NO MORE CHIPPING AWAY: THE ROBERTS COURT USES AN AXE TO TAKE OUT THE FOURTH AMENDMENT EXCLUSIONARY RULE

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INTRODUCTION

This symposium is on the future of Fourth Amendment law. This essay focuses on the Fourth Amendment exclusionary rule, which requires that evidence obtained from an unconstitutional search or seizure be excluded from a criminal prosecution.[1] There was a time when the exclusionary rule or suppression doctrine was considered part and parcel of the amendment.[2] However, the modern Supreme Court no longer sees the rule as anchored by the Fourth Amendment itself. In the mid-1970s, the Burger Court jettisoned the view that the exclusionary rule is a personal right; instead, the Court explained that the rule is a judicially created

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[1] There are several different types of constitutional "exclusionary rules" that mandate the suppression of evidence in criminal prosecutions, and they are not identical in nature. This essay discusses exclusion mandated by Fourth Amendment rules. For an excellent and comprehensive discussion of constitutional exclusionary rules, see JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER (2011).

[2] *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."); Weeks v. United States, 232 U.S. 383, 393 (1914) ("If [documents illegally acquired can be] used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 282 (1974) (stating that *Weeks* "recognized a personal fourth amendment right to exclusion").

remedy to deter police violations of the amendment.[3] The Rehnquist and Roberts Courts have emphatically reaffirmed this view of the rule. Thus, the Court envisions the rule in strictly instrumental terms and not in remedial terms the way the Framers thought about remedies for rights violations.[4]

Since the mid-twentieth century, the exclusionary rule has been a controversial topic—both on and off the Court. After he retired from the Court, Potter Stewart compared its development in the Court to "a roller coaster track constructed while the roller coaster sped along."[5] In a little-noticed opinion in 1979, then-Justice Rehnquist claimed that "one of the central themes" presented in the sweep of the Court's exclusionary rule jurisprudence, which, according to Rehnquist, began in 1914, "has been a continuing re-evaluation of past assumptions."[6] In that opinion, Rehnquist thought a reassessment of the exclusionary rule was overdue, and he urged his colleagues to consider whether, and to what extent, the rule should be retained.[7] This Article proposes a "reassessment" as well; it provides an evaluation of the Roberts Court's intentions for the exclusionary rule. The Article, therefore, departs slightly from the theme of the symposium because it considers the current status of the

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[3] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

[4] *See, e.g.*, Albert W. Alschuler, Herring v. United States*: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 501-07, 510-11 (2009) ("In accordance with the view that a right implies a remedy, the courts of the Founding generation held officers personally liable in damages for every wrongful search and seizure. Yet today the Supreme Court threatens to leave most violations of the Fourth Amendment without any remedy, not even on paper."). For an interesting defense of the exclusionary rule from an originalist's perspective, see Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 4 (2010) (contending that "the Fourth Amendment exclusionary rule is soundly based in the original understandings of the Constitution and the practices of the Founding period").

[5] 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, 1366 (1983). Stewart also remarks that the rule suppresses evidence that would not have been available if the police had "complied with the commands of the fourth amendment in the first place." *Id.* at 1392. Professor Susan Bandes rightly observes that "the controversial nature of the remedy has much to do with the controversial nature of the underlying right." Susan A. Bandes, *The Roberts Court and the Future of the Exclusionary Rule*, AM. CONST. SOC'Y FOR L. & POL'Y, Apr. 2009, at 1, *available at* http://www.acslaw.org/files/Bandes%20Issue%20Brief.pdf.

[6] California v. Minjares, 443 U.S. 916, 922 (1979) (Rehnquist, J., dissenting).

[7] *Id.* at 928.

exclusionary rule under the Roberts Court,[8] as well as what the future holds for the rule.

Despite Justice Kennedy's 2006 declaration that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt,"[9] this Article demonstrates why this is not the case. Kennedy's statement is noteworthy and has been accorded substantial weight primarily because it was made at a time when it was thought that four Justices (Chief Justice Roberts, and Justices Scalia, Thomas, and Alito) were prepared to announce the demise of the exclusionary rule. Part I provides the background for the Court's recent suppression rulings and Kennedy's 2006 statement. Part II then considers the substance and worth of Kennedy's statement as it pertains to *Davis v. United States*[10] and *Herring v. United States*,[11] the Court's most recent rulings on the good-faith exception to the exclusionary rule. Part III considers the meaning of Kennedy's statement in light of the attenuation rule announced in *Hudson v. Michigan*, which imposed a significant restriction on suppression as a remedy to deter Fourth Amendment violations.[12]

I. WHAT THE ROBERTS COURT EXCLUSIONARY RULE CASES ARE *REALLY* ABOUT

The mainstream press reports on and reacts to the Court's latest rulings on the Fourth Amendment exclusionary rule with a subtle uniformity. In theory, the exclusionary rule requires that evidence acquired from an unconstitutional search or seizure be excluded from a criminal prosecution. In reality, the Court has

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[8] Professor Tom Clancy contends that when it comes to search and seizure law, "it is now Scalia's Court." Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191, 195 (2010). According to Clancy, "Scalia stands alone on the current Court. He has vision, force, and perseverance. It is his Court when it comes to the Fourth Amendment and it is his goal to make it irrelevant." *Id.* at 196.

[9] Hudson v. Michigan, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment). For a discerning analysis of Kennedy's concurrence in *Hudson*, see James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1832-33, 1848-49, 1880-81 (2008) [hereinafter Tomkovicz, *the Future*].

[10] 131 S. Ct. 2419 (2011).

[11] 555 U.S. 135 (2009).

[12] 547 U.S. 586 (2006).

created many exceptions to the rule that have greatly reduced its applicability and impact. Nonetheless, much of the public assumes the rule prevents the conviction of guilty defendants. Ironically, twenty-one years have elapsed since the Court upheld application of the exclusionary rule in a search and seizure case; Justices Brennan and Marshall were still on the Court![13] Since then, the Court has decided six exclusionary rule cases, ruling for the government in every case.[14]

When the Court announces a new ruling addressing the exclusionary rule, as it did recently in *Davis v. United States*,[15] the reaction in the press is somewhat predictable. Inevitably the press reports that the rule has lost favor with the Justices, or the Court has created "another" exception to the rule that makes it harder for criminal defendants to suppress evidence obtained pursuant to illegal searches. But these same reports typically contain an observation that the Court seems unwilling to abolish the rule.

Lyle Denniston's post concerning *Davis* on SCOTUSblog is representative of this phenomenon. Denniston, a veteran and respected Supreme Court reporter, wrote that the exclusionary rule "is fading further as a restraint on police evidence-gathering,"[16] and that the result in *Davis* indicates that a solid majority of the Court "is deeply skeptical of the rule [and] appears to be adding new Justices."[17] But Denniston's column also noted that a majority of the Court "does not yet seem ready to cast aside altogether the 'exclusionary rule.'"[18] Two years earlier, after the

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[13] *See, e.g.*, James v. Illinois, 493 U.S. 307 (1990).

[14] *See Davis*, 131 S. Ct. 2419; *Herring*, 555 U.S. 135; *Hudson*, 547 U.S. 586; Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998); Arizona v. Evans, 514 U.S. 1 (1995); New York v. Harris, 495 U.S. 14 (1990).

[15] 131 S. Ct. 2419.

[16] Of course, the exclusionary rule does not "restrain" police evidence-gathering techniques—the Fourth Amendment does. The exclusionary rule, when it applies, merely makes the Fourth Amendment relevant.

[17] Lyle Denniston, *Opinion Analysis: The Fading "Exclusionary Rule,"* SCOTUSBLOG (June 25, 2011, 8:58 AM), http://www.scotusblog.com/?p=122938.

[18] *Id.*; *see also* Craig M. Bradley, *Red* Herring *or the Death of the Exclusionary Rule?*, 45 TRIAL 52 (2009) [hereinafter Bradley, *Red* Herring] (describing the result in *Herring* as "another, fairly minor, chip out of the exclusionary rule"); Craig M. Bradley, *Mixed Messages on the Exclusionary Rule*, 42 TRIAL 56 (2006) [hereinafter Bradley, *Mixed Messages*] ("Four justices in the majority—Antonin Scalia (the author), Clarence Thomas, John Roberts, and Samuel Alito—appear ready to eviscerate the exclusionary

Court decided *Herring v. United States*,[19] Adam Liptak, who covers the Supreme Court for the *New York Times*, adopted a more solemn view of the status of the exclusionary rule. Interestingly, Liptak's story on *Herring* opened with the revelation that as an attorney in the Reagan White House in 1983, John Roberts "was hard at work on what he called in a memorandum 'the campaign to amend or abolish the exclusionary rule.'"[20] Roberts, of course, would later become Chief Justice of the United States and the author of *Herring*. Liptak's story noted that *Herring* was significant because it was the first time the Court had permitted the admission of illegally obtained evidence when "all that was involved was isolated [police] carelessness."[21] Liptak also wrote that the result in *Herring* "suggested that the exclusionary rule itself might be at risk."[22] Liptak later observed that "the fate of the rule seems to turn on the views" of Justice Kennedy, who, according to Liptak, "has sent mixed signals" on whether the rule should be retained.[23]

While press coverage of the Court's exclusionary rule cases is factually accurate, something is missing in these reports. What is not mentioned is a thoughtful awareness of the Court's intentions

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principle. The rule was saved from this fate in *Hudson* only by a confusing (or confused) concurring opinion written by Justice Anthony Kennedy."); Linda Greenhouse, *Justices Will Hear Case on Evidence Suppression*, N.Y. TIMES, Feb. 20, 2008, at A15, *available at* http://www.nytimes.com/2008/02/20/us/20scotus.html (finding that the Justices "have made no secret of their desire to carve more exceptions out of the . . . exclusionary rule" and "Justice Antonin Scalia's majority opinion [in *Hudson*] *appeared* written to solicit further challenges to the rule's application" (emphasis added)); Christine Dowling, *A Massive But Dubious Look at California's Death Penalty*, CRIME & CONSEQUENCES BLOG (June 20, 2011, 1:29 PM), http://www.crimeandconsequences.com/crimblog/ 2011/06/news-scan-964.html (noting briefly that Alito's opinion in *Davis* represents "further paring back applicability of the exclusionary rule"); Adam Liptak, *U.S. Is Alone in Rejecting All Evidence if Police Err*, N.Y. TIMES, July 19, 2008, http://www.nytimes.com/2008/07/19/us/19exclude.html ("The Supreme Court has in recent years whittled away at the exclusionary rule by limiting its applicability and creating exceptions to it. . . . [In] *Hudson v. Michigan*, Justice Scalia *seemed* to say that the exclusionary rule had outlived its original purpose." (emphasis added)).

[19] 555 U.S. 135 (2009).

[20] Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1, *available at* http://www.nytimes.com/2009/01/31/washington/ 31scotus.html.

[21] *Id.*

[22] *Id.*

[23] *Id.*

for the exclusionary rule. Put simply, what is not being discussed is what these cases are *really* all about. Reporters, of course, are often not trained as lawyers and are not experts on constitutional criminal procedure. But members of the Court know their colleagues' intentions better than the press. Thus, it was somewhat odd to read portions of Justice Breyer's dissent in *Davis* questioning whether his colleagues had contemplated the full extent of their ruling's ramifications.

