

# Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment

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# ***Hudson and Samson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment***

*John D. Castiglione*\*

The principles . . . affect the very essence of constitutional liberty and security. They . . . apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .<sup>1</sup>

And what, other than civil suit, is the "effective deterrent" of [a police officer's] violation of an already-confessed suspect's Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one's nightclothes . . . .<sup>2</sup>

## INTRODUCTION

On July 1, 2005, the head marshal of the Supreme Court, Pamela Talkin, hand-delivered a letter to the White House, a letter which contained just three sentences:<sup>3</sup>

Dear President Bush: This is to inform you of my decision to retire from my position as an associate justice of the Supreme Court of the United States effective upon the nomination and confirmation of my successor. It has been

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\* The author currently practices at Latham & Watkins, LLP, in New York. I would like to thank all those who contributed ideas and advice, especially Professor Cynthia Lee and Eric Waldo, currently serving as clerk to Judge Ann Aldrich of the Northern District of Ohio. All errors are my own.

1. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (Bradley, J.).

2. *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006) (Scalia, J.).

3. Richard W. Stevenson, *Court in Transition: The Overview; O'Connor to Retire, Touching Off Battle Over Court*, N.Y. TIMES, July 2, 2005, at A1.

a great privilege, indeed, to have served as a member of the court for 24 terms. I will leave it with enormous respect for the integrity of the court and its role under our constitutional structure.

Sincerely, Sandra Day O'Connor<sup>4</sup>

And just like that, the career of the first woman ever appointed to the Supreme Court came to a close.

It would be almost six months before Justice O'Connor actually left the Court.<sup>5</sup> And yet, within a matter of weeks of her departure, the Supreme Court would embark upon an extraordinary process of curtailing generally accepted Fourth Amendment protections that Justice O'Connor would almost surely have questioned, and in one case prevented. In *Samson v. California*,<sup>6</sup> decided just weeks after Justice O'Connor left, the Court determined that parolees may be subjected to warrantless, suspicionless searches of their person and property, by any government official, at any time.<sup>7</sup> This 6–3 decision marked yet another chapter in the Court's recent history of declaring entire groups of individuals almost completely unprotected by the Fourth Amendment. In *Hudson v. Michigan*<sup>8</sup>—in what was a surprise to almost every observer—the Court held that the Fourth Amendment does not mandate exclusion of evidence discovered following a knock-and-announce violation.<sup>9</sup> What was most surprising about the Court's decision in *Hudson* was the majority's willingness to call into question the central role of the exclusionary rule to Fourth

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4. Text of the letter taken from Nina Totenberg, *Justice Sandra Day O'Connor Retires*, NAT'L PUB. RADIO, July 1, 2005, <http://www.npr.org/templates/story/story.php?storyId=4726127> (last accessed June 18, 2007). Following his receipt of the letter, Mr. Bush held a brief phone conversation with Justice O'Connor, telling her, "For an old ranching girl, you turned out pretty good," a reference to her roots in El Paso, Texas. Stevenson, *supra* note 3.

5. Following Justice O'Connor's announcement, her intended replacement, John Roberts, was nominated for Chief Justice following William Rehnquist's death. Samuel Alito was then nominated as Justice O'Connor's successor, and was confirmed on January 30, 2006. David Stout, *Alito Is Sworn in as 110th Supreme Court Justice*, N.Y. TIMES, Jan. 31, 2006, at A1.

6. 126 S. Ct. 2193 (2006).

7. *Id.* at 2202.

8. 126 S. Ct. 2159 (2006).

9. *Id.* at 2168.

Amendment analysis. Coming in a 5–4 decision that was re-argued after Justice O’Connor left the Court, Justice Alito, O’Connor’s replacement on the Court, supplied the crucial fifth vote for the majority that O’Connor probably would have withheld.<sup>10</sup> And just like that, the continued vitality of one of the most well-established tenants of Fourth Amendment jurisprudence—the exclusionary rule—was back in play almost a century after it was established.<sup>11</sup>

Looking back at the 2005–2006 term, Professor Erwin Chemerinsky quipped that it was a “mixed year” for criminal defendants.<sup>12</sup> On the contrary, 2006 was actually quite a bad year—not only for criminal defendants, but for anyone concerned with the steady tilt of the Court away from an even moderately robust interpretation of the Fourth Amendment. Along with creating yet another categorical exclusion of an entire class of individuals from meaningful Fourth Amendment protection (that being parolees in *Samson*), 2006 inaugurated what promises to be a years-long struggle within the Court for one of the core tenants of modern Fourth Amendment jurisprudence: the exclusionary rule. More fundamentally, the first wave of Fourth Amendment cases clearly indicated the Roberts Court’s thinking vis-à-vis the balance between personal privacy and government power through law enforcement.

In this article, I critique the change of course in criminal procedure chartered by the Roberts Court in these decisions. In Part I, I examine the Court’s decision in *Samson*, arguing that the majority’s decision rests on unsupportable conceptions of the efficacy of suspicionless searches and the role they play in effectuating the penological and rehabilitative goals of parole.

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10. It appears likely from statements made in the first oral argument in *Hudson* that Justice O’Connor probably would have voted to apply the exclusionary rule. See *infra* notes 97–98; see also Akhil Reed Amar, *Criminal Justice*, 34 PEPP. L. REV. 522, 522 (2007).

11. The exclusionary rule was first announced by the Court in *Weeks v. United States*, 232 U.S. 383 (1914) (holding that evidence seized by federal officers in violation of the Fourth Amendment must be excluded from trial in federal cases). The rule was held applicable to the states through the Fourteenth Amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

12. Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 335, 344 (Summer, 2006).

While few would argue that *Samson* is a particularly groundbreaking decision, it is nonetheless notable for its overly broad conception of Fourth Amendment “reasonableness.” In Part II, I examine the Court’s opening salvo against the exclusionary rule in *Hudson*. I assert that *Hudson* was the first shot across the bow in what promises to be a long campaign by the “conservative” bloc of the Court<sup>13</sup> to undermine, and ultimately overrule, the exclusionary rule as a remedy for Fourth Amendment violations. In Part III, I argue that the Court’s decisions in these cases show a clear preference of a majority of the Court for the government’s prerogatives in law enforcement to the determinant of individuals’ legitimate expectations of privacy, dignity, and autonomy. Both

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13. By referencing the “conservative” bloc of the Court (which includes Chief Justice Roberts, Justices Scalia, Thomas, Alito, and sometimes Justice Kennedy), I make no representation as to whether these jurists are in any way “conservative,” as the term is commonly used. I seek not to lump these Justices into umbrella political categories that may or may not be a perfect fit. However, I think that at this point the nomenclature “conservative bloc” has gained much traction when describing this group of justices and, for ease of language, I will occasionally use this term as a short-hand descriptor. A good justification for the use of this terminology was provided by Professor Kerr:

My sense is that we tend to apply terms like “liberal” and “conservative” to individual Justices by looking at those cases and asking if Justice X’s votes consistently try to pull the law to the left or the right compared to a world in which the Court took no cases. If a Justice consistently votes to pull the law to the right, we label that Justice a conservative; if a Justice consistently votes to pull the law to the left, we label that Justice a liberal; and if a Justice’s votes reveal no consistent patterns, we label that Justice a moderate.

What this means, I think, is that calling someone a “conservative Justice” does not mean that the Justice is conservative politically or votes for Republicans. Conversely, calling a Justice a “liberal” does not mean that the Justice is liberal politically or votes for Democrats. In the case of Supreme Court Justices, the label is just a shorthand signaling that the Justice’s votes tend to have the effect of pushing the law in a direction that favors the policy preferences on one side or the other. Thus, we might find a Justice shifting from being a liberal to a conservative even if the Justice’s views don’t change. A good example is Justice Frankfurter, who was considered a liberal in the 1930s but a conservative in the 1950s in part because the political valence of judicial restraint had shifted.

Posting of Orin S. Kerr to The Volokh Conspiracy, <http://volokh.com/posts/1163447802.shtml> (Nov. 13, 2006, 4:06 EST).

*Samson* and *Hudson* offer tantalizing clues as to the new Roberts Court's general theory of the balance of power, if you will, between the state and the individual, a theory which promises to carry over into the "new generation" of Fourth Amendment cases soon to come before the Court.

I. CATEGORICAL EXCLUSION OF PAROLEES FROM FOURTH AMENDMENT PROTECTION: *SAMSON V. CALIFORNIA*<sup>14</sup>

A. *Background—Probationer's Rights Under the Fourth Amendment*

In *Samson v. California*, the Court held, 6–3, that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee.<sup>15</sup> The Court's decision in *Samson* was not a total surprise; the groundwork for the case had been laid five years earlier in *United States v. Knights*,<sup>16</sup> where the Court endorsed a search regime for probationers that required only reasonable suspicion of criminal activity in order to search. In *Knights*, the Court upheld a California law providing that individuals on probation could be stopped and searched at any time during the probationary period upon reasonable suspicion of criminal activity, as opposed to the usual requirement of probable cause.<sup>17</sup> The Court found that such searches were reasonable under the Fourth Amendment.

Writing for a unanimous Court,<sup>18</sup> Chief Justice Rehnquist held in *Knights* that probation was merely one stop along a "continuum" of possible punishments facing a convicted criminal, ranging from "solitary confinement in a maximum-security facility to a few hours of mandatory community service."<sup>19</sup> The Court used the

14. 126 S. Ct. 2194 (2006).

15. *Id.* Justice Thomas delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Alito, Ginsburg, Kennedy, and Scalia. Justices Breyer, Souter, and Stevens dissented.

16. 534 U.S. 112 (2001).

17. *Id.* at 122.

18. Justice Souter filed a one-paragraph concurrence dealing with a secondary issue in the case. *Id.* at 122–23.

19. *Id.* at 119 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (Scalia, J.)).

standard privacy versus governmental interest balancing test to assess the reasonableness of the reduced-suspicion search. The Court found first that probationers, based on their position on the "continuum," had a lowered expectation of privacy. Next, the Court held that it was "reasonable to conclude" that allowing searches of probationers on less than probable cause of criminal activity would "further the two primary goals of probation—rehabilitation and protecting society from future criminal violations."<sup>20</sup> As such, it was reasonable to subject probationers to searches, and those searches need not be supported by probable cause or a warrant. Indeed, the Court specified that the officer need not be the individual's probation officer; rather, any officer with knowledge of the individual's status as a probationer could search without suspicion.<sup>21</sup>

Perhaps the most notable aspect of *Knights* was the Court's holding that it did not need to resort to a "special needs" analysis to justify suspicionless searches of probationers. In *Griffin v. Wisconsin*, decided seven years prior to *Knights*, the Court held that warrantless searches of a probationer's home were permissible;<sup>22</sup> the doctrinal hook, so to speak, was that the state law authorizing the search fulfilled the "special need" of monitoring probationers.<sup>23</sup> "Special needs" was, by the time *Griffin* was decided, a well-established exception to the general warrant and probable cause requirements of the Fourth Amendment.<sup>24</sup> Under *Knights*, however, the Court abandoned the

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20. *Id.*

21. *Id.* at 121.

22. *Griffin*, 483 U.S. at 874.

23. *Id.* at 875-76.

24. *Griffin* was also the case in which Justice Scalia first articulated the "continuum" theory of criminal punishment—a concept that would be instrumental in the Court's opinions in *Knights* and *Samson*:

Probation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service. A number of different options lie between those extremes, including confinement in a medium- or minimum-security facility, work-release programs, "halfway houses," and probation—which can itself be more or less confining depending upon the number and severity of restrictions imposed.

requirement of “special needs”<sup>25</sup> and held that a “general” Fourth Amendment reasonableness analysis was all that was needed to determine that probationers did not enjoy full rights under the Amendment and could be searched at any time on reasonable suspicion alone.<sup>26</sup>

### B. *Samson v. California*<sup>27</sup>

With this precedent less than five years old, the Court decided *Samson v. California*. In *Samson*, another California law mandated that every prisoner eligible for release on parole “shall agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night.”<sup>28</sup> Individualized suspicion of wrongdoing by the parolee was not a prerequisite to search under the law. The facts of the case were quite similar to *Knights*. Petitioner Donald Samson, on parole following a conviction for felony possession of a firearm, was walking down a street with a woman and child. He was approached by a local police officer, who knew that Mr. Samson was on parole and believed him to be subject to an outstanding warrant.<sup>29</sup> After stopping Mr. Samson and confirming that he was not subject to an outstanding warrant, the officer nevertheless searched Mr. Samson, based solely on Mr. Samson’s status as a

*Id.* at 874. Incidentally, one might think that this continuum should include capital punishment, although neither Justice Scalia nor Chief Justice Rehnquist was impolitic enough in their opinions to mention it.

