96</sup> One can only wonder how a reader could interpret this passage from Justice Scalia's majority opinion as anything but a trivialization of the knock-and-announce rule: "Many would regard [the right not to be subjected to physical abuse and the Sixth Amendment right to counsel] as more significant *than the right not to be intruded upon in one's nightclothes.*"<sup>97</sup>

<sup>95</sup>Justice Scalia finished his opinion with a section in which he claimed that the outcome was consistent with three of the Court's prior decisions. *Hudson*, 126 S. Ct. at 2168–70 (Scalia, J.) (citing and discussing *Segura v. United States*, 468 U.S. 796 (1984); *New York v. Harris*, 495 U.S. 14 (1990); and *United States v. Ramirez*, 523 U.S. 65 (1998)). This section of Justice Scalia's opinion did not constitute the opinion of the Court because Justice Kennedy did not agree with this analysis and therefore did not join this section. *Id.* at 2171 (Kennedy, J., concurring) (declining to join Part IV of Justice Scalia's opinion because "I am not convinced that *Segura v. United States* and *New York v. Harris* have as much relevance here as Justice Scalia appears to conclude") (citations omitted).

<sup>96</sup>*Id.* at 2170 (Kennedy, J., concurring). See also *id.* ("It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of a lawful entry. Security must not be subject to erosion by indifference or contempt.').

<sup>97</sup>*Id.* at 2167 (emphasis added).

Second, according to Justice Kennedy, “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>98</sup> How, then, is the reader to interpret the Court’s conclusion that excluding evidence today would be punishing the public “for the sins and inadequacies of a legal regime that existed almost half a century ago,” and the lengthy discussion about how things have changed since *Mapp* was decided?<sup>99</sup>

What makes Justice Kennedy’s concurrence so difficult to fathom is that *he provided the fifth vote* for the portions of Justice Scalia’s opinion trivializing the knock-and-announce rule and casting doubt on the continuing vitality of the exclusionary rule. If he disagreed with those portions of Justice Scalia’s opinion, one would think that he would have written an entirely separate opinion concurring in the result. Instead, he signed on to those portions of Justice Scalia’s opinion, thus creating a majority for the propositions (if not the holdings) that the knock-and-announce rule is simply about the right to pull on one’s nightclothes and that the exclusionary rule is an outdated concept.

The remaining five paragraphs of Justice Kennedy’s short concurrence do not help matters much. According to Justice Kennedy, Hudson’s claim for exclusion fails as a simple matter of causation; that is, the failure to knock and announce did not cause the evidence to be found.<sup>100</sup> But this argument is nothing more or less than the inevitable discovery argument (the evidence would inevitably have been found even if the violation had not occurred) without the crucial requirement that there be a source independent of the police violation that would have found the evidence.

C. “*Knock, Knock. Who’s There? Not the Police, We Don’t Knock Anymore.*”<sup>101</sup> *The Death of an Ancient Privacy Protection*

Before turning to the broader implications of the *Hudson* decision, I think it worthwhile to briefly eulogize the knock-and-announce

<sup>98</sup>*Id.* at 2170 (Kennedy, J., concurring).

<sup>99</sup>See *supra* notes 87–92 and accompanying text.

<sup>100</sup>See Hudson, 126 S. Ct. at 2170–71 (Kennedy, J., concurring) (“Under our precedents the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression”); *id.* at 2171 (“In this case the relevant evidence was discovered not because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant”).

<sup>101</sup>I do not know who authored this joke, but several versions were apparently widely distributed by e-mail in the days after the *Hudson* decision. I thank the many people who forwarded it to me.

rule. A eulogy is appropriate because I do not believe anyone can seriously deny that the knock-and-announce rule is now dead in the United States.

It is true that police departments will still probably play lip service to the rule. But no sane police officer serving a search warrant will bother to comply with the knock-and-announce rule. Some officers might continue to shout "Police, search warrant!" before bursting through the door, just as the officers did in *Hudson*, in order to protect themselves from being mistaken for criminal intruders. But, after *Hudson*, there is no rational reason for an officer to wait for a resident to answer the door before performing an entry. There is essentially no chance that an officer who performs such a precipitous entry will be successfully sued.<sup>102</sup> As for the possibility trumpeted by Justice Scalia that such an officer might be subjected to internal police discipline,<sup>103</sup> I can only say that I have never heard of a police officer being disciplined for a knock-and-announce violation, and I am sure that I never will.