A. Davis Confirms the Direction of the Court

At issue in *Davis* was whether the good-faith exception to the exclusionary rule should extend to a case where police conduct a search relying on binding judicial precedent that is subsequently overruled. By a seven-to-two vote, the Court ruled that the exclusionary rule does not apply in this context.[24] *Davis* provided a ringing endorsement of *Herring*'s edict that to trigger the rule police behavior must be sufficiently deliberate that suppression can meaningfully deter it and sufficiently culpable that such deterrence is "worth the price paid by the justice system."[25] As will be explained below, the result and reasoning in *Davis* was predictable and consistent with the goal of either abolishing or confining the exclusionary rule to egregious police misconduct. In his dissent, Justice Breyer questioned whether the Court was serious about the consequences of its reasoning:

> [*I*]*f* the Court means what it now says, *if* it would place determinative weight upon the culpability of an individual officer's conduct, and *if* it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule.[26]

Perhaps Breyer's comments were an effort to put the best spin on a decision that reaffirms what was said in *Herring*, which Professor Wayne LaFave, "America's preeminent authority on the

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[24] Davis v. United States, 131 S. Ct. 2419, 2434 (2011).
[25] *Id.* at 2428 (quoting Herring v. United States, 555 U.S. 135, 144 (2009)).
[26] *Id.* at 2439 (Breyer, J., dissenting) (emphasis added).

law of the Fourth Amendment,"[27] describes as "flat-out wrong."[28] Or, perhaps Breyer's comments were offered in the hope that one or more of the Justices in the *Davis* majority would come to regret his or her decision to join the *Davis* opinion.[29] In any event, unlike Justice Breyer, we have no doubt that the *Davis* majority, as well as the *Herring* majority, meant what it said when it asserted the exclusionary rule is applicable only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent."[30] Put another way, rather than offer another warning of the possible *future* demise of the exclusionary rule, this Article emphasizes a different point: The revolution is over and the opponents of the exclusionary rule have won (Though we concede that some "mop-up" work may be required to convince the lower courts that the Court meant what it said in *Davis* and *Herring*, namely, that exclusion is unwarranted in all cases where police reasonably believed their conduct complied with the law).

Although some may think the result in *Davis* is simply more "chipping away" at the exclusionary rule and not cause for alarm, we disagree. The rationale of *Davis* confirms that the Court intends to limit application of the rule to deliberate, bad-faith, or recurring Fourth Amendment violations. But there is more. The reasoning and logic of *Hudson v. Michigan*,[31] another Roberts Court ruling, provides the Court an additional jurisprudential tool to bar exclusion even when police deliberately violate the Fourth Amendment. *Hudson* held violations of the Fourth Amendment knock-and-announce rule never require the exclusion of evidence. The tone and language of Justice Scalia's opinion in *Hudson* exhibits contempt and opposition toward suppression.[32] *Hudson*'s

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[27] Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1744 (2008) [hereinafter Alschuler, *Exclusionary Rule*].

[28] Wayne R. LaFave, *The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009).

[29] Although it is far too early to make any firm judgments about Justice Kagan's views, liberals should worry that she joined Justice Alito's opinion in *Davis* without qualification.

[30] *Herring*, 555 U.S. at 144.

[31] 547 U.S. 586 (2006).

[32] Clancy, *supra* note 8, at 202 (stating that at its "most fundamental level," the result in *Hudson* "called into question the future of the exclusionary rule," and that abolition of the rule "is Scalia's clear aim; he has planted the seeds in *Hudson* and

holding was based, in part, on a novel interpretation of the attenuation rule, which is another exception to the exclusionary rule. As will be explained in Part III, the new vision of attenuation adopted in *Hudson* easily applies to Fourth Amendment protections besides the knock-and-announce rule, which means additional injunctions against the suppression doctrine.

B. The Future of Suppression: Why All Eyes Are Rightly on Justice Kennedy

Despite the rulings in *Hudson*, *Herring*, and *Davis*, some judges and legal commentators may still insist that the exclusionary rule is alive and well, although somewhat staggered. This view is undoubtedly fueled by the comments of Justice Kennedy, the crucial swing vote on the Roberts Court. In *Hudson*, Kennedy provided the fifth vote and concurred in the three key parts of Scalia's opinion. Regarding the suppression doctrine, Kennedy said: "[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt."[33] Deciphering what Kennedy meant "turns out to be a challenge."[34] Indeed, a skeptic might "wonder why, if the current operation of the exclusionary rule were *not* in doubt, such a declaration would be required."[35] After reading *Hudson*, a few things came to mind: First, Justice Scalia had lined up the votes to repeal the rule, but Kennedy decided against that move and was signaling his support for the rule—at least for now. On the other hand, why would Kennedy join an opinion that laid the seeds for the destruction of

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needs one more vote to reap the harvest"). Professor Tomkovicz agrees that *Hudson* can be read as a sign that the Court is ready to abolish the rule. *See* Tomkovicz, *the Future*, *supra* note 9, at 1841-47 (explaining that when *Hudson* is broadly read, it "foreshadows and anticipates outright abolition" of the exclusionary rule). However, Tomkovicz believes that is not the best way to interpret *Hudson*—"at least for the present." *Id.* at 1847-49.

[33] *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in judgment).

[34] Sharon L. Davies & Anna B. Scanlon, Katz *in the Age of* Hudson v. Michigan*: Some Thoughts on "Suppression as a Last Resort,"* 41 U.C. DAVIS L. REV. 1035, 1066 (2008).

[35] Donald Dripps, *The Fourth Amendment, The Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 235 (2010).

the rule?[36] Perhaps Kennedy got "cold feet" after reading Scalia's draft in *Hudson* and was unwilling to go along. Alternatively, perhaps Kennedy had not decided what to do about the rule. A concurring opinion would permit Kennedy to join the result in *Hudson*, which moved the Court closer to abolishing the rule. But it would also allow him more time to think about repealing the rule outright.

Justice Kennedy's votes to join the majority opinions in *Herring* and *Davis* have caused us to reconsider his support for the rule and his claim that the rule is still operative. After these decisions, what type of police conduct triggers the exclusionary rule? And what is the meaning and scope of the rule under the logic of *Hudson* and *Herring*? Besides Kennedy's comment in *Hudson*, there are additional reasons to focus on Kennedy's votes and views as a window into the Court's intentions for the rule.

First, and most obviously, Kennedy is currently the pivotal swing vote on the Court.[37] Professor Albert Alschuler, perhaps tongue-in-cheek, has described Kennedy as "the second most powerful man in America."[38] His votes obviously matter in

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[36] David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, CATO SUP. CT. REV. 283, 308 (2006) ("If he really believes in the continuing vitality of the exclusionary rule, it is an absolute mystery to me why he would cast the crucial fifth vote for an opinion that openly declared war on the exclusionary rule."); Davies & Scanlon, *supra* note 34, at 1068 (noting that Kennedy's "cautionary language" in *Hudson* may mean he is unwilling to provide the fifth vote to repeal the exclusionary rule, yet "Kennedy's willingness to align himself with the most wide-reaching points" in Scalia's opinion "leaves this unclear").

[37] Adam Liptak, *A Significant Term, with Bigger Cases Ahead*, N.Y. TIMES, June 29, 2011, at A12, *available at* http://www.nytimes.com/2011/06/29/us/29scotus.html (reporting that during the 2011 Supreme Court Term, twelve of the fourteen closely divided five-to-four cases were split between the four liberal Justices and four conservative Justices, with "Justice . . . Kennedy casting the decisive vote"); Adam Liptak, *Roberts Court Shifts Right, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1, *available at* http://www.nytimes.com/2009/07/01/us/01scotus.html (Liptak observes that during the 2009 term Justice Kennedy was in the majority for eighteen of the twenty-three cases where the Justices split five-to-four: "[I]n 16 [of these decisions], all four members of the court's liberal wing were on one side and all four of its conservatives were on the other. And in between them was Justice Kennedy, the most powerful jurist in America.").

[38] Alschuler, *supra* note 4, at 476. Alschuler's description differs from another description of Kennedy. *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 199 (2007) (reporting that James Dobson, the founder and

suppression cases. In *Hudson*, Kennedy provided the crucial fifth vote for the result, and he joined Scalia's novel analysis on the attenuation exception to the exclusionary rule, but refused to join another part of Scalia's opinion. In *Herring*, Kennedy joined the majority, probably again providing the crucial fifth vote. More importantly, Kennedy joined Chief Justice Roberts's opinion in *Herring* without qualification, including the crucial declarations limiting the applicability of the exclusionary rule to deliberate, reckless, or grossly negligent police violations. These assertions in *Herring*—what Professor Alschuler calls the "'big blast' statements"[39]—were unprecedented and controversial,[40] and thus, one might have thought in light of his comment in *Hudson* about preserving the exclusionary rule, Kennedy would have distanced himself from this reasoning.[41]

1. Justice Kennedy's Influence in *James v. Illinois*

In addition to being the crucial fifth vote, there is evidence that not only is Kennedy willing to stand alone in opposing extension of the exclusionary rule, but that he is also able to influence like-minded Justices to change their votes in order to restrict application of the rule. According to Justice Brennan's private papers, in *James v. Illinois*, Kennedy's dissent convinced Justices O'Connor and Scalia to change their vote in that case. *James* addressed whether the impeachment exception to the exclusionary rule, which allows prosecutors to use illegally acquired evidence to impeach a defendant who takes the stand, extends to *all* defense witnesses.[42]

In late August 1982, Chicago police detectives suspected fifteen-year-old Darryl James was involved in the murder and

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director of Focus on the Family, described Kennedy as "the most dangerous man in America").

[39] Alschuler, *supra* note 4, at 472.

[40] LaFave, *supra* note 28, at 760-70.

[41] Alschuler, *supra* note 4, at 476 ("As the indispensable fifth vote, Kennedy probably had the bargaining power to excise the 'big blast' statements from Chief Justice Roberts's opinion if he wished to do so. He certainly could have disassociated himself from these statements in a concurring opinion."); *see also* Bradley, *Red* Herring, *supra* note 18 (observing that it "was a mistake for Kennedy, if he wishes to preserve the exclusionary rule in its present form as he declared in *Hudson*, to go along with the four conservatives in [*Herring*]").

[42] James v. Illinois, 493 U.S. 307 (1990).

shooting of two teenagers. Witnesses to the shooting told police that the shooter had "reddish," straight hair. These same witnesses also said that they had seen James several weeks earlier at a parade, and James's hair was "reddish" and straight.[43] The day after the shooting, detectives found James at his mother's beauty parlor sitting under a hair dryer. When he emerged, his hair was black and curly. After arresting James, the detectives questioned him about his prior hair color. James told the detectives that the previous day his hair had been reddish brown, long, and combed straight back. He also told the police that he had changed his hair color and style on the day of his arrest "in order to change his appearance."[44]

After James was indicted for murder and attempted murder, the trial court ruled that James's statements to the detectives were inadmissible because they were the fruit of an arrest without probable cause.[45] Although James did not testify at the trial, the defense called a family friend, Jewell Henderson, who testified that she had taken James to register for high school on the day of the shooting, and his hair was black and curly on that day.[46] The prosecutor was allowed to impeach Henderson's testimony by introducing James's statements to the police.[47] During closing arguments, the prosecutor told the jury that the State's evidence contained an admission by the defendant that he changed the color of his hair. James was convicted of murder and attempted murder.[48] The Illinois Supreme Court upheld the convictions, ruling that in order to prevent defendants from engaging in perjury "by proxy," the impeachment exception extended to defense witnesses.[49]

At the conference discussion in *James*, only Chief Justice Rehnquist was clearly committed to affirming James's

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[43] *Id.* at 310.