25. *Knights*, 534 U.S. at 117–18 (“In *Knights*’ view, apparently shared by the Court of Appeals, a warrantless search of a probationer satisfies the Fourth Amendment only if it is just like the search at issue in *Griffin*—*i.e.*, a ‘special needs’ search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions. This dubious logic—that an opinion upholding the constitutionality of a particular search implicitly holds unconstitutional any search that is not like it—runs contrary to *Griffin*’s express statement that its ‘special needs’ holding made it ‘unnecessary to consider whether’ warrantless searches of probationers were otherwise reasonable within the meaning of the Fourth Amendment.”).

26. *Id.* at 118–19.

27. 126 S. Ct. 2193 (2006).

28. *Id.* at 2196 (citing CAL. PENAL CODE § 3067(a) (West 2000)).

29. *Id.*



parolee. During the search, the officer discovered a cigarette box in Mr. Samson's pocket containing methamphetamine.<sup>30</sup>

At the suppression hearing, the trial court refused Mr. Samson's motion to suppress the drugs. Citing the California law,<sup>31</sup> the court found that the search was proper even though the arresting officer lacked any suspicion that Mr. Samson was engaged in criminal activity (apart from the fact that he was a parolee). The jury convicted Mr. Samson, and he was sentenced to seven years imprisonment.<sup>32</sup> The California Court of Appeals affirmed, holding that a suspicionless search of a parolee is "reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious, or harassing."<sup>33</sup>

### 1. *The Majority Opinion*

The Supreme Court granted certiorari and affirmed. Writing for six members of the Court,<sup>34</sup> Justice Thomas began by invoking the "totality of the circumstances" test for determining reasonableness under the Fourth Amendment. "Whether a search is reasonable is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests."<sup>35</sup> Pursuant to this approach, and relying heavily on *Knights*, Justice Thomas found that, by virtue of their status as parolees on the "continuum" of state-imposed punishments, parolees have a diminished expectation of privacy.<sup>36</sup> In effect, parolees fall somewhere between prisoners and probationers, and since neither of those groups enjoy a full

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30. *Id.*

31. CAL. PENAL CODE § 3067(a) (West 2000) (requiring parolees "to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause.").

32. *Samson*, 126 S. Ct. at 2196.

33. *People v. Samson*, No. A102394, 2004 WL 2307111, at \*2 (Cal. Ct. App. Oct. 14, 2004).

34. Chief Justice Roberts, and Justices Alito, Ginsburg, Kennedy, Scalia, and Thomas.

35. *Samson*, 126 S. Ct. at 2197 (citations omitted).

36. *Id.* at 2198-99.

expectation of privacy under the Court's precedents, neither do parolees.

Justice Thomas then looked to the substantial governmental interests in allowing warrantless, suspicionless searches of parolees. "As the [high] recidivism rate [in the state of California] demonstrates, most parolees are ill prepared to handle the pressures of reintegration. Thus, most parolees require intense supervision."<sup>37</sup> This supervision, Justice Thomas asserted, necessarily includes being exposed to suspicionless searches. "Imposing a reasonable suspicion requirement, as urged by petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality."<sup>38</sup> Because this would impede the California legislature's goal of promoting reintegration, suspicionless searches are a "reasonable" response, and therefore consistent with the Fourth Amendment.<sup>39</sup>

## 2. *The Dissent*

Writing for the dissent,<sup>40</sup> Justice Stevens focused first on the fact that the majority opinion marked a clear break from precedent. "What the Court sanctions today is an unprecedented curtailment of liberty."<sup>41</sup> Justice Stevens noted that in the cases most heavily relied on by the majority, *Knights* and *Griffin*, the Court had stopped short of sanctioning completely suspicionless searches of probationers (a close corollary to parolees) by any and all law enforcement officials. As to *Griffin*, Stevens noted that "at least the state in *Griffin* could in good faith contend that its warrantless searches were supported by a special need conceptually distinct from law enforcement goals generally."<sup>42</sup> And as to *Knights*, Stevens noted that, under that decision, reasonable suspicion was required to search probationers.<sup>43</sup> In *Samson*, however, the majority jettisoned both the "special needs" requirement from

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37. *Id.* at 2200.

38. *Id.* at 2201.

39. *Id.* at 2202.

40. *Id.* (Stevens, J., dissenting, joined by Breyer, J., and Souter, J.).

41. *Id.*

42. *Id.* at 2203 n.1.

43. *Id.* at 2204.

*Griffin* and the “reasonable suspicion” requirement from *Knights*: “Ignoring just how ‘closely guarded’ is that ‘category of constitutionally permissible suspicionless searches’ the Court for the first time upholds an entirely suspicionless search unsupported by any special need.”<sup>44</sup>

Justice Stevens then addressed the majority’s determination of a parolee’s lowered expectation of privacy. “Combining faulty syllogism with circular reasoning, the Court concludes that parolees have no more legitimate an expectation of privacy in their persons than do prisoners. However superficially appealing that parity in treatment may seem, it . . . rests on an intuition that fares poorly under scrutiny.”<sup>45</sup> Justice Stevens continued:

Threaded throughout the Court’s reasoning is the suggestion that deprivation of Fourth Amendment rights is part and parcel of any convict’s punishment. If a person may be subject to random and suspicionless searches in prison, the Court seems to assume, then he cannot complain when he is subject to the same invasion outside of prison, so long as the State *can* imprison him . . . . This is a vestige of the long-discredited “act of grace” theory of parole.<sup>46</sup>

Justice Stevens argued that the majority short-circuited a true Fourth Amendment analysis by simply assuming that deprivation of Fourth Amendment rights is necessarily a component of criminal punishment without turning to a “special needs” analysis, which had been the Court’s chosen doctrinal method in *Griffin*, or hewing to the Court’s decision in *Knights* that at least reasonable suspicion is required to search.

### C. Critiquing Justice Thomas’ Opinion

#### 1. The Court Assumes, Without Evidence or Analysis, That Suspicionless Searches Deter Effective Monitoring of Parolees

The majority’s opinion in *Samson* is less than compelling. To begin, Justice Thomas never adequately explains why requiring

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44. *Id.* (citing *Chandler v. Miller*, 520 U.S. 305, 309 (1997)).

45. *Id.* at 2202–03.

46. *Id.* at 2206 (citations omitted).

government officials to have individualized, objectively reasonable suspicion before searching a parolee would handicap the government's penological and rehabilitative interests. While he asserts, uncontroversially, that "a State has an 'overwhelming interest' in supervising parolees" and that "a State's interest in reducing recidivism and thereby promoting reintegration and positive citizenship . . . [warrants a privacy intrusion] that would not otherwise be tolerated under the Fourth Amendment,"<sup>47</sup> he fails to explain, or point to any evidence beyond the California legislature's passing of the law, why requiring government officials to be able to point to at least some objective suspicion of wrongdoing by the parolee would hinder these objectives.

While Justice Thomas is no doubt correct to assert that the legislature, not the courts, are the appropriate forum for determining the wisdom of a particular policy (such as the need to subject parolees to intense supervision), it is nevertheless inherent in the nature of the "totality of the circumstances" inquiry for the Court to determine whether the legislature's chosen method of effectuating its policy choice is consistent with the Fourth Amendment's command of "reasonableness." This means that the Court must make an attempt to determine whether the methods chosen by the legislature (in this case, authorizing suspicionless searches) serve a constitutionally permissible end (that all searches be reasonable). Simply stating that the legislature has determined that "a requirement that searches be based on individualized suspicion would undermine the State's ability to effectively supervise parolees and protect the public"<sup>48</sup> is of no help when facing the constitutional question. In essence, Justice Thomas' complete lack of scrutiny of the legislature's stated claims about the necessity of the search regime means that the legislature becomes the arbiter of whether its methods are permissible under the Fourth Amendment: the very act of the legislature passing the law means the state thinks it was necessary, and that makes it reasonable! The circularity of this argument is apparent.

As to the substance of his argument, Justice Thomas asserts that "[i]mposing a reasonable suspicion requirement, as urged by

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47. *Id.* at 2200 (majority opinion).

48. *Id.* at 2201.

petitioner, would give parolees greater opportunity to anticipate searches and conceal criminality.”<sup>49</sup> Unfortunately, Justice Thomas neglects to explain (or offer any evidence) as to the basis upon which he makes this assertion. The Court determined in *Knights* that probationers are at least entitled to reasonable suspicion of wrongdoing before they are searched.<sup>50</sup> Why is the bar lower for parolees? Is it because they are more likely than probationers to be engaging in criminal activity when searched? The Court declines to mention whether parolees actually commit more crimes than probationers. Similarly, as to “concealing” their criminality,<sup>51</sup> do parolees generally hide evidence faster than probationers when police approach? Do parolees somehow have the ability to sense police from farther away than probationers? If so, that might offer a compelling reason to lower the suspicion bar. If not, why is it necessary to lower that bar before a search can commence? Justice Thomas fails to specify.

While Justice Thomas suggests that the recidivism problem in California indicates that those convicted of crimes are more likely to commit crimes again (thus making it more reasonable to search them without individualized suspicion), it is difficult to see what role that should play in a Fourth Amendment analysis. All the concept of a “high recidivism rate” indicates is that those who have been convicted of a crime are more likely to be convicted a crime again; it emphatically does not mean that those who have committed a crime are necessarily more likely to engage in criminal behavior than other individuals.<sup>52</sup> Indeed, propensity to commit criminal acts (which is really the concept Justice Thomas is basing his argument on) is not generally seen as sufficient to

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49. *Id.*

50. *United States v. Knights*, 534 U.S. 112, 122 (2001).

51. *Samson*, 126 S. Ct. at 2201.

52. Justice Stevens touches on this argument in his *Samson* dissent:

The Court devotes a good portion of its analysis to the recidivism rates among parolees in California. One might question whether those statistics . . . actually demonstrate that the State’s interest is being served by the searches . . . . That said, though, it has never been held sufficient to justify suspicionless searches. If high crime rates were grounds enough for disposing of Fourth Amendment protections, the Amendment long ago would have become a dead letter.

*Samson*, 126 S. Ct. at 2207 n.6 (Stevens, J., dissenting) (citations omitted).

support a search under the Fourth Amendment; rather, it is the likelihood that an individual is currently committing a criminal act that is determinative.<sup>53</sup> The majority cites no evidence (outside its miscast argument concerning recidivism) that parolees are more likely than anyone else to be committing or taking steps to commit a crime at a given moment in time—the essential benchmark of whether a particular search is reasonable.<sup>54</sup>

While Justice Thomas attempts to salvage his point by noting that parolees are, in theory, deemed to have acted more harmfully than probationers,<sup>55</sup> he fails to explain why this makes a difference to the Fourth Amendment analysis. Is a search more “reasonable” because a “more-bad actor” is targeted? Do parolees “deserve” less Fourth Amendment protection than others?<sup>56</sup> If that is the logic to be used, then should not individuals with criminal records be subject to a lower standard of suspicion than the rest of us? Surely former law-breakers “deserve” less protection than law abiding citizens. To most observers, though, the concept that some people are more “worthy” of Fourth Amendment protection than others is a constitutional non-starter, as it should be.

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53. If “propensity” to commit criminal acts were the standard by which Fourth Amendment reasonableness is judged, then one might imagine that serial offenders who are no longer subject to any state-imposed punishment should nevertheless be subject to a lowered-suspicion standard, since they could be said to be more likely to commit crimes in the future. Such individuals are not, however, subject to any lowered level of Fourth Amendment protection.

54. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (“[T]o accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure.”).

55. *Samson*, 126 S. Ct. at 2201 (citing *United States v. Crawford*, 372 F.3d 1048, 1077 (9th Cir. 2004) (explaining that parolees, in contrast to probationers, “have been sentenced to prison for felonies and released before the end of their prison terms” and are “deemed to have acted more harmfully than anyone except those felons not released on parole”)).

56. The fact that prisoners themselves have essentially no rights under the Fourth Amendment is due not to the fact that they are the “most bad actors”; rather, it is the unique environment of the prison itself that makes it necessary for normal Fourth Amendment protections to be discarded. See *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (holding that traditional Fourth Amendment analysis is inapplicable to prisoners because the recognition of any privacy right is incompatible with the concept of incarceration and the needs of penal institutions).