But why should any law-abiding citizen care about the death of the knock-and-announce rule? After all, how likely is it that a decent person will be subjected to a police raid?

The answer is that it is not at all unlikely that an innocent person will be present when the police come suddenly bursting through the door. In his recent comprehensive report on the rise of paramilitary policing in the United States, Radley Balko described seventy-two cases since 1995 in which police officers subjected completely innocent people to terrifying and humiliating paramilitary-style raids only to discover that they had raided the *wrong residence*.<sup>104</sup> While there is no national tracking of such "wrong door" raids, there is no doubt that such occurrences are not especially rare. Indeed, there is an entire American Law Reports (ALR) annotation devoted to the subject of search warrants bearing incorrect addresses, with citations to over 200 state and federal appellate cases, many of them involving raids carried out at the wrong residences.<sup>105</sup>

<sup>102</sup>See *supra* notes 79–81 and accompanying text.

<sup>103</sup>*Hudson*, 126 S. Ct. at 2168.

<sup>104</sup>Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America* 43–63 (Cato Institute 2006).

<sup>105</sup>Jay M. Zitter, *Error, in Either Search Warrant or Application for Warrant, as to Address of Place to be Searched as Rendering Warrant Invalid*, 103 A.L.R.5th 463 (2002).

Even when the police search the correct address, there is an excellent chance that innocent persons will be present in the residence. The standard of probable cause requires the police to show only that there is a “fair probability that contraband or evidence of a crime will be found at a particular place”<sup>106</sup> in order to obtain a search warrant. Since this standard is so low, it is not surprising that the information on which the police rely to obtain a warrant often turns out to be wrong; that is, the police do not find what they are looking for when they carry out the search.<sup>107</sup>

Finally, even if the police do have the right address and the contraband or evidence is present, there is a very good chance that innocent people, such as children or elderly relatives, will be present. Indeed, the Court has long recognized that the police may execute search warrants on premises owned and occupied by people who are not suspected of wrongdoing at all, so long as there is reason to believe that contraband or evidence of crime will be found there.<sup>108</sup>

After *Hudson*, all or virtually all search warrants will be carried out without giving the residents, innocent or not, a chance to answer the door or prepare themselves for the entry. That means, as a practical matter, that there will be more innocent people like Alberta Spruill who will die of heart attacks brought on by a terrifying police entry,<sup>109</sup> and there will be thousands more who will be terrified without dying. There will also be many more innocent people like Cynthia Chapman, who was naked in her shower when the police

<sup>106</sup>*Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>107</sup>There are no national records kept documenting the success rate of police searches. A few newspapers have conducted studies of local police departments and have found that many searches come up empty. See, e.g., Kevin Flynn & Lou Kilzer, No-Knocks Net Little Jail Time, *Rocky Mountain News*, March 12, 2000 (on file with author) (finding 146 no-knock raids in Denver in 1999 resulted in criminal charges in only 49 cases). See also Balko, *supra* note 104, at 26–27 (discussing studies from various jurisdictions showing police raids often turn up no evidence or result in no charges).

<sup>108</sup>See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (“The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific ‘things’ to be searched for and seized are located on the property to which entry is sought”).

<sup>109</sup>New York City police officers raided Ms. Spruill’s apartment with a no-knock warrant, only to discover that they were at the wrong address. William K. Rashbaum, Report by Police Outlines Mistakes in Ill-Fated Raid, *N.Y. Times*, May 31, 2003, at A1.



came charging into her home,<sup>110</sup> who will suffer a humiliating loss of privacy because of *Hudson*. And there will be thousands more Americans who will see their doors destroyed because the police will no longer wait even ten or fifteen seconds for someone to open it.

For some eight hundred years, the knock-and-announce rule has protected English and American citizens from such indignities. I mourn its passing in the United States.

*D. Increased Police Professionalism and the Coming End of the Exclusionary Rule*

It was, of course, the evident hostility to the exclusionary rule permeating Justice Scalia's opinion for the Court that attracted the most attention to the decision in *Hudson*.<sup>111</sup> If, as Justice Scalia claimed, *Mapp* is merely a relic from "a legal regime that existed almost half a century ago,"<sup>112</sup> and the police today reflexively respect constitutional rights because of "increasing professionalism" and an "effective regime of internal discipline,"<sup>113</sup> then the exclusionary rule would seem to be an unnecessary and excessive remedy for any kind of constitutional violation.