[44] *Id.* at 309 (internal quotation marks omitted).

[45] *Id.* at 309-10.

[46] *Id.* at 310.

[47] *Id.*

[48] *Id.* at 311.

[49] People v. James, 528 N.E.2d 723, 730-31 (Ill. 1988), *rev'd sub nom.* James v. Illinois, 493 U.S. 307 (1990).

conviction.[50] All the remaining Justices, including O'Connor and Scalia, voted to reverse the conviction. Rehnquist appeared to concede that the ruling below expanded the impeachment exception beyond the Court's prior rulings. Rehnquist also acknowledged that the challenged evidence "is not impeachment but rebuttal."[51] Nonetheless, Rehnquist voted to affirm on the "ground that the exclusionary rule must give way to truth seeking."[52] O'Connor told her colleagues that an affirmance "would encourage improper police conduct."[53] Scalia said that unless the Court was "going to discard the exclusionary rule," he would vote to reverse.[54] Kennedy signaled "he was on the fence,"[55] but ultimately voted to reverse.[56] Thus, the conference vote was eight-to-one for reversal.

Justice Brennan assigned *James* to himself, and his first draft closely resembled the final published opinion. He stated his concern that expanding the impeachment to encompass the testimony of all defense witnesses "likely would chill some defendants from presenting their best defense—and sometimes any defense at all—through the testimony of others."[57] Brennan wrote this potential "chilling" effect changed the balance of values that informed the Court's earlier impeachment rulings. While the Court's prior cases recognized that defendants were not permitted to exploit tainted evidence as a shield for perjury, Brennan explained: "[I]t seems no more appropriate for the State to brandish such evidence as a sword with which to dissuade

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[50] William J. Brennan, Jr., Case Histories 68-69 (Oct. Term, 1989) [hereinafter Case Histories] (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box II 8, Folder 5).

[51] William J. Brennan, Jr., Brennan's Conference Notes, James v. Illinois (Oct. 6, 1989) (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box I 859, Folder 4).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Case Histories, *supra* note 50.

[56] Harry A. Blackmun, Blackmun's Conference Notes, James v. Illinois (Oct. 6, 1989) (on file with the Library of Congress, Manuscript Division, The Harry A. Blackmun Papers, Box 553).

[57] William J. Brennan, Jr., 1st Draft James v. Illinois 6 (Nov. 2, 1989) (on file with the Library of Congress, Manuscript Division, The Harry A. Blackmun Papers, Box 553).

defendants from presenting a meaningful defense through other witnesses."[58]

Brennan also wrote an expanded impeachment exception would undermine the deterrent effects of exclusion. Authorizing the impeachment of defense witnesses was appreciably different than impeachment of defendants for at least two reasons: First, enlarging the impeachment exception would multiply the occasions on which tainted evidence could be used because defense witnesses outnumber testifying defendants. Second, the possession of tainted evidence gives the prosecution leverage not only to deter perjury, but it will "also deter defendants from calling witnesses in the first place, thereby keeping from the jury much probative exculpatory evidence."[59]

After Brennan's first draft was circulated, Justices White, Marshall, Blackmun, and Stevens soon joined the opinion. "For a while, it even appeared that the Chief might switch his vote and join as well." Rehnquist had told his law clerk "to tinker with a draft dissent but said that he wasn't sure he would circulate anything."[60]

In the meantime, Kennedy wrote Brennan a letter stating that "it seems to me that reversal here requires a rule far more sweeping than I had thought at Conference."[61] Kennedy also thought that the state's position would not undermine the purpose of exclusion because he told Brennan that permitting "rebuttal of the false testimony here need not lower the level of deterrence."[62] Kennedy, whose vote to affirm at the conference was shaky, informed Brennan that he would dissent.[63] Kennedy, according to Brennan's records, "was convinced after a strong lobbying from one of his clerks to write a dissent himself."[64] The first draft that Kennedy circulated dismissed Brennan's fears that permitting the use of tainted evidence would encourage future lawless behavior by the police. Kennedy pointed out that similar fears had been

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[58] *Id.* at 8.

[59] *Id.* at 9.

[60] Case Histories, *supra* note 50.

[61] Letter from Justice Kennedy to Justice Brennan (Nov. 21, 1989) (on file with the Library of Congress, The Harry A. Blackmun Papers, Box 553).

[62] *Id.*

[63] *Id.*

[64] Case Histories, *supra* note 50.

raised and rejected in prior cases.[65] This concern—encouraging police misconduct—was the basis for O'Connor's vote at conference. In addition, Kennedy argued that any gain in deterrence achieved by excluding the evidence was "marginal."[66]

Within three hours of receiving Kennedy's draft, Rehnquist and O'Connor joined it.[67] The next day, O'Connor wrote Brennan to explain that she found Kennedy's dissent "persuasive" and thus was shifting her conference vote.[68] After *James* was announced, Brennan's private papers recalled that O'Connor found Kennedy's dissent "'persuasive' (though it merely relied on the same arguments she had herself rejected at Conference)."[69] Two weeks after Kennedy's dissent circulated, Scalia joined and switched his conference vote.[70] Despite the defections of O'Connor and Scalia, Brennan still had five votes and his final opinion rejected an enlargement of the impeachment exception to the exclusionary rule.

In the mid-1970s,[71] and then again in *United States v. Leon*, Justice Brennan complained that the Court was poised to abolish the exclusionary rule.[72] Brennan had a different reaction after *James* was announced. He believed the result in *James* "casts into some doubt the frequent suggestion that the Court is on the verge of overruling *Mapp v. Ohio* and jettisoning the exclusionary rule altogether."[73] For Brennan, the lesson learned in *James* was that Justice White, "the most ardent foe of the rule through his

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[65] Anthony M. Kennedy, 1st Draft James v. Illinois 6 (Nov. 21, 1989) (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box 859, Folder 5).

[66] *Id.* at 7.

[67] Case Histories, *supra* note 50.

[68] Letter from Justice O'Connor to Justice Brennan (Nov. 22, 1989) (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box 859, Folder 5).

[69] Case Histories, *supra* note 50.

[70] Letter from Justice Scalia to Justice Brennan (Dec. 7, 1989) (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box 859, Folder 5).

[71] *See, e.g.*, United States v. Calandra, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting).

[72] United States v. Leon, 468 U.S. 897, 929, 959 (1984) (Brennan, J., dissenting).

[73] Case Histories, *supra* note 50.

proposed 'good faith' exception, is still the key to preserving the rule against being gutted by attacks along other fronts."[74]

Certainly, White's support was essential for preventing an enlargement of the impeachment exception to the exclusionary rule. But another lesson learned from *James* was that Justice Kennedy was an opponent of the exclusionary rule. To be sure, Kennedy's dissent in *James* did not call for repealing the rule, so the depth of his hostility to exclusion could not be judged by a single opinion. However, *James* did reveal that Kennedy wanted to restrict the rule, knowing that a new exception would impact future prosecutions involving defense witnesses and provide additional incentives for police to violate the constitutional rights of criminal suspects in order to obtain incriminating statements.[75] In *James*, Kennedy stood ready to limit exclusion even when like-minded, conservative Justices were initially unwilling to approve a broad, new exception to the rule.

2. Justice Kennedy: Not So "Moderate" on the Exclusionary Rule

Justice Kennedy is often characterized as a "moderate" member of the Court's conservative majority.[76] His votes in a 1992 Pennsylvania abortion case[77] and in a 2003 case invalidating Texas's criminal sodomy law[78] have led the public to perceive Kennedy as a different type of conservative than, say, Scalia and Thomas, or Chief Justice Roberts. But his voting record as a Justice (as opposed to his comment in *Hudson*) indisputably indicates that he is very much opposed to the exclusionary rule. In

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[74] *Id.*

[75] Note this was shortly before the time when evidence surfaced that California law enforcement agencies were instructing officers that it was permissible to continue questioning suspects who have invoked their *Miranda* rights. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132-40 (1998); *id.* at 134 (describing a California training manual that tells instructors voluntary statements obtained from *Miranda* violations can be used to impeach a defendant at trial; as a basis for obtaining physical evidence; and for other investigative purposes, including locating contraband, identifying co-suspects, and locating witnesses).

[76] *See* Bradley, *Red* Herring, *supra* note 18 (describing Kennedy as a "judicial moderate").

[77] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[78] Lawrence v. Texas, 539 U.S. 558 (2003). In *Lawrence*, Kennedy authored the majority opinion.

contrast to other so-called "moderate" Justices who have sat on the Court in recent years, Kennedy has *never* voted to impose the Fourth Amendment exclusionary rule. By comparison, Justices O'Connor and Souter, neither of whom was a fan of the exclusionary rule, did vote to impose the rule at least one time. O'Connor voted for the defendant in *Illinois v. Krull*[79] and *Murray v. United States*,[80] while Souter voted for the defendant in *Pennsylvania Board of Probation & Parole v. Scott*.[81] According to the *New York Times*, O'Connor was also prepared to vote for the defendant in *Hudson*, but she resigned before the Court decided the case.[82] And in a case that was initially argued in the 1983 Term but decided on different grounds a year later, O'Connor wrote an unpublished opinion in which she dissented from the majority's decision that the exclusionary rule does not apply in juvenile delinquency proceedings to bar the admission of evidence obtained from an illegal search by a school official.[83]

Finally, as a judge on the Ninth Circuit, Kennedy sat on the appellate panel that decided *United States v. Leon*,[84] the progenitor of the good-faith exception that the Roberts Court has transformed and expanded. Kennedy dissented from the ruling ordering the exclusion of evidence obtained pursuant to an invalid

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[79] 480 U.S. 340 (1987).

[80] 487 U.S. 533 (1988). In *Murray*, Justice O'Connor joined Justice Marshall's dissent.

[81] 524 U.S. 357 (1998).

[82] *See* Linda Greenhouse, *Court Limits Protection Against Improper Entry*, N.Y. TIMES, June 16, 2006, at A28, *available at* http://www.nytimes.com/2006/06/16/washington/16scotus.html; Charles Lane, *Court Eases "No Knock" Search Ban; Illegally Collected Evidence Allowed*, WASH. POST, June 16, 2006, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/15/AR2006061500730.html; *see also* David A. Moran, *Waiting for the Other Shoe:* Hudson *and the Precarious State of* Mapp, 93 IOWA L. REV. 1725, 1730-31 (2008). O'Connor participated when *Hudson* was originally argued on January 9, 2006. *Id.* at 1730. Her resignation was effective upon the nomination and confirmation of her successor, Samuel Alito, who took his seat on January 31, 2006. *Id.* at 1731. On April 19, 2006, the Court ordered re-argument in *Hudson*, which suggested that the Court was evenly split after O'Connor's resignation. *Id. Hudson* was reargued on May 18, 2006 and decided nearly a month later, this time with Alito providing the fifth vote to affirm Hudson's conviction. *Id.*

[83] Sandra Day O'Connor, Dissent, 1st Draft New Jersey v. T.L.O. (June 12, 1984) (on file with the Library of Congress, Manuscript Division, The Harry A. Blackmun Papers, Box 414).