2. *The "Continuum" Theory of Privacy Remains Undeveloped by the Court*

Implicit in the argument that parolees have a diminished expectation of privacy is the idea that since parolees could have been denied parole by the state, the fact that they are granted parole must mean that the state is free to impose any burden on the parolee that could have been imposed in prison. As the Court stated:

A California inmate may serve his parole period either in physical custody, or elect to complete his sentence out of physical custody and subject to certain conditions. Under the latter option, the inmate-turned-parolee remains in the legal custody of the California Department of Corrections through the remainder of his term . . . .<sup>57</sup>

Leaving aside for the moment the fact that Justice Thomas seems to suggest that inmates actually have a meaningful choice in whether or not to accept the terms of their parole, one can see how Justice Thomas simply assumes that because parole falls somewhere between imprisonment and probation on the "continuum" of punishments, it *a priori* means that a diminished expectation of privacy exists. While this determination might in theory be justifiable, the fact is that the Court in *Samson* never bothers to explain just why that is the case. Why do parolees necessarily have the same subjective expectation of privacy as prisoners? The Court provides no answers. While one might assume that parolees have the same, or less, expectation of privacy than probationers, one might also assume that they have substantially more of an expectation than prisoners. Should not that in turn mean that at least some level of objective suspicion is necessary? The Court in *Samson* unhelpfully makes assumptions and determinations about these relative levels of expectation of privacy without substantial analysis. This lack of foundational analysis for a central proposition of the Court's decision is unsatisfying to say the least, and it undermines the majority's assertion that *Samson* follows logically from precedent.

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57. *Samson*, 126 S. Ct. at 2199 (citations omitted).

3. *Despite the Court's Insistence, Samson Allows for Arbitrary and Capricious Searches of Parolees*

Justice Thomas also fails to persuade when he attempts to insist that there are meaningful safeguards preventing arbitrary searches of parolees. One major concern raised by the petitioners was that the California law allowed officers to search on a mere whim, the ultimate evil protected against by the Fourth Amendment.<sup>58</sup> Justice Thomas felt that the law contained adequate protection. "The concern that California's suspicionless search system gives officers unbridled discretion . . . is belied by California's prohibition on 'arbitrary, capricious, or harassing' searches."<sup>59</sup> The flaw in this reasoning is obvious. While one might imagine a parolee bringing a successful claim for harassment under the law,<sup>60</sup> it is hard to understand how a parolee might bring a successful claim arguing that he or she has been subject to "arbitrary" or "capricious" searches, given that Justice Thomas himself strongly intimates that the only real criteria for conducting the search is that the officer has knowledge that the individual is a parolee.<sup>61</sup> And so, Justice Thomas expects us to believe that the California law offers meaningful protection against arbitrary or capricious searches, even though the only thing the government would have to establish to support the search is that the officer knew the suspect was a parolee.

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58. NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 92-97 (1937) (noting that one of the primary justifications for the Revolution and the subsequent adoption of the Fourth Amendment was revulsion for the unlimited search power of government officials in the colonial period).

59. *Samson*, 126 S. Ct. at 2202 ("It is not the intent of the Legislature to authorize law enforcement officers to conduct searches for the sole purpose of harassment." (citing CAL. PENAL CODE § 3067(d) (West 2000))).

60. Possible scenarios in which a parolee might bring a successful claim for harassment include situations where repeated searches by police occur in a short time frame, where police engage in extremely invasive or destructive searches, the execution of unnecessary searches at the workplace, etc.

61. *Id.* at 2202 n.5 ("Under California precedent, we note, an officer would not act reasonably in conducting a suspicionless search absent knowledge that the person stopped for the search is a parolee.").



While one might conceive of a situation where an officer “accidentally” searches a parolee whom he doesn’t actually know to be a parolee (thus making the search “arbitrary” within Justice Thomas’s definition, and making it illegal), such a search would be excluded regardless of the searchee’s status—if the officer had no other suspicion factors to point to, the search would be illegal as to anyone. Of course, if the officer did have other individualized search factors to point to that constituted probable cause, the parolee’s parole status is irrelevant, and the search would be permissible. Therefore, it appears as though the Court sanctions “arbitrary and capricious” searches of parolees—in the sense that officers can permissibly search parolees for any reason, or no reason at all, at any time, as long as the government official knows of the searchee’s status as a parolee—a necessary condition for implicating *Samson*’s holding in the first place.<sup>62</sup> While one might not object to such a regime as a matter of preference or policy, it is not clear at all that such a regime comports with the Fourth Amendment, by the Court’s own reasoning.

#### 4. *What Happened to the Special Needs Doctrine?*

Ultimately, the most compelling—and simplest—argument for removing the usual Fourth Amendment requirement of individualized suspicion<sup>63</sup> is that parolees are, in effect, special cases; because they have been sentenced to prison and (presumably) cannot reintegrate into society successfully without intense supervision, searches on less-than-individualized suspicion are necessary.<sup>64</sup> Applying this doctrinal tool to the California law

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62. “To say that th[e] evils [of suspicionless searches] may be averted without that shield is, I fear, to pay lip service to the end while withdrawing the means.” *Id.* at 2207 (Stevens, J., dissenting).

63. By “usual” requirement, I mean “most times”—as Justice Thomas points out in *Samson*: “[A]lthough this Court has only sanctioned suspicionless searches in limited circumstances, namely programmatic and special needs searches, we have never held that these are the only limited circumstances in which searches absent individualized suspicion could be ‘reasonable’ under the Fourth Amendment.” *Id.* at 2201 n.4 (majority opinion).

64. I am not convinced that this is necessarily a true proposition, as my argument immediately preceding this section indicates; I believe it is not at all clear that subjecting parolees to suspicionless searches is a necessary element of

in *Samson* would have been the most straightforward method of resolving the case. Normally, a finding by the Court that “special needs” exist outside those of pure law-enforcement allows for an otherwise impermissible curtailment of some or all Fourth Amendment protections. The Court has not been shy about recognizing special needs in other contexts.<sup>65</sup> And yet, while Justice Thomas’s argument seems tailor-made for a special needs analysis—replete with references to the penological and reintegrationist goals of the statute—the Court makes clear that “general” Fourth Amendment doctrine was sufficient to determine that parolees may be subjected to suspicionless searches:<sup>66</sup> “Nor do we address whether California’s parole search condition is justified as a special need under *Griffin v. Wisconsin*, because our holding under general Fourth Amendment principles renders such an examination unnecessary.”<sup>67</sup>

The question, then, is why the Court chose to abandon the special needs analysis in this case. While Justice Thomas asserts that “general” Fourth Amendment analysis is sufficient to decide

an effective parole regime. As the petitioners in *Samson* argued, the majority of states, as well as the federal government, required some level of suspicion for parolee searches. *Id.* at 2201. Nevertheless, applying a special needs analysis would have at least supplied the precedential hook that that majority opinion in *Samson* lacked.

65. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822 (2002) (holding that a policy requiring all students who participated in competitive extracurricular activities to submit to drug testing was a reasonable means of furthering the school district’s important interest in preventing and deterring drug use among its schoolchildren, and therefore did not violate Fourth Amendment); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“For example, we have upheld certain regimes of suspicionless searches where the program was designed to serve ‘special needs, beyond the normal need for law enforcement.’”); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding the random drug testing of student-athletes under the “special needs” doctrine); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (permitting exceptions to the warrant and probable-cause requirements for a search when “special needs, beyond the normal need for law enforcement,” make those requirements impracticable (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring))).

66. *Samson*, 126 S. Ct. at 2201.

67. *Id.* at 2199 n.3.

the case, just as it was in *Knights*,<sup>68</sup> this seems too facile an explanation if taken on its face.<sup>69</sup> In this case, using the special needs doctrine would have been the simplest ground on which to decide the case. The Court could have held, probably uncontroversially, that managing parolees outside of prison is, in essence, a unique undertaking, and that suspicionless searches were necessary to fulfill that need. This would have comported comfortably with the Court's precedent and probably attracted at least one (Justice Stevens) and possibly all of the dissenters. Instead, the Court chose to apply the general "reasonableness" test.

Two explanations are possible. First, it could be the case that the majority realized that attempting to show how suspicionless searches are at all reasonably necessary to promote the "special needs" of a parole regime was a tough sell, as it were, for the reasons outlined above.<sup>70</sup> It would be far better to simply show that it is somehow generally "reasonable" to subject convicted criminals to suspicionless searches, than to have to show how those searches actually promote the state's penological and rehabilitative interests.<sup>71</sup> As the dissent argues, the nature of the California law (allowing any law enforcement official to search any parolee at any time, without suspicion of criminal activity) is far too broad to reasonably comport with the special need of supervising parolees. "Had the State imposed as a condition of parole a requirement that [prisoners] submit to random searches by his parole officer . . . the condition might have been justified . . . under the special needs doctrine."<sup>72</sup> Similarly, had the parole

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68. 534 U.S. at 117-18.

69. "We held in *Knight*—without recourse to *Hudson*—that the balance favored allowing the State to conduct searches based on reasonable suspicion. Never before have we plunged below that floor absent a determination of 'special needs.'" *Samson*, 126 S. Ct. at 2207 (Stevens, J., dissenting).

70. See *supra* Part I.C.1.

71. "Special needs" doctrine allows for searches on less-than-full suspicion when legitimate needs "beyond the normal need for law enforcement make the probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Searches conducted pursuant to "special needs" must be reasonable in scope. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989).

72. *Samson*, 126 S. Ct. at 2207.

board singled out particularly dangerous or untrustworthy inmates for suspicionless searches, one might make the argument that the program is tailored to advancing the specific need of supervising the individual parolees that require supervision the most. The fact that the majority eschews the special needs analysis indicates that the majority knew that a compelling “special needs” case possibly could not, in fact, have been made.

A second, more comprehensive explanation is simply that the majority takes a very limited view of the scope of Fourth Amendment vis-à-vis the individual’s right to privacy and autonomy. In other words, the Justices composing the majority in *Samson* did not need to resort to a special needs analysis because they believe that, as a general matter, the Fourth Amendment provides relatively little protection to the individual when the government can articulate an important-sounding reason to impose upon the individual’s interests. The unbalanced balancing approach taken by the Court has been criticized as insufficiently protective of Fourth Amendment rights, as well as needlessly complicating what should be a straightforward application of special needs doctrine in most cases.<sup>73</sup> This argument is revisited in more detail below.<sup>74</sup>

## II. TAKING ON THE EXCLUSIONARY RULE: *HUDSON V. MICHIGAN*

Regardless of its flaws, *Samson* was a widely anticipated decision. Once *Knights* held that probationers did not have full Fourth Amendment rights, it was only a matter of time before the Court extended that basic rationale to parolees. The Court’s decision in *Hudson v. Michigan*, however, caught much of the legal community by surprise. While there may have been clues, here and there, that certain Justices—Justice Scalia in particular<sup>75</sup>—had been planning to call the vitality of the exclusionary rule into question, the fact that the newly-composed

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73. See, e.g., Antoine McNamara, *The “Special Needs” of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209 (2007) (arguing that searches of probationers and parolees should be justified under the special needs doctrine, and that alternative justifications are unsound and unnecessarily complex).

74. See *infra* Part III.B.

75. See *infra* note 106.

Court moved so decisively—and so quickly—following Justice O'Connor's departure was surprising. In this section, I will examine the Court's decision in *Hudson*, including the dissent and Justice Kennedy's enigmatic concurrence. I will then critique Justice Scalia's opinion for the majority, centering my comments on his cavalier endorsement of alternative remedies for knock-and-announce violations and the low bar set by the majority for the restriction of individual rights in the face of law enforcement prerogatives.

### A. Existing Exceptions to the Exclusionary Rule

Carving exceptions out of the exclusionary rule has been something of a pet project for the Court since the rule was incorporated to the states in *Mapp v. Ohio*.<sup>76</sup> Finding a consistent theme to these carve-outs is difficult.<sup>77</sup> Ostensibly, the Court applies the exclusionary rule only “where its remedial objectives are thought most efficaciously served.”<sup>78</sup> The test for making that determination allows for the application of the rule only “where its deterrence benefits outweigh its ‘substantial social costs.’”<sup>79</sup> Whether the Court's decisions hew closely to this formulation are largely a function of one's personal opinion; since *Mapp*, the Court has found the rule inapplicable, for example, in civil trials,<sup>80</sup> grand

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76. 367 U.S. 643 (1961).

77. See e.g., Donald L. Doernberg, *The Right of the People: Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 260 (1983) (exploring the “inconsistency in the Court's treatment of Fourth Amendment rights and remedies”); Wesley MacNeil Oliver, *Toward a Better Categorical Balance of the Costs and Benefits of the Exclusionary Rule*, 9 BUFF. CRIM. L. REV. 201, 201 n.1 (2005) (“I am certainly not the first to observe the irrational patchwork covered by the exclusionary rule.” (citing Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that the Court-created exceptions to the exclusionary rule are inconsistent and subject to personnel shifts on the Court))).