Until *Hudson* was decided, I am not aware of any scholar who seriously believed that the exclusionary rule was in danger of being overruled. In the weeks since that decision, everyone in the field believes that it is now crystal clear that the rule will become a historical relic if one more like-minded justice joins the Court.

Indeed, it even seems possible that the Court could overrule the exclusionary rule with its current composition. Although Justice Kennedy insisted in the first paragraph of his concurring opinion that the "continued operation of the exclusionary rule, as settled

<sup>110</sup>See Balko, *supra* note 104, at 48 (discussing Chapman's case). Chapman was also the victim of a wrong door raid.

<sup>111</sup>See, e.g., Linda Greenhouse, Court Limits Protection Against Improper Entry, *supra* note 78, at A28 ("The majority opinion was sufficiently dismissive of the exclusionary rule as to serve as an invitation to bring a direct challenge to the rule in a future case"); Charles Lane, Court Eases "No Knock" Search Ban, *supra* note 78, at A1 (noting that Justice Breyer argued in dissent that majority approach would "roll back the use of the exclusionary rule to enforce the Fourth Amendment in areas where it has long been recognized").

<sup>112</sup>*Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006).

<sup>113</sup>*Id.* at 2168.

and defined by our precedents, is not in doubt,"<sup>114</sup> he joined the very parts of Justice Scalia's opinion that cast doubt on the exclusionary rule. If he really believes in the continuing vitality of the exclusionary rule, it is an absolute mystery to me why he would cast the crucial fifth vote for an opinion that openly declared war on the exclusionary rule.<sup>115</sup>

The hot question that is being asked in the solicitor general's office and in state attorney general offices across the country is: "when will the time be ripe to take down the exclusionary rule *in toto*?" To put it more concretely, if a challenge is brought now, which Justice Kennedy will be there? The Justice Kennedy who signed on to Justice Scalia's opinion denigrating the exclusionary rule, or the Justice Kennedy who tried (but failed) to take it all back in his concurrence? Will there be a retirement among the *Hudson* dissenters so that President Bush (or, perhaps, his successor) can appoint another justice hostile to the exclusionary rule?

I am quite confident that a state prosecutor or attorney general will bring a direct challenge to the entire exclusionary rule to the Court within the next year. That is, a certiorari petition will be filed in a state criminal case that will concede that a clear constitutional violation occurred, such as failure to obtain a warrant before searching a house, but that will argue that *Mapp* should be overruled and that the evidence found after the violation should therefore be admitted.<sup>116</sup>

The hard question is what the Court will do with that certiorari petition. Perhaps the uncertainty in Justice Kennedy's position will cause both the other four justices in the *Hudson* majority and the four justices in the *Hudson* dissent to vote to deny the petition. On

<sup>114</sup>*Id.* at 2170 (Kennedy, J., concurring).

<sup>115</sup>I am not the only one who was mystified by Justice Kennedy's concurrence. See Greenhouse, *supra* note 78, at A28 ("One puzzling aspect of the decision was a concurring opinion by Justice Kennedy, who said that he wished to underscore the point that 'the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.' Nonetheless, he signed the part of Justice Scalia's opinion that suggested that the exclusionary rule rested on an increasingly weak foundation").

<sup>116</sup>I think it less likely that such a petition will be filed in a federal case, because the solicitor general will probably refrain from taking that position until it is abundantly clear that there is a majority on the Court in favor of abolishing the exclusionary rule.

the other hand, if the justices who dissented in *Hudson* are confident that Justice Kennedy meant what he wrote in his concurrence, perhaps they would vote to grant certiorari in such a case in the hope of getting a fresh precedent reaffirming *Mapp*. But granting certiorari is risky because a single change in the Court's personnel while the case is pending could change the result, just as a change in the Court's makeup changed the outcome in *Hudson*. By the same token, the four justices in the *Hudson* majority (other than Justice Kennedy) might well vote to grant certiorari in a direct challenge to *Mapp*, either because they are convinced that Justice Kennedy will be on their side or because they believe that there is likely to be a new justice in their camp before the case is decided.

There are, in short, a lot of variables that make it impossible to predict the future of the exclusionary rule. But there is no doubt after *Hudson* that the exclusionary rule is back in play and could well be overruled within the next few years.

Like I said, I never saw it coming.