[84] 468 U.S. 897 (1984).

search warrant. Like the other judges on the panel, Judge Kennedy declined to discuss a good-faith exception to the exclusionary rule. The closing paragraph of his short dissent, however, took a side-swipe at the exclusionary rule when he observed: "Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is on-going criminal activity."[85]

In sum, Justice Kennedy has been a key player on the Court in restricting the applicability and scope of the exclusionary rule. Without his votes, the opinions in *Hudson* and *Herring* would be very different. Thus, Court-watchers and legal scholars rightly focus on Kennedy because they believe his position will determine the future of the Fourth Amendment's exclusionary rule.[86] While Kennedy's influence and votes have been crucial, it is a mistake to think that the Court remains unsure about the future of the rule. Five Justices have already made their move, although they are not yet marching in lockstep together. Kennedy's statement in *Hudson* on the continued viability of the rule tends to mislead rather than inform readers about the Roberts Court objectives for the rule. Professor Craig Bradley takes the view that a majority of the Court has decided "that the exclusionary rule must be reconsidered."[87] This Article contends that the Roberts Court has already made its intentions known. If outright repeal is

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[85] United States v. Leon, No. 82-1093, 1983 WL 486883, at *3 (9th Cir. Jan. 19, 1983) (Kennedy, J., dissenting).

[86] In a comprehensive and perceptive article on *Hudson v. Michigan*, Professor Tomkovicz offers the view that Justice Kennedy has carefully positioned himself on the exclusionary rule: "It seems fair to say that Justice Kennedy concurred in the [*Hudson*] majority's language and reasoning insofar as they addressed suppression for knock-and-announce violations. He made it clear, however, that he was not participating in any exclusionary rule revolution that might be seen in *Hudson*'s undercurrents." Tomkovicz, *the Future*, *supra* note 9, at 1849; *see also id.* at 1886 (noting that Kennedy's "unavoidable declaration of allegiance to the exclusionary rule . . . indicates that [abolition of the rule] is not imminent"). Professor Tomkovicz's analysis was provided *before* the results in *Herring* and *Davis*.

[87] Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 217 (2010), *available at* http://scholarship.law.duke.edu/lcp/vol73/iss3/6/; *see also id.* at 212 (noting that the Court is "dissatisfied with the mandatory aspect of the *Mapp* rule," and that in *Hudson* and *Herring*, the "Court has indicated that the rule should be changed but has stopped short of mandating a broad alteration").

unattainable, then the goal is continued prohibition on suppression as a remedy for entire categories of cases, as done for knock-and-announce cases in *Hudson*, and application of the rule only in cases of culpable police misconduct.

The next two Sections of this Article ponder the Court's most recent exclusionary rule decisions. Specifically, Part II considers what *Herring* and *Davis* tell us about the Roberts Court intentions for the suppression doctrine. Part III considers a specific section of *Hudson v. Michigan* and what it means for the continued operation of the exclusionary rule. Unlike Justice Kennedy, based on our reading of these cases, we think the "continued operation" of the exclusionary rule is very much in doubt.

II. *HERRING* AND *DAVIS*: YES, THE COURT MEANT WHAT IT SAID

Davis v. United States provides convincing evidence that the broad language in *Herring v. United States* on the applicability of the exclusionary was not obiter dicta, but instead was meant to be the core of *Herring*.[88] In order to understand the significance of *Davis*, a description of the reasoning and result in *Herring* is helpful.

A. Herring's Move Towards Suppression for Only Deliberate and Culpable Conduct

While Bennie Dean Herring was checking on his impounded vehicle at the Coffee County, Alabama sheriff's office, sheriff's deputy, Mark Anderson, who was aware of Herring's less-than-perfect background, requested that the Coffee County warrant clerk run a warrant check on Herring.[89] When the warrant search came back negative, Anderson had the warrant clerk call neighboring Dale County to see if there were any outstanding warrants for Herring. The warrant clerk for Dale County reported that there was an outstanding arrest warrant for Herring. This information was relayed to Anderson, who then arrested Herring as he was driving away from the impoundment lot. A search of

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[88] *See* Alschuler, *supra* note 4, at 474 ("[*Herring*'s] 'big blast' statements look more like *ratio decidendi* (or the Court's 'reason for deciding' as it did) than like *obiter dicta* (or things 'said by the way.') . . . [*Herring*'s big blast] statements appeared as part of a sustained argument." (footnotes omitted)).

[89] Herring v. United States, 555 U.S. 135, 137 (2009).

Herring's person and vehicle incident to arrest revealed narcotics and a weapon.[90] Ten to fifteen minutes later, officials learned that the warrant listed in the Dale County database should not have been there; the warrant had been recalled five months earlier. A negligent employee of the sheriff's office should have removed the warrant.[91] Herring's arrest was illegal.[92]

Although Herring's arrest violated the Fourth Amendment, the evidence discovered incident to his arrest was admitted at his federal narcotics prosecution under the good-faith exception. The lower courts ruled that suppression would serve no deterrent purpose. The officers who arrested Herring were innocent of wrongdoing; the failure to update the computer records was negligent, not a deliberate or tactical decision.[93]

After losing his argument for exclusion in the lower federal courts, Herring appealed to the Supreme Court. Chief Justice Roberts's opinion for a five-to-four majority has been the subject of considerable scrutiny and controversy. While some scholars have interpreted *Herring* narrowly,[94] it is not obvious why Roberts's opinion should be read that way. To be sure, the issue confronting the Court was the one left unresolved in *Arizona v. Evans*,[95] namely, whether the exclusionary rule applies to suppress evidence obtained from an illegal arrest that was prompted by errors in police recordkeeping. But Roberts's opening paragraph suggests that his logic and holding apply beyond the specific facts

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[90] *Id.*

[91] *Id.* at 138.

[92] *Id.*

[93] United States v. Herring, 492 F.3d 1212, 1218 (11th Cir. 2007) *aff'd sub nom.* Herring v. United States, 555 U.S. 135 (2009).

[94] Professor Orin Kerr has written that "*Herring* is a minor case. . . . I think it's a narrow and interstitial decision, not one that is rocking the boat. In particular, I don't see it as suggesting a general good faith exception for police conduct. Such a position would be an extraordinary shift in Fourth Amendment law that would effectively overrule a ton of cases. . . . The decision was quite narrow." Orin Kerr, *Responding to Tom Goldstein on* Herring, VOLOKH CONSPIRACY (Jan. 14, 2009, 2:38 PM), http://volokh.com/posts/1231961926.shtml; *see also* Matthew J. Franck, *Hyperventilating About the Exclusionary Rule*, NAT'L REV. ONLINE (Feb. 16, 2009, 11:21 AM), http://www.nationalreview.com/bench-memos/50452/hyperventilating-about-exclusionary-rule/matthew-j-franck# (describing *Herring* as "really pretty ordinary, and simply applies a principle established . . . in *United States v. Leon*," 468 U.S. 897 (1984), and "there's no sign that the Roberts Court has lost its interest in maintaining" the exclusionary rule).

[95] 514 U.S. 1 (1995).

of the case. Roberts asks: "What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?"[96] The Chief Justice provides the following answer: Exclusion of evidence obtained from an illegal arrest is not a mechanical reaction to a Fourth Amendment violation. Rather, "the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances . . . [exclusion is not appropriate]."[97] Of course, the error in *Herring* involved negligence by a police employee in *another county*, but Roberts's framing of the issue suggested that error by an officer in the same police department should not result in exclusion either.[98]

Professors LaFave and Alschuler have already provided detailed and compelling critiques of Roberts's opinion.[99] We agree with much of their analysis and criticism of *Herring*. Our emphasis is on *Herring*'s statements regarding the type of police conduct that justifies exclusion as a remedy. Specifically, *Herring* stated: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[100] Relying on prior cases, *Herring* asserted: "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[101] Roberts then noted that Deputy Anderson's illegal arrest of Herring did "not rise to that level."[102]

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[96] *Herring*, 555 U.S. at 136-37.

[97] *Id.* at 137.

[98] Alschuler, *supra* note 4, at 471 ("Roberts asked about the significance of a negligent error by *any* officer other than the one who conducted the search. His opinion implied that even negligence by another officer in the same police agency might be regarded as 'attenuated.'").

[99] *See* Alschuler, *supra* note 4; LaFave, *supra* note 28; *see also* Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 679-88 (2011) (explaining the reasoning of *Herring* is a significant departure from the Court's prior cases).

[100] *Herring*, 555 U.S. at 144.

[101] *Id.*

[102] *Id.*

A few points about this language should be highlighted. First, it is a mistake to interpret this part of the opinion as dicta. Roberts's description of the level of police culpability necessary to trigger exclusion was stated without qualification. More importantly, this language does not mention "attenuation." Unlike the unexplained references to "attenuation" in other parts of his opinion, the discussion on the need for culpable police conduct to trigger the exclusionary rule appears as part of a "sustained argument."[103] Furthermore, no ruling prior to *Herring* had asserted or even implied that suppression turns on deliberate or grossly negligent police conduct.[104]

Second, it is also a mistake to think that this language from *Herring* will not be cited by the Court when future defendants seek application of the exclusionary rule to ordinary Fourth Amendment violations. To be sure, the "holding" of *Herring* appeared to be bound by the facts. But the opening paragraph of *Herring*, which frames the issue before the Court, suggests that the Chief Justice sees the case as one involving a broader concern beyond the specific facts of the case. If the Chief Justice truly intended a narrow reading of *Herring*, he certainly knew how to write an opinion that would convey to the lower courts that *Herring*'s holding and reasoning were confined to negligent recordkeeping cases. If *Herring* was simply deciding the issue left open in *Arizona v. Evans*, the "big blast" statements were unnecessary to decide the case. It borders on the naïve to think these statements were heedlessly included in the opinion. Rather, the statements were a purposeful addition, as the Roberts Court intends to restrict the exclusionary rule to instances of culpable police behavior.

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[103] Alschuler, *supra* note 4, at 474.

[104] Alschuler, *supra* note 4, at 488-89 ("No decision prior to *Herring* . . . had suggested or implied that the exclusionary rule should be limited [to culpable police misconduct]. . . . *Herring*'s 'big blast' statements would preclude exclusion even when an officer was not 'objectively reasonable' as long as he was not grossly negligent. Declaring that this standard had been 'laid out in our cases' took chutzpa."); LaFave, *supra* note 28, at 763-68.

B. Davis Not Only Embraces, but Expands Herring

Notwithstanding the language on culpable police conduct, erudite scholars rejected the claim that *Herring* was cause for alarm.[105] Justice Alito's opinion in *Davis*, however, indicates that six (and maybe seven) of the current Justices read *Herring* the way we read *Herring*. As noted above, *Davis* addressed whether the exclusionary rule applies when police perform a search in reliance on "binding [judicial] precedent" that is later overruled.[106] *Davis* involved a police search of a car that was lawful at the time of the search, but that was later overruled by the Court while Davis's appeal was pending. When *Davis* arrived at the Court, few thought that Davis had any chance of winning because police reasonably relied on existing law to perform the search. Although all agreed that the search violated the Fourth Amendment, excluding the evidence found from the now-illegal search would serve no deterrent purpose because the officer was neither culpable nor did anything wrong when performing the search. As far as the good-faith exception went, the facts in *Davis* appeared to be on all fours with *Herring* and the Court's previous good-faith cases.[107]

Indeed, Justice Alito held that because exclusion "would do nothing to deter police misconduct" and would impose a high cost to "both the truth and the public safety" the rule does not apply in this context.[108] His opinion explains, relying on *Herring*, that the deterrence benefits of suppression vary with the culpability of the

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[105] *See, e.g.*, Bradley, *Red* Herring, *supra* note 18 (observing that *Herring* "is only a slight change from *Arizona v. Evans*," and that *Herring* "represents another, fairly minor, chip out of the exclusionary rule since most illegal searches will not be attenuated from the error that caused them"). But Bradley did caution that if four of the Justices "get their way, the major pillar upholding Fourth (and Fifth) Amendment rights, will collapse." *Id.*

[106] Davis v. United States, 131 S. Ct. 2419, 2434 (2011).