78. *United States v. Calandra*, 414 U.S. 338, 348 (1974).

79. *Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

80. *United States v. Janis*, 428 U.S. 433, 459–60 (1976) (“[T]he judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign.”).

jury proceedings,<sup>81</sup> when police reasonably rely on a warrant unsupported by probable cause,<sup>82</sup> when police reasonably rely on statutory authority,<sup>83</sup> when the evidence seized would have been inevitably discovered,<sup>84</sup> when the illegal actions of police are sufficiently attenuated from the discovery of the evidence,<sup>85</sup> and so forth. What is clear, however, is that the Court had consistently upheld the central role of the exclusionary rule in Fourth Amendment analysis.

*B. Hudson v. Michigan—The Frontal Assault on the Exclusionary Rule Begins*

Given the Court's history in this regard, a holding that an exclusionary remedy was not available for knock-and-announce violations seems like just another log on the pile. Why, then, should one be concerned about the Court's decision in *Hudson*? I argue that the majority opinion in *Hudson* betrayed a disturbingly hostile attitude by the conservative bloc of the new Roberts Court to the very idea of the exclusionary remedy itself. While one might legitimately question whether an exact fit exists between a knock-and-announce violation and an exclusionary remedy in this particular case, the majority opinion in *Hudson* makes clear that the newly-composed Court is beginning a serious re-evaluation of the exclusionary rule's place in the constitutional order and offers clues as to a majority of the Court's view of personal privacy vis-à-

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81. *Calandra*, 414 U.S. at 349–52 (holding the exclusionary rule inapplicable to grand jury proceedings).

82. *Leon*, 468 U.S. at 912–22 (1984) (adopting a good faith exception where officers reasonably rely on a warrant later found to be unsupported by probable cause).

83. *Illinois v. Krull*, 480 U.S. 340, 349–55 (1987) (establishing a good faith exception to the Fourth Amendment exclusionary rule where police rely on statutory authority).

84. *Nix v. Williams*, 467 U.S. 431 (1984) (establishing an exception to the Fourth Amendment exclusionary rule when the evidence illegally seized would have been inevitably discovered by authorities).

85. *Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that the confession of a suspect that was sufficiently attenuated from illegal arrest could be admitted at trial).

vis the government's interest in searches, surveillance, and general law enforcement.

### 1. *Setting the Stage*

It all started innocently enough. In late 2005, the Supreme Court agreed to hear the appeal of *People v. Hudson*,<sup>86</sup> a state case in which the Michigan Supreme Court, in direct contravention of every state court (save one)<sup>87</sup> and every federal circuit (save one),<sup>88</sup> reaffirmed its decision that the exclusionary rule was an inappropriate remedy for knock-and-announce violations.<sup>89</sup> The attorney who argued the case to the Supreme Court on behalf of the petitioner, David A. Moran, has written that he felt strongly that this case would be nothing more than an opportunity for the Court to rebuke the Michigan court's outlier decision while cleaning up some doctrinal loose ends emerging from *Wilson v. Arkansas*,<sup>90</sup> the case that "constitutionalized" the knock-and-announce rule a decade prior.<sup>91</sup>

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86. No. 246403, 2004 WL 1366947 (Mich. Ct. App. June 17, 2004), *lv. appeal denied*, 692 N.W.2d 385 (Mich. 2006).

87. *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999).

88. *United States v. Langford*, 314 F.3d 892, 894 (7th Cir. 2002).

89. *Hudson*, 2004 WL 1366947, at \*1 (citing *People v. Vasquez*, 602 N.W.2d 376 (1999); *People v. Stevens*, 597 N.W.2d 53 (1999)).

90. 514 U.S. 927 (1995).

91. David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO S. CT. REV. 283, 295-96 (2006):

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*, 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*, 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. *Stevens*, in effect, gave the Michigan 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. The Michigan Supreme Court's decision seemed especially vulnerable given that the United States Supreme Court had

The facts of *Hudson* were simple enough. After obtaining a warrant authorizing a search for drugs and firearms at the home of the defendant, Booker Hudson, the police arrived at his home, announced their presence, and, after waiting just “three to five seconds,” entered Mr. Hudson’s home.<sup>92</sup> This was a clear knock-and-announce violation;<sup>93</sup> indeed, Michigan conceded as much at trial and throughout the appeal.<sup>94</sup> Moreover, the crime for which Mr. Hudson was eventually convicted, possession of crack cocaine, was “relatively minor.”<sup>95</sup> All told, this should have been a fairly straightforward case of applying *Wilson* and holding that the exclusionary rule applied to knock-and-announce violations, just as almost every court in the country assumed it did.<sup>96</sup>

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twice suppressed evidence seized after knock-and-announce violations, and had, just eleven years ago, unanimously held that the knock-and-announce rule was part of the Fourth Amendment in *Wilson v. Arkansas*.

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, 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*, 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.

(citations omitted).

92. *Hudson v. Michigan*, 126 S. Ct. 2159, 2162 (2006).

93. *Id.* at 2163.

94. *Id.*

95. Hudson was found by the judge at his bench trial as having possessed five rocks of crack cocaine and was sentenced to probation. Moran, *supra* note 91, at 297–98.

96. Prior to oral argument, Moran believed that the only interesting question in the case was whether the Michigan Supreme Court had unduly expanded the “inevitable discovery” doctrine to encompass any situation in which a knock-and-announce violation occurred. As he stated:

Therefore, I thought *Hudson* was about two things: the importance of maintaining an effective deterrent so that police would respect the



And at the first oral argument in January, 2006, that seemed to be the case. While Justice Scalia floated the idea of 42 U.S.C. § 1983 (hereinafter § 1983) being an adequate remedy to knock-and-announce violations, it appeared that at least five (and possibly six) Justices were supportive of the idea that the exclusionary rule was the proper remedy.<sup>97</sup> As fate would have it, though, shortly after oral argument Justice O'Connor, a probable supporter of Mr. Hudson's argument,<sup>98</sup> resigned from the Court. After Justice

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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.

*Id.* at 299.

97. It was clear that Justices Breyer, Ginsburg, Souter, and Stevens were supportive, and it appeared as though Justice O'Connor and perhaps Justice Kennedy were as well. For a transcript of the first oral argument, see United States Supreme Court Official Transcript, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360), 2006 WL 88656.

98. Justice O'Connor indicated her sympathy for Mr. Hudson's position at the first oral argument. From that argument, the following exchange took place between Justice O'Connor and David B. Salmons, Assistant to the Solicitor General, appearing as *amicus curiae* on behalf of the Respondent:

MR. SALMONS: No, Your Honor. The knock-and-announce requirement is—we take no issue with that. That is required by the fourth amendment. With regard—

JUSTICE O'CONNOR: Well—

MR. SALMONS: —to deterrence—

JUSTICE O'CONNOR: —but in this very case you had an officer who said it was his regular policy—

MR. SALMONS: Well—

JUSTICE O'CONNOR: —never to knock and announce—

MR. SALMONS: That's not—

JUSTICE O'CONNOR: —to just go in. So, if the rule you propose is adopted, then every police officer in America can follow the same policy. Is there no policy protecting the homeowner a little bit—

MR. SALMONS: Of course the—

JUSTICE O'CONNOR: —and the sanctity of the home—

MR. SALMONS: Of course there is—

JUSTICE O'CONNOR: —from this immediate—

MR. SALMONS: —Your Honor, and that is not—

JUSTICE O'CONNOR: —entry?

O'Connor was replaced by Samuel Alito, the Court ordered the case re-argued. It soon became clear at re-argument that Justice Scalia, with a new-found ally, had grand plans in mind for Mr. Hudson. As Dean Moran recounts:

At the re-argument . . . 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 knock-and-announce rule. When I responded that such a notion contradicts the very premise of *Mapp v. Ohio*, 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>99</sup>

Just a few weeks later, the Court delivered its opinion. The result was unexpected, to say the least.<sup>100</sup>

## 2. *The Majority Opinion*

Justice Scalia, joined by Justices Alito, Kennedy, Thomas, and Chief Justice Roberts, began by noting that the knock-and-

MR. SALMONS: —our position. And we, respectfully, would argue that that’s not an appropriate way to conduct the deterrence analysis. Even just on the terms of deterrence, we think that suppression here would be a disproportionate remedy. And that’s because, as this Court has repeatedly recognized, the officers already have an incentive, inherent in the nature of the circumstances, to announce and delay some period of time before entry.

*Id.* at 58–59.

99. Moran, *supra* note 91, at 299–300 (citations omitted).

100. See, e.g., M.K. Jamison, *New Developments in Search & Seizure Law*, 2006-APR Army Law. 9, 25 (2006) (noting, in 2004, that the Court’s October, 2005 term will see a case (*Hudson*) dealing with the inevitable discovery exception to the exclusionary rule). Needless to say, the Court had other ideas about what to do with *Hudson*.

announce rule itself was not at issue; rather, the only question was one of remedy.<sup>101</sup> Specifically, the question was whether excluding evidence obtained in the home following a knock-and-announce violation was appropriate.<sup>102</sup> From the start, Justice Scalia made his lack of enthusiasm for the exclusionary rule apparent. “Suppression of evidence . . . has always been our last resort, not our first impulse . . . . [We] have . . . repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging its application.”<sup>103</sup>

The crux of the majority’s opinion dealt with the causal connection between a violation and the application of the exclusionary rule. Noting that the exclusionary rule is not automatically applied when evidence is obtained illegally because the causal connection “can be too attenuated to justify exclusion,”<sup>104</sup> the Court found that while violations of the warrant requirement bear a direct relation to the discovery of evidence (because “citizens are entitled to shield their persons, houses, papers, and effects” until a valid warrant has been issued),<sup>105</sup> violations of the knock-and-announce rule do not bear such a direct relationship because the purpose of the rule is the “protection of human life and limb,” both of the homeowner and the entering agent.<sup>106</sup>

Turning next to the deterrence effect of the exclusionary rule in this context, Justice Scalia noted that exclusion is appropriate only “where its deterrence benefits outweigh its substantial social costs.”<sup>107</sup> He found the costs were considerable; not only would incriminating evidence be lost, but “a constant flood of alleged failures to observe the rule” would deluge the courts, offering

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101. *Hudson v. Samson*, 126 S. Ct. 2159, 2162–63 (2006).

102. *Id.*

103. *Id.* at 2163 (citations omitted).

104. *Id.* at 2164.

105. *Id.* at 2165 (citing U.S. CONST. amend. IV).

106. *Id.* Justice Scalia continued: “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 evidence, the exclusionary rule is inapplicable.” *Id.*

107. *Id.*

some defendants a virtual “get-out-of-jail free” card.<sup>108</sup> As opposed to these high costs, Justice Scalia urged that there is virtually no deterrence benefit to applying the rule, since the requirement can be suspended whenever there is a reasonable possibility that evidence would be destroyed or violence would erupt. Just because the Court applies an exclusionary remedy to other violations in different contexts to deter illegal conduct does not mean that exclusion is a valid remedy here:

And what, other than civil suit, is the “effective deterrent” of a police [officer’s] violation of an already-confessed suspect’s Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one’s nightclothes . . . .<sup>109</sup>

Addressing the elephant in the room, Justice Scalia argued that denying an exclusionary remedy to knock-and-announce violations would not eviscerate the knock-and-announce rule itself. Given the availability of § 1983 remedies to constitutional violations by state officers, as well as the availability of 42 U.S.C. § 1988(b) (2000) [hereinafter § 1988(b)], which authorizes plaintiff’s attorney’s fees in civil rights cases, and the prospect of “increasingly professional” police forces, the majority asserted (although they admit they do not know for certain) that violations of the knock-and-announce rule will be adequately deterred in the absence of an exclusionary remedy.<sup>110</sup>

Justice Scalia concluded by tying *Hudson* to three cases previously decided by the Court: *Segura v. United States*,<sup>111</sup> *New York v. Harris*,<sup>112</sup> and *United States v. Ramirez*.<sup>113</sup> These cases,

108. *Id.* at 2165–66.

109. *Id.* at 2167.

110. *Id.* at 2167–68.

111. 468 U.S. 796 (1984) (holding that evidence obtained pursuant to an illegal entry into the home by police need not be excluded if the police had sufficient information to obtain a warrant prior to the illegal entry).

112. 495 U.S. 14 (1990) (holding that in the situation where police entered a home illegally and arrested the suspect, that suspect’s statements at the stationhouse need not be excluded because the exclusionary rule was “designed to protect the physical integrity of the home”).

Justice Scalia argued, stood for the “proposition that an impermissible manner of entry [into the home] does not necessarily trigger the exclusionary rule . . . .”<sup>114</sup> These cases, all involving some sort of illegal police behavior during entry into the home, and where the evidence discovered was deemed admissible, were cited primarily to show that “the reason for a rule must govern the sanctions for the rule’s violation.”<sup>115</sup> In cases like *Hudson*, where they do not, exclusion is not proper.

### 3. Justice Kennedy’s Concurrence

Justice Kennedy provided the crucial fifth vote against the petitioner.<sup>116</sup> He joined most of Justice Scalia’s opinion (save for the portion citing *Segura*, *Harris*, and *Ramirez* as support for the majority’s reasoning),<sup>117</sup> in addition to adding some thoughts of his own in concurrence.

To begin, Justice Kennedy offered assurances that the knock-and-announce rule was still alive and well. “Two points should be underscored with respect to today’s decision. First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order.”<sup>118</sup> Next, he assured his audience that the exclusionary rule maintained its central role in Fourth Amendment analysis: “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>119</sup> While Kennedy noted the historic import of the knock requirement, he found that suppression was unjustified. “Under our precedents, the causal link between a violation of the knock-and-announce requirement and a later search is too

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113. 523 U.S. 65 (1998) (discussing in dicta that property destruction during a home search only mandates exclusion of recovered evidence when a sufficient causal relationship between the property destruction and the discovery of the evidence exists). This portion of the opinion was joined only by Chief Justice Roberts and Justices Thomas and Alito.

114. *Hudson*, 126 S.Ct. at 2170.

115. *Id.* at 2169 n.2.

116. *Id.* at 2170 (Kennedy, J., concurring).

117. *Id.* at 2168–70 (majority opinion).

118. *Id.* at 2170 (Kennedy, J., concurring).

119. *Id.*

attenuated to allow suppression.”<sup>120</sup> While the dissent was right to note the constitutional sanctity of the home, the fact that other civil remedies exist (such as § 1983 claims), and the fact that no “demonstrated pattern of knock-and-announce violations” has been shown, Justice Kennedy argued that suppression is too strong a medicine for this particular constitutional violation.<sup>121</sup>

#### 4. *The Dissent*

Writing for the dissent, Justice Breyer began by arguing that the Court’s holding “represents a significant departure” from precedent.<sup>122</sup> Clearly, it was undisputed that the Fourth Amendment requires police to knock-and-announce their presence prior to executing a warrant in the home.<sup>123</sup> And so, given the Court’s reasoning in *Wilson* that “a court must ‘consider[r]’ whether officers complied with the knock-and-announce requirement ‘in assessing the reasonableness of a search or seizure,’”<sup>124</sup> and given the command of *Weeks* and *Mapp* that an unreasonable search or seizure generally requires exclusion of evidence gleaned therefrom, Justice Breyer argued that an exclusionary remedy to knock-and-announce violations flows naturally from the Court’s precedent: “Why,” Justice Breyer asked, “is [the] application of the exclusionary rule any less necessary here?”<sup>125</sup>

Turning to the deterrence values of alternative remedies, Justice Breyer questioned whether knock-and-announce violations will be under-deterred. “What reason is there to believe that those remedies (such as private damages actions under § [1983]), which the Court found inadequate in *Mapp*, can adequately deter

120. *Id.*

121. I discuss Justice Kennedy’s concurrence in detail *infra* Part II.C.4.

122. *Hudson*, 126 S. Ct. at 2171 (Breyer, J., dissenting).

123. See *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) (unanimously holding that the Fourth Amendment requires police to knock-and-announce their presence prior to executing a warrant in the home).

124. *Hudson*, 126 S. Ct. at 2173 (Breyer, J., dissenting) (quoting *Wilson*, 514 U.S. at 934).

125. *Id.* at 2174.

unconstitutional police behavior here?”<sup>126</sup> Noting that the Court failed to cite a single case where a plaintiff had collected more than nominal damages stemming from a violation,<sup>127</sup> Justice Breyer criticized the Court for simply assuming that civil claims will adequately protect the integrity of the knock-and-announce without any supporting evidence. Critically, Justice Breyer admonished the Court for its over-reliance on the idea of the “substantial social costs” incurred by applying the rule here. He argued that the costs incurred are no different than the costs incurred by any application of the exclusionary rule: evidence might be lost, and the guilty might go free.<sup>128</sup> Justice Breyer recognized the majority’s formulation of these costs as a broader argument against exclusion: “The majority’s ‘substantial social costs’ argument is an argument against the Fourth Amendment’s exclusionary principle itself.”<sup>129</sup>

Finally, Justice Breyer criticized the majority assertion that knock-and-announce violations are not the “but for” causation of the discovery of evidence that typically leads to exclusion. Besides the fact that this is a questionable empirical claim at best,<sup>130</sup> Justice Breyer argued that it is of limited relevance:

[W]hether the interests underlying the knock-and-announce requirement are implicated in any given case is, in a sense, beside the point . . . where a search is unlawful, the law insists upon suppression of the evidence consequently discovered, even if that evidence or its possession has little or nothing to do with the reasons underlying the constitutionality of the search.<sup>131</sup>

In short, Justice Breyer believed that the values underlying the Fourth Amendment are served by exclusion of evidence obtained pursuant to illegal entry by police whether or not the actual

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126. *Id.* (citing Yale Kamisar, *In Defense of the Search and Seizure Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 119, 126–29 (2003) (arguing that there is no “meaningful alternative” to exclusion)).

127. *Id.*

128. *Id.* at 2177.

129. *Id.*

130. *Id.* at 2177–79.

131. *Id.* at 2181.

discovery of evidence is causally related to the knock-and-announce violation.<sup>132</sup>

### C. Critiquing Hudson

Two main grounds of criticism arise from the majority's opinion in *Hudson*. First is the majority's insistence that civil remedies will adequately protect individuals' right under *Wilson* to be informed of police presence before entry. Second, the majority uses a social cost versus deterrence benefit balancing test that will in theory almost never result in the application of the exclusionary rule. Whether or not this is by design,<sup>133</sup> the majority's methodology has called into question the continued vitality of the exclusionary rule as a remedy for Fourth Amendment violations, and provides compelling evidence of the "conservative" bloc's conception of individual privacy and dignity vis-à-vis the interests of government and law enforcement.

#### *1. Despite the Court's Insistence, the Efficacy of Civil Suits to Remedy Knock-and-Announce Violations is Uncertain*

To begin, Justice Scalia's assertion at oral argument and in his opinion that § 1983 provides an adequate remedy for victims of knock-and-announce violations<sup>134</sup> is dubious at best. Justice Scalia effectively argues that, in the absence of an exclusionary remedy, every time the police commit a knock-and-announce violation (an event one might expect to occur more frequently following *Hudson*),<sup>135</sup> the aggrieved party will have the knowledge,

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132. The dissent concludes by noting that the Court's precedents allow for no-knock entries where the danger of violence or the destruction of evidence are reasonable possibilities, thus blunting the United States' argument that the exclusionary rule is too harsh a remedy for knock-and-announce violations given the possibility of loss of evidence. *Id.* at 2181–82. The dissent also criticizes the majority's reliance on *Segura*, *Harris*, and *Ramirez*. *Id.* at 2183–86.

133. I argue that the majority intentionally placed the continued vitality of the exclusionary rule in question, based on the content of the opinion and Justice Scalia's statements at oral argument. *See infra* Part III.A.

134. *Hudson*, 126 S. Ct. at 2167.

135. Given that *Hudson* removes one deterrent to violations (however effective one believes it to be), logic suggests that this would have the effect of



resources, ability, and time to successfully bring a § 1983 action in federal court.<sup>136</sup> The dissent in *Hudson* recognized this reasoning as pure sophistry. “What reason is there to believe that those remedies (such as private damages actions under § 1983), which the Court found inadequate in *Mapp*, can adequately deter unconstitutional police behavior here?”<sup>137</sup> The dissent continues:

[T]he majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. . . . As Justice Stewart, the author of a number of significant Fourth Amendment opinions, explained, the deterrent effect of damage actions “can hardly be said to be great,” as “such actions are expensive, time-consuming, not readily available, and rarely successful.”<sup>138</sup>

Responding to this critique, Justice Scalia would have us believe that § 1988(b), which provides for attorney’s fees for civil rights plaintiffs, offers an adequate incentive for attorneys to pursue knock-and-announce claims in federal court.<sup>139</sup> Justice Scalia notes that “[t]he number of public-interest law firms and

necessarily increasing the number of violations, at least in the short term. Whether increased use of civil remedies will, in the long term, reduce the number of violations (as Justice Scalia intimates, but cannot bring himself to fully argue) is obviously an open question, and will be for some time.

136. *Id.* (“Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; *Monroe v. Pape*, [which] began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*. It would be another 17 years before the § 1983 remedy was extended to reach the deep pocket of municipalities . . . .”). One might be right to question Justice Scalia’s enthusiasm even for this proposed remedy, given his backhanded tone.

137. *Id.* at 2174 (Breyer, J., dissenting) (citing Kamisar, *supra* note 126, at 126–29 (arguing that “five decades of post-Weeks ‘freedom’ from the inhibiting effect of the federal exclusionary rule failed to produce any meaningful alternative to the exclusionary rule in any jurisdiction” and that there is no evidence that “times have changed” post-*Mapp*)).

138. *Id.* at 2174–75 (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1388 (1983)).

139. *Id.* at 2167 (majority opinion).

lawyers who specialize in civil-rights grievances has greatly expanded.”<sup>140</sup> The insincerity of this argument is apparent. Even given the existence of § 1988(b), relatively few defendants would have the wherewithal and the resources to find representation and bring such claims to their conclusion. Indeed, what would be the point? By the time the civil case was tried or settled, the suspect in question would have been acquitted of the charge, already released, or still be imprisoned. Does Justice Scalia believe that a civil suit for nominal damages (the cost of a broken door, say) will be pursued by most (or even some) of these individuals, especially if they are no longer incarcerated, even if they had the prospect of representation?<sup>141</sup> It would hardly seem worth the trouble, given the slim prospects for substantial recovery. Prospects for pro se plaintiffs are even dimmer.<sup>142</sup> Justice Scalia’s assertion that there are a “greatly expanded” number of public interest law firms who specialize in civil rights grievances is equally un-compelling. Justice Scalia provides no evidence (nor even explicitly argues) that there are sufficient numbers of attorneys available and willing to handle the new civil suits that he claims will take the place of suppression motions, nor does he provide any guidance as to

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140. *Id.*

141. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111 (2003) (noting plaintiffs’ high failure rate and theoretically high barriers to success in civil actions for exclusionary violations); William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 828 (2000) (agreeing with the Court’s finding in *Leon* that once a Fourth Amendment violation has occurred, the injury is essentially irreversible and cannot easily be repaired).

142. Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Court*, 47 N.Y.U. L. REV. 157, 176–87 (1972) (arguing that the vast majority of pro se prisoners are unable to state valid claims of civil rights violations); Richard Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 284–85 (2006) (“Unable to hire a lawyer or investigator, with no right to an appointed lawyer, the typical indigent, convicted, and innocent person is unlikely to be able to uncover any evidence that would prove that he or she did not commit the crime. Even if the wrongfully convicted person is fortunate to find evidence that casts doubt upon guilt, and can either initiate litigation pro se or find a lawyer willing to take the case, the person still has to navigate the perilous waters of retroactivity, time limits, procedural defaults, finality, difficult burdens of proof, and downright judicial hostility in order to gain relief.”).

whether the Court would be willing to re-establish an exclusionary remedy for violations should that unknown number of civil-rights attorneys dip below a certain level—or whether such a thing could conceivably be measured accurately.

Similarly, putting aside for the moment the question of efficacy, the Court's preference for post hoc civil remedies undermines another main rationale for its decision—the danger of a “flood” of knock-and-announce suppression claims. Justice Scalia argues that “[i]mposing that massive remedy [exclusion] . . . would generate a flood” of claims for suppression.<sup>143</sup> However, most criminal cases that go to trial will include a suppression hearing anyway; there would seem to be no great burden in allowing knock-and-announce claims to be brought alongside other suppression claims a defendant may have.<sup>144</sup> Given that, until *Hudson*, it had been assumed by most courts that an exclusionary remedy existed for knock-and-announce violations, and given that the criminal courts have not been suffering from a deluge of knock-and-announce suppression motions, Justice Scalia is clearly overstating the threat to judicial economy posed by allowing exclusion. Indeed, Justice Scalia's judicial economy argument seems especially disingenuous given his full-blown endorsement

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143. *Hudson*, 126 S. Ct. at 2165–66.