[107] At first glance, *Davis* might qualify "as a 'no-brainer.'" *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3 at 21 (4th ed. Supp. 2011-2012). But as Fourth Amendment scholars know, the Court's rulings in this area often require close scrutiny. According to Professor LaFave, "some questions exist with respect to either the result or the majority's reasoning [in *Davis*] that might give one pause." *Id.* Moreover, the result in *Davis* raises significant disincentives for future defendants to challenge search and seizure practices that might result in the creation of new Fourth Amendment law. *See* Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077 (2011).

[108] *Davis*, 131 S. Ct. at 2423-24.

challenged police misconduct: "When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is *strong* and *tends* to outweigh the resulting costs."[109] On the other hand, Alito also elaborates, in line with *Herring*'s focus on culpable police conduct, that when police search or seize "with an objectively 'reasonable good-faith belief' that their conduct is lawful,"[110] or when their unconstitutional behavior "involves only simple, 'isolated' negligence,"[111] deterrence "loses much of its force," and exclusion is not required.[112]

Significantly, *Davis* expands *Herring*, a point recognized by Justice Breyer's dissent.[113] Recall that *Herring*'s "holding" suggested that exclusion is not required in circumstances where the constitutional offense "was the result of isolated negligence *attenuated* from the arrest."[114] Commentators and lower courts that interpreted *Herring* narrowly believed that the attenuation element would contain *Herring*'s impact and prevent its logic from applying to garden-variety Fourth Amendment violations.[115]

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[109] *Id.* at 2427 (emphasis added) (quoting Herring v. United States, 555 U.S. 135, 144 (2009)). Notice that *Davis* is unwilling to categorically state that when police are culpable, exclusion *is* required. Alito will only say that such conduct provides a "strong" reason to exclude and that exclusion "tends" to outweigh the costs to society.

[110] *Id.* (quoting United States v. Leon, 468 U.S. 897, 909 (1984)).

[111] *Id.* at 2427-28 (quoting *Herring*, 555 U.S. at 137).

[112] *Id.* at 2428 (quoting *Leon*, 468 U.S. at 919).

[113] *Id.* at 2439-40 (Breyer, J., dissenting).

[114] *Herring*, 555 U.S. at 137 (emphasis added).

[115] *See, e.g.*, United States v. Green, Criminal No. 1:08 CR 0041, 2009 WL 230890, at *10 (M.D. Pa. Jan. 30, 2009) (granting the suppression motion following an officer's illegal search and explaining that "the Supreme Court clearly restricted the reach of *Herring's* limitation on the exclusionary rule to police misconduct that is 'attenuated' from the arrest. Unlike the case at bar, *Herring* involved a computer error by police that was remote in both time and location from the unlawful arrest."); State v. Handy, 18 A.3d 179, 187-88 (N.J. 2011) (affirming the suppression motion and concluding that although the police officer reasonably relied on a mistake by a dispatcher, the conduct of the dispatcher was not sufficiently attenuated from the arrest to trigger the good-faith exception in *Herring*); State v. Hess, 785 N.W.2d 568, 579 (Wis. 2010) (explaining that the Supreme Court "held that the police conduct in *Herring* did not warrant exclusion because it 'was the result of isolated negligence attenuated from the arrest,'" and holding that the good-faith exception to the exclusionary rule did not apply to a civil bench warrant that was invalid when issued) (quoting *Herring*, 555 U.S. at 137); Bradley, *Red* Herring, *supra* note 18 ("[*Herring's* holding] won't apply to the vast majority of cases, despite the apparent attempt of the majority opinion to establish a new approach to the exclusionary role [sic] that would apply to *all* cases. In most cases,

Interestingly, Tom Goldstein, a Supreme Court litigator who represented Herring, discounted this view of *Herring*'s scope. Goldstein conceded that the attenuation element temporarily contained the reach of *Herring*'s holding, but he observed that "the logic of [*Herring*] spans far more broadly, and the next logical step—which I predict is 2 years away—is abandoning the 'attenuation' reference altogether."[116] Goldstein's prediction was dead-on. When describing the type of police conduct that justifies suppression, *Davis*, decided two years after *Herring*, never mentions "attenuation."[117]

C. What the Court's Good-Faith Exception in Herring and Davis Means for the Future of the Exclusionary Rule

Two years ago, one of us predicted that the Roberts Court would eventually repeal the exclusionary rule.[118] We have no doubt that the Chief Justice and Justices Scalia, Thomas, and Alito are ready to abolish the exclusionary rule. But even if we are wrong about that, the logic and results in *Herring*, and now *Davis*, move the Court nine-tenths of the way toward outright abolishment. Even before the recent holding in *Davis*, *Herring*'s "big blast" statements significantly undermined and confined application of the exclusionary rule to a small number of cases. Put simply, the Chief Justice's opinion in *Herring* laid the foundation for a general good-faith exception for routine search and seizure cases.

After *Herring*, will the Court countenance the suppression of evidence obtained after an officer negligently, but in good faith, decides she has probable cause to search a car or make an arrest,

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the police error will not be 'attenuated' from the search, but will be committed by the same officers who did the searching.").

[116] Tom Goldstein, *The Surpassing Significance of* Herring, SCOTUSBLOG (Jan. 14, 2009, 11:32 AM), http://www.scotusblog.com/2009/01/the-surpassing-significance-of-herring/.

[117] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.3 at 28 n.181.30 (4th ed. Supp. 2011-2012) ("The *Davis* majority's 'restatement' of the *Herring* rule omits its most significant limitation, namely, that 'negligent' conduct by police supports a good-faith claim only if the negligence was 'attenuated.'").

[118] Tracey Maclin, Joseph Lipsitt Faculty Research Scholar, Bos. Univ. Sch. of L., The Fourth Amendment and the Exclusionary Rule, Address to the Hoffinger Criminal Justice Colloquium, New York University School of Law (Feb. 24, 2009).

or sufficient suspicion to conduct a *Terry* frisk? If the officer's judgment is wrong, but not culpable, and there is no proof that she has engaged in recurring violations of this kind, the logic of *Herring* dictates that exclusion is not justified. Why *would* the exclusionary rule apply in such circumstances? "[A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous 'binding precedent,'"[119] or one who relies upon an arrest warrant that had been recalled five months earlier.

Or consider what Professor Richard McAdams had to say about the logic of *Herring* even when viewed as a case that merely decides the issue left open in *Arizona v. Evans*. Shortly after the oral argument in *Herring*, McAdams noted that if the Court was unwilling to distinguish between the errors of judicial employees and police employees who operate databases, the Court was unlikely to "draw a line between a sworn field officer and a police clerk."[120] As McAdams saw it, if an officer can rely in good faith on the error of a police clerk, as *Herring* now permits, she can likely rely in good faith on the error of a fellow detective. If a court will not exclude when Detective A relies on a negligent error by Detective B, then why exclude when Detective A relies on *her own* negligent, but isolated, error?[121]

If under *Herring*, only culpable or deliberate violations of the Fourth Amendment merit suppression, then a great number—perhaps the overwhelming majority—of unreasonable searches and seizures will be immunized from the exclusionary rule. After all, most search and seizure violations addressed by courts in suppression hearings across the nation involve good-faith or negligent—*not* deliberately culpable—mistakes by police officers. Before and after *Herring*, Fourth Amendment scholars made this point. The Justices know this as well.[122] Justice Breyer,

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[119] Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).

[120] Richard McAdams, *Wither the Exclusionary Rule?*, U. CHI. L. SCH. FAC. BLOG (Oct. 29, 2008), http://uchicagolaw.typepad.com/faculty/2008/10/wither-the-excl.html.

[121] *Id.*

[122] *See, e.g.*, *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) (explaining that most suppression motions challenge conduct where, "police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will

however, seemed surprised, if not alarmed, by the prospect of the *Herring–Davis* logic applying to routine violations of the Fourth Amendment. He noted:

> [*I*]*f* the Court means what it now says, *if* it would place determinative weight upon the culpability of an individual officer's conduct, and *if* it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception *will* swallow the exclusionary rule.[123]

Surely Breyer knows his colleagues better than that. Of course, the Court meant what it said in *Herring* and *Davis*. That was the point of *Herring*—to confine application of the exclusionary rule to the type of purposefully, bad-faith police misconduct seen in *Mapp v. Ohio*.[124] The *Herring* majority knows that egregious Fourth Amendment violations are rarely seen in suppression hearings. Does Justice Breyer really believe that his colleagues have not made up their minds to extend the *Herring–Davis* logic to routine violations of the Fourth Amendment? Why the repeated use of the term "if" by Breyer? That is exactly what the majority intends to do. And as Breyer recognizes, some lower courts are already heading in that direction after reading *Herring*.[125]

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find that the police were wrong."); Stewart, *supra* note 5, at 1388-89 (observing civil damages lawsuits and criminal prosecutions "punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.").

[123] *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) (emphasis added).

[124] 367 U.S. 643 (1961).

[125] *See, e.g.*, United States v. Master, 614 F.3d 236, 243 (6th Cir. 2010) (noting that "the *Herring* Court's emphasis" weighed in favor of not suppressing illegally seized evidence "unless the officers engage in 'deliberate, reckless, or grossly negligent conduct'") (quoting Herring v. United States, 555 U.S. 135, 144 (2009)); United States v. Julius, 610 F.3d 60, 66-67 (2d Cir. 2010) (remanding to the district court for a determination of "whether the degree of police culpability in this case rose beyond mere administrative negligence such that application of the rule is necessary" to deter Fourth Amendment violations under the "cost/benefit analysis required by *Herring*."); United States v. Tracey, 597 F.3d 140, 151, 154 (3d Cir. 2010) (noting that "the Supreme Court has instructed that the exclusionary rule should only be applied when 'police conduct [is] . . . sufficiently deliberate that exclusion can meaningfully deter it,

D. Justice White's Roadmap for the Roberts Court's Good-Faith Exception

Perhaps one reason why judges and scholars have been reluctant to believe that the *Herring* majority really does intend to limit suppression to bad-faith or egregious search and seizure violations is the fact that the Court has never adopted this position. Although there is no precedent for this objective, Justice White provided a blueprint for reaching this goal.