144. Indeed, Justice Scalia argues that determinations of whether knock-and-announce violations occurred are inherently more complicated—requiring more “extensive litigation”—than determining whether, say, the warrant or *Miranda* requirements have been fulfilled. “[W]hat constituted a ‘reasonable wait time’ in a particular case . . . or whether there was reasonable suspicion . . . is difficult for the trial court to determine and even more difficult for an appellate court to review.” *Id.* at 2166.

This argument borders on the absurd. Given the complex and often contradictory nature of the Court's other criminal procedure jurisprudence—especially its warrant and *Miranda* jurisprudence—it simply boggles the mind that Justice Scalia actually believes that, for some reason, knock-and-announce motions are more than the criminal court system can handle on a regular basis. One would be justified, I think, in questioning the sincerity of Justice Scalia's belief in this line of reasoning.

of a § 1983 remedy, a far more costly and time consuming process than a straightforward suppression motion to the trial court.<sup>145</sup>

*2. The Court's Social Cost Versus Deterrence Benefit Analysis Will Almost Never Result in the Application of the Exclusionary Rule*

More fundamentally, the Court engages in a social cost versus deterrence benefit analysis that can be expected to preclude the application of the exclusionary rule in most circumstances. As to the costs of imposing the rule, Justice Scalia warns that “[i]n addition to the grave adverse consequences that exclusion of relevant evidence always entails,” including the release of “dangerous criminals” into society and handicapping police in effectuating investigations and arrest, “imposing that massive remedy . . . would generate a flood” of claims for suppression.<sup>146</sup> On the other hand, Justice Scalia claims that deterrence benefits would be small: since there is not strong incentive for police to violate the rule, and since civil remedies are available,<sup>147</sup> “deterrence of knock-and-announce violations is not worth a lot.”<sup>148</sup> Justice Scalia clearly signaled his broader intentions at oral argument when he said that “*Mapp* was a long time ago. It was before § 1983 was being used, wasn’t it?”<sup>149</sup> Obviously, Justice Scalia (and, by extension, the four other Justices that signed onto the reasoning of his opinion) more or less agree with this sentiment.

The danger in the Court’s formulation of this balancing act is that it by its very formulation favors the government interest over that of the individual’s interest in autonomy, privacy, and dignity—the essential values protected by the Fourth Amendment. One could almost always successfully argue that reducing the risk of letting “dangerous criminals” go free, or reducing the risk of

145. One might be justified in wondering whether the majority was cognizant of this contradiction and chose to argue it anyway, thus betraying their true enthusiasm for the knock-and-announce rule in and of itself.

146. *Id.* at 2165–66.

147. *See supra* Part II.C.1.

148. *Hudson*, 126 S. Ct. at 2166.

149. Moran, *supra* note 91, at 299–300 (citations omitted).

handicapping the ability of police to effectively investigate crime, arrest criminals, and protect themselves is more important than maintaining one individual's interest in some amorphous conception of privacy. This "thumb on the scale" method of applying the exclusionary rule has been heavily criticized from many quarters as being designed to prevent the application of the exclusionary rule in most circumstances,<sup>150</sup> as well as being guilty of false precision.<sup>151</sup>

### *3. The Court's Assault on Exclusion Ignores the Judicial Integrity Rationale of the Exclusionary Rule*

Perhaps the most distressing aspect of the Court's assault on the exclusionary rule is that *Hudson* fails to address the higher-order purpose served by the exclusionary rule: judicial integrity. *Terry* is worth quoting at length here:

The [exclusionary rule] also serves another vital function—"the imperative of judicial integrity." Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of

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150. See, e.g., Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, 34 TULSA L. REV. 465, 487 (1999) (arguing that the results of the Court's balancing test are "quite predictable" given the formulation of the test itself); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261 (1998) (describing the Court's test as "flawed"); Oliver, *supra* note 77 at 210 (describing the Court's cost-benefit analysis as a "sham").

151. Norton, *supra* note 150, at 305-06 ("[T]he exclusionary rule has been converted into an unprincipled economic version of the Rorschach ink blot, called the cost-benefit analysis. Using an economic metaphor, but without measurable empirical data to weigh, the Supreme Court has too often engaged in what can only be described as adjudication by hunch.").

legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.<sup>152</sup>

While the *Hudson* majority asserts that civil remedies will be sufficient to make victims of constitutional violations whole—a dubious assertion at best<sup>153</sup>—its focus on deterrence as the sole justification for the exclusionary rule is unsatisfying. Judicial integrity is (or at least was) a key rationale behind the Court’s recognition of the rule, as articulated in *Weeks*<sup>154</sup> and *Mapp*.<sup>155</sup>

Now, one would be justified in arguing that the “judicial integrity” train has long since left the station when it comes to the exclusionary rule, given the myriad exceptions to the rule carved out since *Mapp*.<sup>156</sup> In none of those rule-limiting decisions does the Court seem particularly troubled with the idea that the integrity of the judicial system is compromised when evidence seized in the wake of illegal police behavior is used against the defendant in one fashion or another. If that is the case, why should one be concerned with *Hudson*? Isn’t this case just more of the same? There are two responses. First, simply because the Court has had a history of carving exceptions to the exclusionary rule without paying adequate heed to this fundamental concern does not excuse the Court from ignoring it in the future; the integrity of the trials and the judicial process as a whole is central to the purpose of the

152. *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968) (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

153. *See supra* Part II.B.1.

154. *Weeks v. United States*, 232 U.S. 383 (1914) (“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”).

155. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (Clark, J.) (“But, as was said in *Elkins*, ‘there is another consideration—the imperative of judicial integrity.’ The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” (citations omitted)).

156. *See supra* Part II.A.

rule. As Professor Norton has suggested, "deterrence need not and should not be viewed as the only, or even the most important, justification for the exclusion of evidence seized in violation of the Constitution."<sup>157</sup> Certainly, the idea of exclusion being necessary to legitimize criminal trials is a consistent theme throughout the early exclusion cases.<sup>158</sup>

Second, the decision in *Hudson* is qualitatively different than the Court's prior recognition of exceptions to the rule in ways that seriously undermine the legitimacy of trials in which evidence gleaned pursuant to a knock-and-announce violation is admitted. The removal of an exclusionary remedy in these situations places the Court in the position of removing an exclusionary remedy at trial for blatant, knowing constitutional violations by government officials that lead directly to the discovery of evidence. This stands in contrast to the Court's prior carve-outs, which allowed for introduction of illegally obtained evidence in venues outside the prosecution's case-in-chief,<sup>159</sup> where the violation and the discovery of evidence were in some sense "separate" from the illegal activity of the officers,<sup>160</sup> or where the officers had a good faith belief that they were acting in accordance with the law.<sup>161</sup> In none of these situations could the government official knowingly violate a suspect's constitutional rights and use the evidence he

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157. Norton, *supra* note 150, at 284.

158. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968).

159. The exclusionary rule is generally not applicable in grand jury proceedings (*United States v. Calandra*, 414 U.S. 338 (1984)), deportation proceedings (*I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984)), federal civil tax proceedings (*United States v. Janis*, 428 U.S. 433 (1976)), habeas corpus proceedings (*Stone v. Powell*, 428 U.S. 465 (1976)), or parole revocation hearings (*Pa. Bd. of Prob. v. Scott*, 524 U.S. 357 (1998)).

160. See, e.g., *Murray v. United States*, 487 U.S. 533 (1988) (holding that illegal investigatory behavior by police does not render evidence inadmissible if discovered independently of the illegal activity; also, evidence that would have inevitably been discovered is admissible at trial); *Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that confession of suspect was sufficiently attenuated from illegal arrest, and thus could be admitted at trial).

161. *Leon v. United States*, 468 U.S. 897 (1984) (holding that evidence obtained during a search conducted pursuant to a facially valid warrant is admissible, even if the warrant is later found to be unsupported by probable cause).

obtains at trial against the suspect in the prosecution's case-in-chief. Now after *Hudson*, he can.

Take, for example, a situation where Officer is about to enter Suspect's home pursuant to a valid warrant. Suspect is engaging in some sort of illegal activity that could be ceased, without leaving incriminating evidence, if given a few second's notice, within sight of the doorway. Officer knowingly chooses not to knock-and-announce, and enters the home. Suspect is seen by Officer engaging in the illegal activity. No exceptions to the knock-and-announce rule apply. At trial, evidence of the illegal activity is presented. Prior to *Hudson*, it was assumed that such evidence could not have been admitted because its discovery was the direct result of a constitutional violation. With *Hudson*, the Court has now sanctioned the use in the prosecution's case in chief of evidence gleaned as a direct and knowing result of a violation of an individual's Fourth Amendment rights.

While it seems unsavory to defend the application of the exclusionary rule in a given instance by arguing that the proper application of the rule shields illegal conduct from discovery, that is the natural byproduct of the rule: privacy, dignity, and autonomy are deemed important enough to justify the possibility that evidence will on occasion be lost and crimes will go unpunished. An honest defense of the rule must acknowledge this fact: the exclusionary rule will seldom—but sometimes—protect criminals. And that is the way it should be, if the goal of Fourth Amendment adjudication is the promotion of the legitimate privacy interests of all individuals, and the maintenance of the integrity of the judicial system.

#### *4. Justice Kennedy's Concurrence Supports the Notion that the Exclusionary Rule is in Danger*

Some might question whether *Hudson* truly marks the opening salvo in an effort to repudiate the exclusionary rule. Is it not a bit reactionary to assume some grand scheme to overturn such a fundamental rule based on one case alone? Justice Kennedy's concurrence provides clues that change is in the air. In his concurrence, Justice Kennedy took pains to emphasize the historical importance—and the continued vitality—of the knock-



and-announce rule. And yet, he supported the reasoning of a majority opinion that removed what had almost universally been assumed to be the proper remedy for a knock-and-announce violation: exclusion.<sup>162</sup> What message was Justice Kennedy trying to send by concurring?

One reading of Justice Kennedy's concurrence supports the conclusion that he believes that the conservative bloc of the Court (which he is often mentioned as a part of)<sup>163</sup> has called into question the continued vitality of the rule. Clearly, Justice Kennedy agreed with the majority's finding that the purposes of the knock-and-announce rule were not served by excluding evidence seized from the home in the wake of a violation. "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."<sup>164</sup> While he ruminates that a "demonstrated pattern of knock-and-announce violations" might lead the Court to reconsider its decision in *Hudson*, he notes that such a move would force the Court to fundamentally re-evaluate causation doctrine as applied to Fourth Amendment analysis. He notes that the prospects of the Court undertaking such a sea-change are a long shot, at best.<sup>165</sup> The only portion of the Court's opinion Justice Kennedy takes issue with, apparently, is the Court's analysis of *Segura*, *Harris*, and *Martinez*, and yet even then he simply discounts Justice Scalia's analysis as having limited relevance.

The question, then, is why Justice Kennedy concurred. If he was in substantial agreement with the Court's conclusions, why not just sign on to the opinion? This is clearly not a case of a "limiting" concurrence; Justice Kennedy makes clear that he adopts the majority's reasoning, and notwithstanding his somewhat off-handed remark that changing situations might someday cause the Court to reconsider its decision (a position he essentially discounts in the next sentence), the concurrence leaves no "wiggle

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162. See Moran, *supra* note 91, at 299.

163. See *supra* note 13.

164. *Hudson v. Michigan*, 126 S. Ct. 2159, 2170–71 (2006) (Kennedy, J., concurring).

165. *Id.* at 2171.

room” for lower courts looking to soften the blow of the majority’s opinion.

The only plausible answer is that Justice Kennedy concurred to make but one point: “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>166</sup> Justice Kennedy wants to reassure his audience that the Court’s decision does not call the vitality of the rule into question. This, of course, begs the question: if there really was nothing to worry about, why does Justice Kennedy find it necessary to reassure us? If it were clear from the Court’s reasoning that knock-and-announce violations were on a relatively short, finite list of violations that do not carry a remedy of exclusion, there would be no reason for him to concur. Most likely, Justice Kennedy recognizes the tone and substance of the majority opinion for what they are—a bold indication by four justices that they believe that application of the exclusionary rule is not appropriate for most Fourth Amendment violations, and that the scope of the rule will be dramatically constricted as the new Court matures.<sup>167</sup> While Justice Kennedy might someday be the deciding fifth vote that keeps such a fundamental change at bay, one wonders whether Justice Kennedy could supply that vote while remaining consistent with the reasoning he endorses in *Hudson*.<sup>168</sup>

166. *Id.* at 2170.

167. Justice Kennedy’s own line of reasoning in *Hudson* almost assures that the exclusionary rule is slated for substantial contraction, if not outright repudiation, despite his apparent preference to the contrary. By endorsing the majority’s social costs versus deterrence benefits methodology, Justice Kennedy endorses a methodology that will almost never result in the application of the rule. See *supra* Part II.C.2.

168. Justice Kennedy has become somewhat notable for agreeing in principle with a particular line of reasoning, but requiring facts so specific that it becomes difficult or impossible for plaintiffs to meet the standard. Supreme Court reporter Dahlia Lithwick summed up this tendency colorfully:

Kennedy, in short, look[ed] poised to do that thing he does—close the constitutional door to everyone but Elijah. . . . This brand of jurisprudence is the Kennedy blue-plate special. He is officially waiting for the perfect facts before he decides environmental cases, racial gerrymandering cases, and possibly voluntary desegregation cases, too. He’ll agree with the liberals in theory, agree with the conservatives in specifics, and nobody will know what to do about anything.

Nevertheless, it is clear that Justice Kennedy believes, whether he admits it or not, that the conservative bloc of the Court has embarked upon a process of dramatically curtailing the exclusionary rule—a process he will be in the position to ratify or reject.

### III. *SAMSON* AND *HUDSON* TOGETHER: THE ROBERTS COURT DEEMPHASIZES PERSONAL PRIVACY, DIGNITY, AND AUTONOMY

Ultimately, the controversy over the particular remedy for a knock-and-announce violation is of relatively minor importance in the larger constitutional order. While one would be justified in decrying the effective passing of an ancient tenant of security in the home,<sup>169</sup> it seems as though essentially allowing police to proceed into a suspect's home without announcing their presence and waiting a few seconds is a somewhat marginal curtailment of liberty, considering the widespread use of no-knock warrants and the broad "exigent circumstances" exception to the knock-and-announce rule, both of which allow police officers to enter a suspect's home unannounced if they reasonably believe that announcing their presence will present a threat of violence or will lead to the destruction of evidence.<sup>170</sup> Likewise, with regard to the Court's holding in *Samson*, the question of whether parolees have access to full (or even just some) Fourth Amendment rights—in particular the right not to be searched without cause—was something of a foregone conclusion given the Court's precedent, and does not, at first glance, seem to bode especially ill for the future of the Republic.

The unspectacular nature of these rulings on the surface obscures their far-reaching implications, only some of which are

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Dahlia Lithwick, *Affirmative Inaction: Anthony Kennedy Is Sort of Horrified by Voluntary School Desegregation*, SLATE, Dec. 4, 2006, <http://www.slate.com/id/2154853/index.html>.

169. See *Hudson*, 126 S. Ct. at 2171–72 (Breyer, J., dissenting) (decrying the majority's decision to find no exclusionary remedy to knock-and-announce violations under the Fourth Amendment, despite the roots of the requirement dating "back to the 13th century").

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

immediately obvious. What was most notable about *Hudson* was the majority's clear indication that the exclusionary rule is now up for grabs. Whereas the Court before *Hudson* had essentially agreed with the fundamental premise of *Mapp*, that "experience has taught that [exclusion] is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words,'"<sup>171</sup> and simply carved out exceptions to that general rule where appropriate,<sup>172</sup> the majority opinion in *Hudson* betrays a much more fundamental opposition to the application of the rule in most criminal contexts. Similarly, while one might ultimately agree with the Court's conclusion in *Samson* that parolees should be subject to searches on less than probable cause, the Court's rather cavalier assumption that the government's interest in supervising parolees overrides the interest of the parolee to be searched only when there is reason to believe some sort of criminal conduct is afoot is disturbing. This is especially true given the fact that the majority's opinion fails to argue compellingly that such suspicionless searches actually serve the penological, rehabilitative, and reintegrationist goals of parole.<sup>173</sup>

Looking at these decisions as a whole, two conclusions arise. The first is that, in the immediate wake of Justice O'Connor's retirement, the continued vitality of the Fourth Amendment exclusionary rule is clearly in doubt. The second conclusion, again growing directly out of the Court's change in personnel, is that there is now a majority on the Court that will largely accept the idea that the State's interest in law enforcement overrides the individual interest in autonomy, dignity, and privacy in the Fourth Amendment context. While this development has obvious implications in the "ordinary" criminal procedure context, as discussed above, it potentially has more far reaching consequences for the "new generation" of search and seizure cases, only some of

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171. *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (citing *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

172. *See id.* ("Moreover, in some contexts the rule is ineffective as a deterrent.").

173. *See supra* Part I.C.1.

which deal in substantial part with “classic” Fourth Amendment issues. This “new generation” of cases will involve the Court in decisions on national security, executive powers, detainee rights, and privacy in the Internet age.

*A. The Exclusionary Rule Is Now in Play*

The first lesson to take from the Roberts Court’s first major Fourth Amendment cases is that, at least in the short-to-middle term, the exclusionary rule has reached its apex and may well be significantly contracted. Justice Scalia made clear at oral argument and in his opinion that *Hudson* was about more than the potentially loose fit between knock-and-announce violations and the deterrence rationale behind the exclusionary rule. After remarking at oral argument to counsel for the petitioner that *Mapp* was outdated,<sup>174</sup> Justice Scalia wrote in his opinion for the majority that:

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago.<sup>175</sup>

If Justice Scalia simply believed that knock-and-announce violations did not fit comfortably with an exclusionary remedy (a conviction he no doubt holds), there would be no reason to comment upon the “sins” and “inadequacies” of the exclusionary regime as a whole.<sup>176</sup> Clearly, Justice Scalia is making a larger

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174. See Moran, *supra* note 91, at 299–300.

175. *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006).

176. The irony of such a statement being made in an opinion authored by Justice Scalia is eye-opening. Justice Scalia, of course, has premised his constitutional philosophy on an “originalist” view of the Constitution, which (put overly simply) posits that the Constitution should be understood to mean what it meant at the time it was ratified, and that the text of the document being construed, the debates that led to its ratification, and the “beliefs, attitudes, philosophies, prejudices and loyalties” of the adopters of that text are all that should be consulted when applying the text at hand to the case at bar. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989); see also Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 357

point about where he hopes to take the Court's exclusionary jurisprudence. This is not the first time he has intimated his intentions.<sup>177</sup> The numbers seem to work in Justice Scalia's favor; Justice Thomas, his long-time ally, clearly agrees with this sentiment. While it is difficult to speculate given their short tenures as of this writing, it appears as though the newest members of the Court, Chief Justice Roberts and Justice Alito, also agree with this roll-back; if they did not, one would expect them to at least have joined Justice Kennedy in concurrence. And so, Justice Kennedy, the wavering ally, would be the crucial fifth vote to severely curtail or overturn exclusion. The prospects of Justice Kennedy becoming the deciding fifth vote are outlined above.<sup>178</sup> As of this writing, another Court vacancy filled under a Republican president might well make unnecessary Justice Kennedy's participation in the Roberts Court's new Fourth Amendment course.

No longer can it be said, as it was by Professor Oliver just two years ago, that "[t]he Court has used the opinions creating

(2006). To say that the public should not be forced to "pay for the sins and inadequacies of a legal regime that existed almost a half-decade ago" is to wonder why Justice Scalia so often "forces" the public to pay for the sins of old legal regimes in so many other contexts, and why Justice Scalia abandoned his usual practice in the case of knock-and-announce violations.

One might answer these queries by noting that Justice Scalia takes aim at the "legal regime" of exclusion erected by the Court in *Weeks* and *Mapp*, not the legal regime surrounding the adoption of the Fourth Amendment itself, which is the only legal regime inviolate to an originalist. In response, one might in turn argue that given the patently inadequate remedies available for knock-and-announce violations in the wake of *Hudson*, see *supra* Part II.C, the Court has essentially read the requirement (which predated the Fourth Amendment) out of the Constitution—certainly a non-originalist action, bearing in mind that Justice Scalia himself claims not to dispute that knock-and-announce is a constitutional requirement. Such a determination, of course, requires one to agree with the idea that exclusion is the only truly effective remedy yet discovered for Fourth Amendment violations.

177. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) ("One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly.").

178. See *supra* Part II.C.4.

exceptions to the rule to obscure its continued support for the rule that it has not abandoned."<sup>179</sup> Clearly, *Hudson* marks a shift in the Court's jurisprudence away from carving exceptions to the rule towards questioning the basic validity of the rule itself. While it is still early in the new Court's tenure, the Roberts Court may yet prove correct Justice Brennan's then-premature proclamation that the exclusionary rule is soon to be a historical footnote of Fourth Amendment jurisprudence.<sup>180</sup>

*B. Hudson and Samson Together—The Court Takes a Dim View of Personal Privacy and Autonomy*

More fundamentally, *Samson* and *Hudson* can be seen as natural outgrowths of the conservative bloc's view of the balance between constitutionally protected personal privacy and the interests of government in law enforcement and social control. In *Samson*, the Court found that society's interest in supervising parolees outweighed any expectation of privacy and autonomy that parolees might subjectively or objectively have; in *Hudson*, the Court found that society's interest in effective law enforcement (through admission of evidence discovered following an illegal entry into the home) outweighed the citizen's right to be informed of police presence before entry.

The troubling aspect of the Roberts Court's decisions in these cases is not so much its substantive determinations about the particular questions presented, although they are highly questionable; rather, it is the fact that the Court's formulations of the balancing test between constitutionally protected autonomy and law enforcement ensure that in the majority of future cases of this sort, one can expect that the government's interests will predominate over those of the individual. In *Samson*, the Court determined that it was reasonable for the government to essentially have the unfettered right to search any parolee at any time. This is

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179. Oliver, *supra* note 77, at 242.

180. *United States v. Calandra*, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting) ("I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases . . .").

troubling, not because parolees should be free from intense oversight, but because it puts government officials in the position of being able to search someone “just because.” In essence, the Court held that since parolees need oversight, suspicionless searches are acceptable. The conclusion, however, does not follow from the premise. If the Court in *Samson* had bothered to attempt to tie such searches to the effective supervision of parolees, instead of simply assuming the relationship to be self-evident, or had undertaken a good-faith special needs analysis, the decision might be justifiable. It appears as though the reason the Court did not tie these together is because it could not; there is at this point no reason to believe that suspicionless searches play any significant role in the penological or rehabilitative goals of parole.<sup>181</sup> Given that the Fourth Amendment has long been construed as being primarily concerned with preventing searches unless justified by probability of contemporaneous wrongdoing, this penchant for automatically equating effective “supervision” with almost unfettered official discretion to search is worrisome.

The same is true for the Court’s decision in *Hudson*; as the majority sees it, the government’s ability to use evidence discovered immediately following a blatant illegality trumps the individual’s right to (sometimes) be notified before the police enter the home. To the extent one believes the exclusionary rule to be the most effective method yet discovered for deterring Fourth Amendment violations,<sup>182</sup> the Court’s move away from the rule potentially opens the door to a vast restructuring of the power balance between individuals and the state. Even those, like Justice Scalia, who feel that the Fourth Amendment exclusionary rule only protects the guilty<sup>183</sup> (a crass characterization) should recognize that guilty people are of course still entitled to the effective protection of their rights, and that the integrity of the criminal

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181. See *supra* Part I.C.1.

182. See *Kamisar*, *supra* note 126, at 126–29.

183. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (“One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today’s opinion reinforces that view.”).



justice system is denigrated when the government is allowed to retain the advantages of evidence seized unconstitutionally.<sup>184</sup> The idea that the government can knowingly violate an individual's constitutional rights and yet incur no meaningful penalty (such as the exclusion of evidence from trial) is fundamentally antithetical to a constitutional order premised on individual liberty. Civil remedies do not appear to offer sufficient disincentives for government actors to forgo unconstitutional behavior when real damages are slight, and may not speak to the actual harm inflicted.<sup>185</sup> Such questions of government power and individual liberty—and the tradeoffs that must be made to accommodate the needs of both—come to light dramatically in exclusionary rule cases, which is why such cases like *Hudson* operate as effective barometers of the Court's more fundamental inclinations.<sup>186</sup>

*C. The Court's Other First-Term Criminal Procedure Cases Confirm This Observation*

*Hudson* and *Samson* were the starkest examples in the Roberts Court's first term of the Justices' predilections on these fundamental questions. The "minor" Fourth Amendment cases decided by the new Court in its first term do nothing to undermine these observations. In *United States v. Grubbs*,<sup>187</sup> a unanimous Court (argued before Justice Alito joined the bench) held that "anticipatory warrants" are not per se unconstitutional, a holding in accord with every federal circuit that had considered the

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184. See Zeigler & Hermann, *supra* note 142, at 849 ("By stripping the wrongdoer of all gain, a court provides a deterrent against future misconduct. In addition, disgorgement also makes clear a court's unwillingness to countenance wrongful behavior.").