In the 1970s, Justice White began urging his colleagues to adopt a good-faith exception to the exclusionary rule. White's proposal was always framed in expansive terms, even in cases where a narrower exception was available. For example, in *Stone v. Powell*,[126] Nevada police relied upon a vagrancy statute to arrest Lloyd Powell. In a companion case, Nebraska law enforcement officers obtained incriminating evidence against David Rice pursuant to a search warrant.[127] The statute and warrant were later declared unconstitutional, and the lower courts suppressed evidence obtained incident to the arrest of Powell and search of Rice's home. A majority of the Court ultimately ruled in *Stone v. Powell* that where a state has provided a defendant a full and fair opportunity to raise a Fourth Amendment claim, the Constitution does not require a state prisoner be granted federal habeas corpus relief because illegally acquired evidence was admitted at his trial.[128] In his dissent in *Stone v. Powell*, Justice White opposed restricting the remedies of habeas petitioners.[129] But White also thought that the Court should substantially limit the scope of the suppression doctrine and adopt a good-faith exception. White eschewed a modification

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and sufficiently culpable that such deterrence is worth the price paid'" and holding that the exclusionary rule does not apply because the officer's actions did "not amount to 'deliberate, reckless, or grossly negligent conduct'" or indicate "'recurring or systemic negligence'") (citing *Herring*, 555 U.S. at 144); People v. McDonough, 917 N.E.2d 590, 594 (Ill. App. Ct. 2009) (claiming that "absent police misconduct, the exclusionary rule does not apply . . . [I]f the justification for the exclusionary rule is solely to deter police misconduct (as the Supreme Court reaffirmed in *Herring*), then the necessary condition precedent for the exclusionary rule's application is police misconduct.").

[126] 428 U.S. 465 (1976).

[127] *Id.*

[128] *Id.* at 481-82 (footnote omitted).

[129] *Id.* at 536 (White, J., dissenting).

of the exclusionary rule that would permit the admission of evidence where police either rely on a statute or warrant that is later declared invalid. Instead, White proposed a modification of the exclusionary rule that would apply in every case:

> [S]o as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. . . . When law enforcement personnel have acted mistakenly, but in good-faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.[130]

In the early 1980s, White continued to push for an expansive, general good-faith exception. Around the time that John Roberts finished his clerkship with Justice Rehnquist and started a four-year stint in the office of President Reagan's White House counsel, White convinced his colleagues to order reargument in *Illinois v. Gates* so that the Court could consider a good-faith exception to the exclusionary rule.[131]

White's reargument order was broadly framed. The order did not ask the parties to address whether the exclusionary rule should be modified to allow the admission of evidence obtained by police acting in reasonable reliance on a search warrant that was later declared invalid, which tracked the facts in *Gates*. White was seeking a restriction of the exclusionary rule that went beyond the facts in *Gates*. White's order asked the parties to address whether the rule should be modified when evidence was obtained "in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."[132] Framed this way, a good-faith exception would be available in every case of a Fourth Amendment violation and would not be confined to the narrow category of cases where police rely on a warrant that is subsequently ruled illegal.

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[130] *Id.* at 538-40.

[131] William J. Brennan, Jr., Case Histories xxix-xxxi (Oct. Term, 1982) (on file with the Library of Congress, Manuscript Division, The William J. Brennan Papers, Box 11:7, Folder 11).

[132] Illinois v. Gates, 459 U.S. 1028, 1028 (1982).

When the parties in *Gates* submitted new briefs on the good-faith issue that the Court had asked them to address, the amicus brief filed by President Reagan's Solicitor General urged the Court to modify the exclusionary rule along the exact lines proposed by White in his *Stone v. Powell* dissent. Although the *Gates* majority ultimately decided not to reach the good-faith issue, Justice White's concurrence provided a framework for a broad good-faith exception that went beyond the facts in *Gates*. White began his *Gates* concurrence by reaffirming the position he took in *Stone v. Powell*: "[T]he exclusionary rule is an inappropriate remedy where law enforcement officials act in the reasonable belief that a search and seizure was consistent with the Fourth Amendment."[133] Acknowledging that suppression deters some police misconduct, White asserted, "it is apparent as a matter of logic that there is little if any deterrence when the rule is invoked to suppress evidence obtained by a police officer acting in the reasonable belief that his conduct did not violate the Fourth Amendment."[134]

White did not pull any punches on the scope of his good-faith exception: "There are several types of Fourth Amendment violations that may be said to fall under the rubric of 'good faith.'"[135] He recognized that a good-faith exception would be available in cases of warrantless arrests—occasions where judges disagree on the issue of probable cause, "no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question."[136] But White also signaled, in a footnote discussing the concept of judicial integrity, that his good-faith exception was available where police have "reasonably erred in assessing the facts, mistakenly conducted a search authorized under a presumably valid statute, or relied in good faith upon a warrant not supported by probable cause."[137] In such cases, "the question of exclusion must be viewed through a different lens," and the "integrity of the courts is not implicated."[138] White did note, however, that exclusion would remain available for "searches and seizures perpetrated in

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[133] Illinois v. Gates, 462 U.S. 213, 246 (1983) (White, J., concurring).
[134] *Id.* at 260.
[135] *Id.* at 262.
[136] *Id.* (quoting Stone v. Powell, 428 U.S. 465, 539-40 (1976) (White, J., dissenting)).
[137] *Id.* at 259 n.14.
[138] *Id.*

intentional and flagrant disregard of Fourth Amendment principles."[139]

Although no other Justice joined White's concurrence in *Gates*, a year later White would write for a majority in *United States v. Leon*, which was the first case to adopt a good-faith exception to the exclusionary rule.[140] *Leon* held that the rule does not forbid the use in the prosecution's case-in-chief of evidence obtained by police acting in reasonable reliance on a search warrant issued by a judge but later determined to be unsupported by probable cause.[141] White also authored the companion case to *Leon*, *Massachusetts v. Sheppard*, which concluded that the exclusionary rule should be modified to permit the admission of evidence seized in reasonable reliance on a search warrant supported by probable cause but later held invalid due to the failure to specify the items to be seized.[142] Although the holdings in *Leon* and *Sheppard* were limited to cases where police obtained warrants, White sprinkled dicta throughout his opinions suggesting a good-faith exception would embrace various types of reasonable police mistakes.[143] This language was consistent with the expansive good-faith exception White had proposed in his separate opinion in *Gates* and in his dissent in *Stone v. Powell*.

Justice White's many opinions outlining the parameters of the good-faith exception provide the roadmap for the Roberts Court's goal of limiting the exclusionary rule to bad faith or egregious Fourth Amendment violations. Concededly, *Herring* and *Davis* can be read narrowly, but when it comes to the exclusionary rule, we believe that the Roberts Court does not have a narrow

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[139] *Id.*

[140] United States v. Leon, 468 U.S. 897 (1984).

[141] *Id.* at 926.

[142] Massachusetts v. Sheppard, 468 U.S. 981, 989-91 (1984).

[143] *See, e.g.*, *Leon*, 468 U.S. at 919 (asserting that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity"); *id.* at 908 (noting "when law enforcement officers have acted in objective good faith or their transgressions have been minor," the benefit afforded the defendant "offends basic concepts of the criminal justice system") (citing Stone v. Powell, 428 U.S. 465, 490 (1976)); *see also* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1056 (1984) (White, J., dissenting) (relying on *Leon* for the assertion that if immigration officers "neither knew nor should have known that they were acting contrary to the dictates of the Fourth Amendment, evidence will not be suppressed even if it is held that their conduct was illegal").

agenda. To ensure that the rest of the lower courts receive the message that suppression is justified only upon a showing of culpable police conduct, the Court will probably have to take a case involving a routine search and seizure violation, for example, a car search or *Terry* frisk case. If we are right about the intentions of the Roberts Court, the Court will rule that the exclusionary rule does not apply unless there is proof of culpable police conduct. If this occurs, the exclusionary rule will no longer matter. As Justice Breyer described it in his *Davis* dissent, if suppression of illegally acquired evidence is warranted only when the police are deliberately or recklessly culpable, "then the good-faith exception will swallow the exclusionary rule."[144]

III. BEYOND GOOD-FAITH: APPLYING *HUDSON V. MICHIGAN*'S LOGIC TO BAR SUPPRESSION AS A CATEGORICAL MATTER

Detroit, Michigan police possessed a lawful warrant to search for drugs and guns in Booker Hudson's home. After announcing their presence, police waited only three to five seconds before entering. Inside they found Hudson, drugs, and a gun.[145] After Hudson was convicted of narcotics and gun possession, Michigan prosecutors conceded the manner of entry violated the Fourth Amendment's knock-and-announce rule.[146] Thus, the only issue confronting the Justices in *Hudson v. Michigan* was whether suppression is appropriate when police infringe the knock-and-announce rule.[147]

A. Justice Scalia's Three Rationales in Hudson

Justice Scalia's opinion for the Court in *Hudson* held that suppression is never a remedy for knock-and-announce violations. Scalia's ruling rested on three distinct and independent bases. First, he explained that the unlawful entry "was *not* a but-for cause of obtaining the evidence."[148] The failure to comply with the

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[144] Davis v. United States, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).

[145] Hudson v. Michigan, 547 U.S. 586, 588 (2006).

[146] *Id.* at 590.

[147] While Justice Scalia's opinion does not frame the issue this way, surely this *was* the issue addressed and decided by the Court. *See* Tomkovicz, *the Future*, *supra* note 9, at 1822, 1823 nn.13 & 19.

[148] *Hudson*, 547 U.S. at 592.

announcement rule had no causal nexus to obtaining the evidence because whether the police would have complied with the Constitution or not, they would have executed the warrant and discovered the evidence. This conclusion was sufficient to affirm Hudson's conviction and end the case, but Scalia had more on his mind.[149]

Second, Scalia explained that even if the constitutional violation was the but-for cause of obtaining the evidence, admission of the evidence is nevertheless proper when the connection between the police illegality and the discovery of the evidence is "too attenuated to justify exclusion."[150] Here, Scalia invoked the attenuation exception to the exclusionary rule. He accurately noted that in prior cases, suppression was denied where the nexus between the Fourth Amendment violation and the seizure of evidence was "remote."[151] Although Scalia did not acknowledge it, this traditional attenuation exception was unavailable in *Hudson* since the discovery of the evidence immediately followed on the heels of the illegal entry, and there were no intervening circumstances that severed the connection between the violation and discovery.[152]

Undeterred by prior precedent, Justice Scalia created a new form of attenuation. He explained, "Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[153] Scalia then noted that the interests protected by the announcement rule included protecting human life and limb, preventing the

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[149] *See also* Tomkovicz, *the Future*, *supra* note 9, at 1825 ("Justice Scalia could have ended his opinion at this point. His conclusion about the absence of a causal connection between the knock-and-announce violation and the discoveries in the home foreclosed application of the *Mapp* rule to this case. Justice Scalia continued, however, turning to additional, broader grounds for declaring the [exclusionary] rule inapplicable to Hudson's gun and drugs."); *id.* at 1825 n.31 ("The fact that [Scalia] did not pen a short, simple opinion that rested solely on the absence of causation is just one of many indications that the *Hudson* majority was bent upon accomplishing more than simply eliminating the exclusionary remedy for knock-and-announce violations.").

[150] *Hudson*, 547 U.S. at 592.

[151] *Id.* at 593.

[152] *See also* Tomkovicz, *the Future*, *supra* note 9, at 1863-64 (The evidence found in Hudson's home was "primary, immediately acquired products, not derivative evidence with a weakened connection to the unconstitutionally hasty entry.").

[153] *Hudson*, 547 U.S. at 593.

destruction of property, and protecting aspects of privacy and dignity that can be disturbed by a sudden entry. Scalia then distinguished these interests from the interest protected by the warrant requirement.[154] When police violate the warrant requirement, Scalia explained, the government infringes a person's right to "shield 'their persons, houses, papers, and effects from the government's scrutiny."[155] Exclusion of evidence obtained in violation of the warrant requirement "vindicates that entitlement."[156] The knock-and-announce rule, however, does not protect a person's interest in precluding police from seizing evidence described in a valid warrant. Thus, Scalia concluded: "Since the interests that *were* violated in [*Hudson*] have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."[157]

The third basis for *Hudson*'s holding was that "the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs."[158] The origins of this amorphous balancing test dates back to *Alderman v. United States*,[159] and the test has been a central element of the Court's exclusionary rule cases ever since.

The objective of this section is not to assess the merits of Scalia's legal reasoning in *Hudson*. Other scholars, including Professors Al Alschuler, Sharon Davies, Eric A. Johnson, Wayne LaFave, and James Tomkovicz, have already superbly performed that task, and we recommend reading their analyses.[160] Rather, our goal is to consider what *Hudson*'s attenuation analysis means

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[154] *Id.* at 593-94.

[155] *Id.* at 593 (quoting U.S. CONST. amend. IV).

[156] *Id.*

[157] *Id.* at 594.

[158] *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)) (internal quotation marks omitted).

[159] 394 U.S. 165 (1969).

[160] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.6(h) at 43-49 (4th ed. Supp. 2011-2012); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4 at 44-48 (4th ed. Supp. 2011-2012); *id.* § 11.4 at 52-60; Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113 (2008); Alschuler, *Exclusionary Rule*, *supra* note 27; Davies & Scanlon, *supra* note 34; Tomkovicz, *the Future*, *supra* note 9. For a thorough survey of the lower courts' use of *Hudson's* logic, see Christopher D. Totten, *The Exclusionary Rule After* Hudson v. Michigan*: Mourning the Death of the Knock and Announce Rule*, 46 No. 5 CRIM. L. BULL. art. 1 (Fall 2010).

for the future of suppression law. We think *Hudson*'s novel attenuation rule was designed to apply to search and seizure violations beyond the announcement rule. In addition, we believe that Scalia wrote *Hudson* to lay the foundation for abolishing suppression generally. In other words, Scalia's analysis in *Hudson* is *not* a "good-for-this-train-only" ticket. Rather, it is intended specifically for use in future cases to bar suppression as a categorical matter, and *Hudson* itself, as a general matter, was structured to provide a blueprint for repealing the exclusionary rule when five Justices are ready to do so.

B. Two Different Forms of Attenuation: Traditional and Hudson v. Michigan Attenuation

From its inception, attenuation analysis was designed to curtail application of the exclusionary rule. The concept of attenuation originated in Justice Frankfurter's opinion in *Nardone v. United States*[161] as a way for the government to bypass the exclusionary rule and admit illegally acquired evidence. According to Frankfurter, it was "a matter of good sense" that the connection between an illegal search and the evidence proffered by the government at trial "may have become so attenuated as to dissipate the taint."[162] Although *Nardone* was not a Fourth Amendment case, and Frankfurter's thoughts on attenuation were obiter dictum, twenty years later *Wong Sun v. United States* adopted Frankfurter's analysis to determine when evidence obtained from a Fourth Amendment violation was subject to exclusion.[163] Around the same time, Professor Anthony Amsterdam, a former Frankfurter clerk, characterized the attenuation doctrine as "foggy" and "inarticulately and unsystematically designed."[164] Yet, he recognized that the purpose of attenuation analysis was "to mark the point of diminishing returns of the deterrence principle" of the exclusionary rule.[165]

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[161] 308 U.S. 338 (1939).

[162] *Id.* at 341.

[163] 371 U.S. 471 (1963).

[164] Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389-90 (1964).

[165] *Id.* at 390.

As an exception to the exclusionary rule, traditional attenuation only applies to derivative evidence because the nexus between an illegal search and direct or primary evidence (e.g., evidence seized from the pocket of a person illegally arrested) "is both proximate and strong, not 'remote' or 'attenuated.'"[166] During the 1960s and 1970s, attenuation analysis "probed the strength of the connection between the police illegality and the evidence the prosecutor wished to introduce by examining the circumstances under which the evidence came into the hands of the police."[167] But the Court's rulings also rejected per se or absolute formulas proposed by the government to circumvent exclusion.[168] As Justice Powell described it, "the question of attenuation inevitably is largely a matter of degree."[169] In sum, although designed to take some of the bite out of the exclusionary rule, traditional attenuation analysis, at least as practiced by the Court prior to *Hudson*, paralleled the deterrence purposes of the exclusionary rule.

It is important to understand that the type of attenuation adopted in *Hudson* is not only novel and expansive,[170] but it also drastically differs from a traditional attenuation analysis. As Professor Tomkovicz explains in his recent book on constitutional exclusion:

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[166] Tomkovicz, *the Future*, *supra* note 9, at 1863.

[167] Davies & Scanlon, *supra* note 34, at 1060.

[168] For example, in *Brown v. Illinois*, 422 U.S. 590 (1975), the Illinois attorney general urged the Court to adopt a per se rule that *Miranda* warnings were sufficient to dissipate the taint of an illegal arrest and thus allow the admission of the defendant's statement given while in police custody. *Id.* The Court rejected that rule and instead employed a multi-prong test to determine whether a confession was obtained by exploitation of an illegal arrest. *Id.* at 603-04. Similarly, in *United States v. Ceccolini*, 435 U.S. 268 (1978), the government argued that live witness testimony was never tainted fruit no matter how direct the nexus between an illegal search and the testimony. *Id.* Again, the Court rejected the proposed per se rule in favor of a multi-factor balancing test. *Id.* at 274, 276-80. *But cf.* New York v. Harris, 495 U.S. 14, 21 (1990) (deciding in what amounted to a per se rule, that where police have probable cause to arrest a suspect, the exclusionary rule does not bar the admission of a voluntary confession given by the suspect outside of his home, even though the confession is taken after an arrest in the home that violates the rule of *Payton v. New York*, 445 U.S. 573 (1980)). The connection between the results in *Hudson* and *Harris* have been analyzed by Professor Eric Johnson. *See* Johnson, *supra* note 160.

[169] *Brown*, 422 U.S. at 609 (Powell, J., concurring in part).

[170] Tomkovicz, *the Future*, *supra* note 9, at 1863; Davies & Scanlon, *supra* note 34, at 1061.

> "Attenuation" seems like a misnomer for this alternative version of the exception. The connection between the violation and the evidence at issue can be very close and very strong. Indeed, this offshoot of the attenuation doctrine encompasses even *primary* evidence acquired as an immediate result of a Fourth Amendment violation and is unconcerned with the culpability of the officers or the egregiousness of their transgression. Considering its very different character, it is at least odd to pair it with the traditional form of the attenuation.[171]

C. Extending Hudson's Attenuation Logic Beyond the "Knock-and-Announce" Context

It is also imperative to appreciate how easily *Hudson*'s attenuation analysis can be employed to admit evidence in cases of other search and seizure violations. Under *Hudson*, the exclusionary rule applies only when excluding evidence serves the constitutional interest promoted by the Fourth Amendment rule that the police have failed to follow. The Court could extend *Hudson's* logic to bar suppression in a number of contexts.

1. *Hudson* and the "No Press" Rule

The logic of *Hudson*'s attenuation rule bars exclusion when the *manner* of a police entry into a home violates the Constitution. Thus, exclusion is never appropriate when the police allow journalists or other third parties to accompany them when they enter a home to make an arrest or conduct a search. A decade ago, *Wilson v. Layne* found this practice unconstitutional because the Fourth Amendment requires that police actions in execution of a warrant be "related to the objectives of the authorized intrusion," and, as a general matter, the presence of reporters in a home does not aid the police in executing a warrant.[172] While *Wilson* did mention the "privacy" afforded the home, the Court was also careful to observe that the Fourth Amendment violation "is the presence of the media and not the presence of the police in the home," and thus it was reserving the question "whether the exclusionary rule would apply to any evidence discovered or

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[171] TOMKOVICZ, *supra* note 1, at 51.

[172] Wilson v. Layne, 526 U.S. 603, 611 (1999).

developed by the media representatives."[173] Despite the ruling in *Wilson*, television news programs continue to show videos of police raiding private homes and businesses, indicating that *Wilson* is still being violated in some locales. But after *Hudson*, there is no reason to think the Court will countenance exclusion for this offense. The Court could easily use *Hudson*'s attenuation logic to conclude that suppression does not vindicate the interests for excluding the media and hold that the exclusionary rule is inapplicable.

2. *Hudson* and the "Right-to-See-a-Warrant" Rule

Similarly, the Court has not definitively decided whether a homeowner has a right, circumstances permitting, to inspect a warrant before police enter a home to effectuate a search or an arrest. Language from some of the Court's rulings implicitly recognizes a homeowner's right to inspect a warrant before police entry. Over forty years ago, *Camara v. Municipal Court* acknowledged the dilemma facing a homeowner when confronted with a municipal inspector's demand to perform a warrantless search of his home: The homeowner "has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization."[174]

Similarly, *Wilson v. Arkansas* ruled that the common law knock-and-announce requirement was constitutionally based.[175] One of the interests served by the common law announcement rule was to allow a homeowner the opportunity to demand identification from officers seeking entry and to allow the resident to explain to the officers that the person or premises were mistakenly described in the warrant.[176] Of course, these purposes could not be served if the homeowner had no right to see the warrant before police entry.

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[173] *Id.* at 614 n.2.

[174] Camara v. Mun. Ct. of S.F., 387 U.S. 523, 532 (1967).

[175] Wilson v. Arkansas, 514 U.S. 927 (1995).

[176] *See* Charles P. Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 687-88 (1993).

Finally, when *Groh v. Ramirez* explained why the presence of a search warrant serves a high function (that could not necessarily be vindicated by some other document not made available to the homeowner), the Court suggested that a homeowner could see the warrant "for her inspection" before police entry.[177] These statements provide the basis for concluding that a homeowner has a constitutional right to see a warrant prior to entry. That right would protect, *inter alia*, an occupant's interest in assuring that the entry was lawful, the occupant is informed of the scope of the power of the police to search or seize, and that the police are acting under proper authority.

To be sure, more recently in *United States v. Grubbs*, Justice Scalia's majority opinion observed in dictum that the Fourth Amendment imposed no requirement to present a homeowner with a warrant.[178] Justice Souter's concurrence, however, pointed out that the Court had previously reserved that question in *Groh v. Ramirez*, and that it remained unsettled after *Grubbs*.[179] Souter observed that displaying a warrant to a homeowner "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."[180]

Assuming the Court will find that the Fourth Amendment grants a homeowner a right to see a warrant before a police entry, *Hudson*'s attenuation logic ensures that exclusion will never be an appropriate remedy where police violate this right and discover evidence in a subsequent search. As in *Hudson*, the Fourth Amendment interests protected by a "right-to-see-a-warrant" are different from and "do not include the shielding of potential evidence from the government's eyes."[181] In fact, in *United States v. Hector*, the Ninth Circuit used *Hudson's* attenuation reasoning to conclude that the exclusionary rule does not apply when the police fail to present the defendant with a search warrant.[182]

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[177] Groh v. Ramirez, 540 U.S. 551, 557 (2004).

[178] United States v. Grubbs, 547 U.S. 90, 98 (2006).

[179] *Id.* at 101 (Souter, J., concurring in part and concurring in the judgment).

[180] *Id.* (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)).