185. See *supra* Part II.C.1, for a discussion on the inefficacy of civil remedies to deter Fourth Amendment violations.

186. Oliver, *supra* note 77 (citing Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 575 (1973) ("The exclusionary rule only makes this conflict (reliable fact-finding vs. the concern for individual rights) obvious. Any protection of individual rights against police tactics that produce reliable evidence will have this effect.")).

187. 126 S. Ct. 1494 (2006).

question.<sup>188</sup> In *Brigham City v. Stuart*,<sup>189</sup> the Court unanimously held that police who witnessed a fight through a screen door could enter the home under the “exigent circumstances” exception to the warrant requirement.<sup>190</sup> In *Georgia v. Randolph*,<sup>191</sup> the Court held 5–4 that a warrantless search of the home is invalid as to a “physically present co-occupant” who refuses to consent to police entry.<sup>192</sup>

In *Randolph*, the need to properly weigh the ethereal concepts of individual privacy, autonomy, and dignity with the concrete interest of government in law enforcement pervades Justice Souter’s majority opinion.

Yes, we recognize the consenting tenant’s interest as a citizen in bringing criminal activity to light . . . [a]nd we understand a co-tenant’s legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal . . . [b]ut society can often have the benefit of these interests without relying on a theory of consent that ignores an inhabitant’s refusal to allow a warrantless search.<sup>193</sup>

Once again, Justice Kennedy was the deciding fifth vote, leaving the conservative bloc in this case to sign on to the majority opinion joined by Justices Souter, Breyer, Ginsburg, and Stevens.

Chief Justice Roberts delivered a strong dissent, arguing that majority’s formulation of society’s expectations of privacy is without compelling support, and that the risks to effective law enforcement and prevention of domestic violence override the slight gains to privacy. He emphasized that privacy is curtailed once the information sought (for instance, the presence of drugs in the home) has been disclosed to others, even if disclosed only to a co-habitant or family member. “The Constitution . . . protects . . . privacy, and once privacy has been shared, the shared information,

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188. *Id.* at 1499 (citing *United States v. Loy*, 191 F.3d 360, 364 (3d Cir. 1999) (collecting cases)).

189. 126 S. Ct. 1943 (2006).

190. *Id.* at 1949.

191. 126 S. Ct. 1515 (2006).

192. *Id.* at 1518–19.

193. *Id.* at 1524.

documents, or places remain private only at the discretion of the confidant.”<sup>194</sup> Of interest here, Chief Justice Roberts explicitly played out the “minor imposition, severe consequences” balancing act in support of broader government power, just as the majority (of which he joined) did in *Samson* and *Hudson*: “Just as the source of the majority’s rule is not privacy, so too the interest it protects cannot reasonably be described as such . . . . While the majority’s rule protects something random, its consequences are particularly severe.”<sup>195</sup> He argued that while privacy in shared living arrangements is already attenuated (because, for instance, a co-occupant can effectively consent to search if the other is absent), the risks of evidence destruction and domestic violence are high.<sup>196</sup>

Again, whether or not one agrees with the outcome in *Randolph*, what is clear from the opinions is that the conservative bloc adheres to a balancing jurisprudence that de-emphasizes individual privacy by juxtaposing supposedly minor impositions with great, often speculative, social harms. This fully comports with the decisions arising out of *Hudson* and *Samson*.

#### D. *Samson* and *Hudson*: Implications Going Forward

Aside from the very real concerns about the Court’s doctrinal shift on privacy and autonomy in the “regular” criminal context, *Samson* and *Hudson* offer clues about the Court’s direction in the coming “new generation” of cases that go beyond the traditional boundaries of Fourth Amendment jurisprudence.<sup>197</sup> Such emerging issues include the warrantless wiretapping of American-based telephone users by national intelligence agencies,<sup>198</sup> suspicionless

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194. *Id.* at 1533 (Roberts, C.J., dissenting).

195. *Id.* at 1536–37.

196. *Id.*

197. See Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 279 (2005) (arguing that the collection of digital evidence requires a new conception of criminal procedure jurisprudence).

198. David Stout, *Federal Judge Orders End to Warrantless Wiretapping*, N.Y. TIMES, Aug. 17, 2006, at A1; see David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice over Internet Protocol*, 47

searches of individuals on public transportation,<sup>199</sup> new methods of internet surveillance,<sup>200</sup> the increasing use of public surveillance cameras,<sup>201</sup> data mining,<sup>202</sup> and so forth. While many of these cases will hinge on areas of law apart from pure Fourth Amendment reasonableness calculations, all of them will require the Court (or lower courts looking for Supreme Court guidance on the issue) to make fundamental determinations about the proper balance between personal privacy and autonomy and the interests of government in law enforcement. Courts will have to make, even if just implicitly, a determination about the values underlying the Fourth Amendment's basic command that all searches and seizures be reasonable, and will have to apply specific rules and tests to make such determinations. *Samson* and *Hudson* offer a compelling preview of a majority of the new Court's attitude on the fundamental reasonableness calculus common to all these issues. Given the Court's formulation of the balancing test, the government's interest will almost always seem more compelling when the threat of violence or the loss of evidence is at stake,<sup>203</sup> and the imposition on a given individual (which

B.C. L. REV. 505 (2006) (exploring the legal issues surrounding the NSA's warrantless wiretapping program).

199. Timothy Williams & Sewell Chan, *In New Security Move, New York Police to Search Commuters' Bags*, N.Y. TIMES, July 21, 2005, at A1.

200. Declan McCullagh, *FBI Plans New Net-Tapping Push*, CNET NEWS.COM, July 7, 2006, [http://news.com.com/2100-1028\\_3-6091942.html](http://news.com.com/2100-1028_3-6091942.html).

201. Judy Keen, *Daley Wants Security Cameras at Bars*, USA TODAY, Feb. 15, 2006, at A3.

202. Mark Clayton, *U.S. Plans Massive Data Sweep*, CHRISTIAN SCI. MONITOR, Feb. 9, 2006, at 1.

203. Kamisar, *supra* note 126, at 486–87 (discussing the skew of the Court's balancing test in the context of the exclusionary rule):

The “costs” of the exclusionary rule are immediately apparent—the “freeing” of a “plainly guilty” drug dealer—but the “benefits” of the rule are hard to grasp. One could say that the benefits “involve safeguarding a zone of dignity and privacy for every citizen, controlling abuses of power [and] preserving checks and balances.” And one could regard these goals as “pretty weighty benefits, perhaps even invaluable ones.” But the Court has not done so. Instead, it has viewed the benefits of the rule “as abstract [and] speculative.” On the other hand, the Court has underscored what it thinks are the severe costs of the rule. Thus, it has called the rule a “drastic measure,” an “extreme sanction,”

oftentimes will be one who is clearly guilty of something) will almost always seem small by comparison, given the amorphous nature of those underlying values.

Going forward, petitioners seeking to challenge government actions using Fourth Amendment reasonableness arguments will have to go above and beyond, as it were, to show that the challenged intrusion outweighs the law enforcement benefits, because at least five members of the High Court,<sup>204</sup> including its newest members Justice Alito and Chief Justice Roberts, can be expected to default to the position that the government's law enforcement interests usually trumps that of the individual's interest in privacy and autonomy. This is especially true given that this "new generation" of cases will present issues of personal privacy not well embedded in the constitutional tradition. Does a person give up the right not to be filmed by government security cameras when he goes out into public? Are random searches of commuters' bags reasonable given the threat of terrorism? Does a person give up the right not to be "data mined" if they voluntarily share information on the Internet? The answers are not obvious given current Fourth Amendment jurisprudence. However, given the conservative bloc's formulation of the "reasonableness" inquiry in more "core" Fourth Amendment cases like *Samson*, *Hudson*, and *Randolph*, one can expect that petitioners seeking to expand the Amendment's protections into new realms will have a heavy, perhaps insurmountable, burden.

### CONCLUSION

Much has been—and will be—written about the Supreme Court's opening salvo against the exclusionary rule in *Hudson*.<sup>205</sup>

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a rule that "exact[s] a costly toll upon the ability of courts to ascertain the truth in a criminal case," and one whose application is "contrary to the idea of proportionality that is essential to the concept of justice."

(citations omitted).

204. While Justice Ginsburg joined in the *Samson* decision, it is questionable whether she fully supports the conservative bloc's Fourth Amendment inclinations as described here.

205. See, e.g., Craig M. Bradley, *Mixed Messages on the Exclusionary Rule*, 42-DEC Trial 56, 59 (2006) ("The better way to have handled this issue would have been to hold that the Fourth Amendment does not require knock-and-

However, a true accounting of the Roberts Court's initial forays into the broader Fourth Amendment realm cannot be had without accounting for *Samson* as well. Taken together, a broader jurisprudence begins to appear in focus, and lessons for future petitioners can be gleaned. In the crudest measure, the Roberts Court came down strongly in favor of the government in its first term Fourth Amendment cases, four decisions to one. And as to that one case decided against the government, *Randolph*, at least one commentator has questioned the precedential force of the decision given the majority opinion's narrow scope and the existing exceptions to the consent requirement.<sup>206</sup>

Going forward, challenges to government action in the Fourth Amendment context will have a high hurdle to overcome, because the presumption exists among at least five members of the Court that the governmental interest in law enforcement (specifically crime prevention and evidence gathering) will usually trump the individual's interest in privacy. This "thumb on the scale" method of constitutional adjudication de-emphasizes the individual's right to a certain sphere of privacy or autonomy that cannot be (or at least should not be) constitutionally invaded without a warrant. This government-preferred formulation will play a large role in the "next generation" Fourth Amendment cases sure to come before the Roberts Court in the near future, each of which requires the Court to balance an individual's privacy interests with the government's desire to conduct searches or surveillance on less than probable cause.<sup>207</sup>

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announce. Now, the Court has put itself in the disreputable position of solemnly declaring a Fourth Amendment right and then inviting police officers to violate it, while providing no realistic remedy for violations."); *Fourth Amendment—Exclusionary Rule—Knock and Announce Violations*, 120 HARV. L. REV. 173, 182–83 (2006) ("The question remains whether, having laid the groundwork, the Court will actually get rid of the exclusionary rule . . . . *Hudson* is a strong signal that the exclusionary rule is in trouble."); Moran, *supra* note 91, at 283–84.

206. Moran, *supra* note 91, at 291–92 ("The holding of Justice Souter's majority opinion is so narrowly drawn that it will apply only to a handful of cases every year . . . . The real world impact of *Randolph* is exceedingly slight.")

207. See *supra* Part III.D.

Wrangling over these issues is not new; all of this is merely a recasting of the ever-present “freedom versus security” argument that is, in a certain sense, the fundamental issue of governance, politics, and law. Neither are these issues new in the context of the Supreme Court’s Fourth Amendment and criminal procedure jurisprudence. Much has been written about the Burger and Rehnquist Courts’ retrenchment of Warren-era expansion of constitutional protections for criminals and the accused.<sup>208</sup> What is most important at this juncture is that the Roberts Court, in just its first term, has signaled clearly where it stands on the issue of personal autonomy and privacy when those values conflict with law enforcement prerogatives. Justice Breyer had it half right in *Hudson* when he said that “[t]he majority’s ‘substantial social costs’ argument is an argument against the Fourth Amendment’s exclusionary principle itself.”<sup>209</sup> The truth is broader; the conservative bloc’s balancing test is an argument against a protective Fourth Amendment in general. Whether this tilt will carry over into other areas of law, both within the traditional Fourth Amendment sphere and without, remains to be seen.

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208. See Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1044 (2006) (arguing that although the record is mixed, “the conventional wisdom about the Rehnquist Court is that its dominant mission in criminal law was to overrule or limit cases from the Warren Court era in order to cut back on criminal procedure protections”); Louis D. Bilonis, *Criminal Justice After the Conservative Reformation*, 94 GEO. L.J. 1347, 1350 (2006) (“During the last third of the twentieth century, we witnessed what I favor calling a ‘conservative reformation’ in constitutional criminal justice. The conservative reformation was the product of social, cultural, and political forces that arose in opposition to the liberal criminal justice decisions of the Warren and early Burger Courts, unrest in the streets and on the campuses, and increasing crime.”); Kamisar, *supra* note 126, at 485 (“Although not all post-Warren Court search and seizure rulings have been in favor of the government, in the main the Court has significantly reduced the impact of the exclusionary rule in both respects.”); Carol S. Steiker, *Counter Revolution in Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (exploring division among scholars regarding the impact of the Burger and Rehnquist Courts on of criminal procedure jurisprudence).

209. *Hudson v. Michigan*, 126 S. Ct. 2159, 2177 (2006) (Breyer, J., dissenting).