[181] Hudson v. Michigan, 547 U.S. 586, 593 (2006).

[182] United States v. Hector, 474 F.3d 1150, 1155 (9th Cir. 2007), *cert. denied*, 552 U.S. 1104 (2008).

After obtaining a lawful warrant, Los Angeles police pried open Albert Hector's door to search his apartment for drugs and related paraphernalia. During the search, the officers showed Hector a "Search Warrant Notice of Service," which was not the actual search warrant and did not contain the address of the location to be searched or list the items to be seized. The police did not show Hector the warrant at any time during the search. At Hector's apartment, the police found drugs, money, and a loaded handgun.[183] The jury found Hector guilty of drug and weapons offenses based on evidence found in his apartment. After the jury verdict, Hector moved to suppress the evidence. The district court granted the motion and "held that the officers' failure to serve Hector the search warrant violated the Fourth Amendment and required suppression of the evidence."[184]

The Ninth Circuit reversed. Relying on *Hudson*'s attenuation analysis, the court ruled that regardless of whether the failure to serve a copy of the warrant was a violation of the Fourth Amendment, exclusion was inappropriate.[185] The Ninth Circuit, embracing *Hudson*'s logic, found that "[t]he causal connection between the failure to serve the warrant and the evidence seized is highly attenuated, indeed nonexistent, in this case."[186] The court noted that the only legitimate interest served by presenting the warrant after *Grubbs* "is to head off breaches of peace by dispelling any suspicion that the search is illegitimate."[187] The court explained that this interest, like the interests promoted by the announcement rule, does not involve the "seizure of evidence described in the search warrant nor would it be vindicated by suppression of the evidence seized."[188] Accordingly, the Ninth Circuit concluded that under *Hudson*'s logic, suppression was unwarranted.[189]

Similarly, the district court in *United States v. Makki* relied on *Hudson*'s attenuation logic and the Ninth Circuit's analysis in *Hector* to hold that exclusion was not an appropriate remedy when

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[183] *Id.* at 1153.
[184] *Id.*
[185] *Id.* at 1155.
[186] *Id.*
[187] *Id.* (quoting United States v. Stefonek, 179 F.3d 1030, 1035 (7th Cir. 1999)).
[188] *Id.*
[189] *Id.*

the police failed to show the defendant the list of items to be seized pursuant to a search warrant.[190] The court found that "the causal connection between any failure to provide Defendant with a list of the items to be seized and the evidence actually seized is 'highly attenuated, indeed non-existent.'"[191] The court further explained that the interest promoted by presenting the list of items in the warrant—"head[ing] off breaches of the peace by dispelling any suspicion that the search is illegitimate . . . does not implicate the seizure of evidence . . . ."[192] The court concluded that suppression would not vindicate the interest that was violated.[193] "[I]n light of the rationale of the exclusionary rule and the considerations set out by the Supreme Court in *Hudson*," the district court found suppression an inappropriate remedy.[194]

Because the interests served by showing a warrant are separate from a person's interest in precluding police from seizing evidence described in that warrant, *Hudson*'s reasoning easily extends to bar suppression after the police fail to present a search warrant. Thus, as some courts have already recognized, *Hudson*'s attenuation logic will ensure that even if the Court finds that the Fourth Amendment protects a person's "right-to-see-a-warrant," the exclusionary rule will not apply to violations of this right.

3. *Hudson* and the "No Arbitrary Destruction of Property" Rule

Hudson's attenuation analysis would also seem to bar exclusion where police arbitrarily destroy property while executing a warrant. In *United States v. Ramirez*, the Court stated in dictum: "Excessive or unnecessary property destruction during a search may violate the [Fourth] Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression."[195] And *Ramirez* reserved whether, if breaking a window to enter a garage violated the Fourth Amendment, there was a "sufficient causal relationship" between the breaking and

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[190] United States v. Makki, No. 06-20324, 2007 WL 1100453, at *4 (E.D. Mich. Apr. 12, 2007).

[191] *Id.* (quoting United States v. Hector, 474 F.3d 1150, 1155 (9th Cir. 2007)).

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] United States v. Ramirez, 523 U.S. 65, 66 (1998).

the discovery of evidence to justify suppression.[196] However, even assuming a direct connection between the breaking and the discovery of evidence, *Hudson*'s attenuation theory would bar suppression because the constitutional interest protected here—preservation of property—is unrelated to and does not "include the shielding of potential evidence from the government's eyes."[197]

Professor Tomkovicz has written that "[i]t would seem" that *Hudson*'s attenuation analysis is applicable "to violations of other [constitutional] rules that prescribe the constitutional *manner* of home entries or other searches."[198] We agree with his conclusion, but without the cautious qualification. We see no principled difference in the conclusion that the announcement rule does not promote the "shield" function identified by Justice Scalia's new attenuation theory, and the conclusion that the "no press" rule, the "right-to-see-a-warrant" rule, and the "no arbitrary destruction of property" rule, also do not promote the "shield" function.

4. *Hudson* and the "Inventory Search" Rules

Professor Tomkovicz also believes that *Hudson*'s attenuation theory is potentially applicable "to any case involving evidence found as a result of an unconstitutional *seizure* of a person or property."[199] According to Tomkovicz:

> The Fourth Amendment's prohibitions of unreasonable seizures of individuals and effects are arguably designed to serve liberty and possessory interests, respectively, not to shield potential evidence from government eyes. According to the logic of *Hudson*, because suppression does not serve the interests beneath those rules, the exclusionary rule is inapplicable.[200]

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[196] *Id.* at 72 n.3. In *Hudson*, Justice Scalia, speaking for four Justices, viewed *Ramirez*'s reservation of this issue as a clear expression of the "proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule." Hudson v. Michigan, 547 U.S. 586, 602 (2006).

[197] *Hudson*, 547 U.S. at 593.

[198] Tomkovicz, *the Future*, *supra* note 9, at 1864-65 (footnote omitted).

[199] *Id.* at 1865.

[200] *Id.*

Again, we agree with Tomkovicz's judgment. Just as rational persons could determine that exclusion does not advance the purposes behind the constitutional bar on unreasonable seizures, rational persons could also decide that exclusion does not advance the purposes the Court has identified in its inventory search cases. In several cases, the Court has upheld the government's power to conduct inventory searches of impounded cars and an arrestee's effects. The searches involved can be quite extensive, like the search in *Colorado v. Bertine*, which included the detailed inspection of a backpack located inside a vehicle after the owner of the vehicle had been arrested for driving under the influence.[201] The *Bertine* Court, relying on earlier inventory search cases, *South Dakota v. Opperman*[202] and *Illinois v. Lafayette*,[203] held that the police do not violate the Fourth Amendment when they discover evidence pursuant to departmental standardized guidelines for inventory searches. These cases explain that neither the warrant nor probable cause requirements govern inventory searches.[204] Because inventory searches are not designed to advance criminal investigations, traditional Fourth Amendment safeguards, like a magistrate's independent determination that a search is proper or individualized suspicion of wrongdoing, are inapplicable.[205] The Court has also explained that the purposes served by inventory searches include protecting a person's property while in police custody; guarding the government against frivolous lawsuits over lost, stolen, or vandalized property; and

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[201] Colorado v. Bertine, 479 U.S. 367, 368-69 (1987). In the backpack, the officer came across a nylon bag containing metal canisters. *Id.* at 369. After opening the canisters, the officer found drugs, drug paraphernalia, and cash. *Id.* He also discovered cash in a *sealed* envelope located in a zippered outside pocket of the backpack. *Id.* The officer took the backpack and its contents to the police station, and Bertine was charged with possession and intent to sell the drugs. *Id.*

[202] 428 U.S. 364, 369 (1976) (holding that the police's search of a closed glove compartment pursuant to a routine inventory search of a lawfully impounded car did not violate the Fourth Amendment).

[203] 462 U.S. 640 (1983) (holding that the inventory search of an arrestee's personal effects at the police station did not violate the Fourth Amendment's warrant requirement).

[204] *See Opperman*, 428 U.S. at 367 (noting that although vehicles are "effects" within the reach of the Fourth Amendment, the inherent mobility of cars and the reduced expectation of privacy within a vehicle makes "rigorous enforcement of the warrant requirement . . . impossible"). *See generally Lafayette*, 462 U.S. 640.

[205] *Bertine*, 479 U.S. at 371.

protecting police safety.[206] Thus, the Court has authorized inventory searches if law enforcement agencies provide standardized guidelines to control police discretion when conducting such searches.

Keeping in mind the constitutional interests served by inventory searches, we see no reason why suppression is warranted when police conduct an illegal inventory search. As in *Hudson*, the interests protected by the Court's inventory cases "are quite different—and do not include the shielding of potential evidence from the government's eyes."[207] Thus, even if an officer conducts an unreasonable inventory search by ignoring standardized procedure, the Court will find suppression inappropriate. Because the interests served by inventory searches—safeguarding an owner's property; shielding the government from lawsuits over lost, stolen, or vandalized property; and promoting police safety—"have nothing to do with the seizure of . . . evidence," the Court will likely rule, using *Hudson*'s attenuation logic, that the exclusionary rule is inapplicable.[208]

In sum, while Justice Kennedy may believe that after *Hudson* the exclusionary rule remains functioning, there is good reason to believe that *Hudson*'s attenuation theory was designed to restrict future applications of the rule. We believe that *Hudson*'s attenuation theory will not be confined to the context of police violations of the knock-and-announce rule. By insisting that the suppression doctrine only applies when exclusion will promote the underlying Fourth Amendment value the police have violated, *Hudson* brazenly contradicted the notion that exclusion was not intended to vindicate a defendant's constitutional rights.[209]

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[206] *Id.* at 372.

[207] Hudson v. Michigan, 547 U.S. 586, 593 (2006).

[208] *Id.* at 594.

[209] Professor Alschuler cogently explains why *Hudson*'s analysis contradicts a central tenant of the Burger and Rehnquist Courts:

> For more than forty years, the Court has denigrated "rights" theories of the [exclusionary] rule and contended that exclusion never vindicates the interests of the defendant before the court. The Court has insisted that exclusion is always what the *Hudson* Court said it never can be—a windfall awarded to a defendant for the sake of protecting the rights of others. If, as the Court has said repeatedly, exclusion cannot restore the defendant's violated interests and is not designed to do so, *Hudson*'s declaration that

Moreover, Scalia's opinion takes a long stride toward eventual abolition of the exclusionary rule.

CONCLUSION

We believe that the Court is already implementing its "reassessment" of the exclusionary rule. If we are right about the intentions of the Roberts Court, the Court will take a case involving a routine search and seizure violation and rule that the exclusionary rule does not apply unless there is proof of culpable or egregious police conduct. If this occurs, the exclusionary rule will no longer matter—nor will the protections of the Fourth Amendment.

> exclusion is inappropriate *unless* it restores the defendant's violated interests is simply a formula for abolishing the rule.

Alschuler, *Exclusionary Rule*, *supra* note 27, at 1764 (footnote omitted). We believe it is incredible that Justice Scalia was unaware of the inconsistency between the conclusion that exclusion is not a personal right and his newly announced theory in *Hudson*. Scalia is simply too smart and savvy not to have noticed the conflict. This is another example of Scalia's, and the conservative majority's, willingness to find or create theories to promote their anti-exclusionary rule agenda. *See id.* at 1756 ("The Court shifts to whichever reason for exclusion gives it a reason not to exclude.").