

# Criminal Justice

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As Professor Kmiec has said—and Dean Starr before him—the big news in the last year is not this case or that one but the change of personnel. Let's start with Justice Alito since you've heard a little bit more about Chief Justice Roberts.

Justice Alito is a former prosecutor.<sup>2</sup> He brings to the Court not only more prosecutorial experience than any of the other members of this Court, or the Court in recent history, but perhaps more prosecutorial experience than any previous Justice in U.S. Supreme Court history.

How will that play out? What will it mean? Let's take one case where perhaps Justice Alito's vote was decisive last Term. It's the case of *Hudson v. Michigan*.<sup>3</sup> The reason that I say that perhaps Justice Alito's vote may have been decisive is that *Hudson* is a five-to-four case in which Justice Alito sided with the State of Michigan.<sup>4</sup> It was a case that was initially heard when Justice O'Connor was still in the Court, and it's quite possible that she had tentatively decided against the State of Michigan and for the criminal defendant in the case.

So here's a situation where, at least if you read certain tea leaves, it seems that the shift from Justice O'Connor to Justice Alito may have made a difference on the Court.

Here's the case: It's well established—and no one on the Court disagreed on this point—that in a variety of situations, the police, when they

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2. Justice Alito served as an Assistant U.S. Attorney from 1977 to 1980, Assistant Solicitor General from 1981 to 1985, Deputy Assistant Attorney General in the Office of Legal Counsel from 1985 to 1987, and U.S. Attorney for the District of New Jersey from 1987 to 1990. The White House, Biography of Justice Samuel A. Alito, <http://www.whitehouse.gov/infocus/judicialnominees/alito.html> (last visited Oct. 25, 2006).

3. 126 S. Ct. 2159 (2006).

4. *Id.* at 2170-71.

get a warrant, have to knock and announce their presence and wait a little bit (say, ten to fifteen seconds) before they enter a dwelling place.<sup>5</sup>

Now, sometimes there are exceptions, in cases of danger and risk of destruction of evidence, but in this case, no one was really arguing that; Michigan was not arguing that the exception actually applied.<sup>6</sup> So the case was argued under the premise that the police were supposed to knock and announce they had a warrant. And though the police did in fact have the warrant, they didn't wait the ten seconds.<sup>7</sup> They knocked and then just came in, and they found cocaine.<sup>8</sup> They found what they were looking for.

And the question is whether the cocaine should have been suppressed, should have been excluded, because they didn't follow the rule of waiting the ten to fifteen seconds.<sup>9</sup> And by vote of five to four, the Supreme Court said that exclusion is not required in this situation.<sup>10</sup>

Now, this case involved only a tiny corner of Fourth Amendment doctrine and a really small set of facts, but the reasons that were given are quite significant and may foreshadow something interesting in future cases. And remember, Justice Alito is the swing voter in effect on this because it's four to four when he joins the Court.

The opinion of the Court, written by Justice Scalia, makes a couple of arguments. Here's one: There's no causation. There's no causal link between the violation—the fact that the cops didn't wait the ten to fifteen seconds—and the finding of the cocaine.<sup>11</sup> If the police had waited ten to fifteen seconds, they would have found the cocaine ten to fifteen seconds later. So what's the difference? (And by the way, if the homeowner would have gotten rid of the cocaine in those ten to fifteen seconds, well, then maybe the cops shouldn't have had to wait in the first place.)

So that's one argument: There's no causation. That's actually a really significant point when you think about it. Later, I'm going to give you another kind of case where that point could be very significant. But before I do, here is another thing that the majority said: There's no good fit between exclusion of evidence and the relevant values that the Fourth Amendment is

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5. The common law knock and announce rule is "embedded in Anglo-American law." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (quoting *Miller v. United States* 357 U.S. 301, 313 (1958)).

6. *See id.* at 2163.

7. *Id.* at 2162.

8. *Id.*

9. *Id.* at 2162, 2171 (acknowledging that the police in this case only waited about 3-5 seconds whereas previous cases have held 10-20 seconds is reasonable).

10. *Id.* at 2168.

11. *Id.* at 2164.

designed to serve.<sup>12</sup> In fact, in a variety of situations, civil damage actions might be a better way of vindicating the Fourth Amendment.<sup>13</sup>

To flesh out this point, consider why it would ever matter whether the cops waited the fifteen seconds. Here's a hypothetical case that Justice Scalia seemed to hint at. (I'm elaborating a little bit on his intuition.) Let's imagine *not* a guilty homeowner where the cops find the drugs. Let's imagine an innocent homeowner. She's in her nightgown. The cops don't wait the ten to fifteen seconds, and they just bust in and she hasn't even had a chance to cover up.

Now, in this hypothetical case, you can see the harm that's done by that failure to wait fifteen seconds. Let's further imagine that the cops don't find anything incriminating when they search her house. She's innocent. The exclusionary rule does her no good at all. It really isn't connected to the real wrong. The wrong isn't really done to the guilty person when you find the cocaine ten seconds later. It's really done to the innocent person when her privacy and dignity have been invaded without proper respect at the door.

And the suggestion by the Court is that there actually is a better way to remedy various sorts of Fourth Amendment violations.<sup>14</sup> A better remedy, for example, would be a civil damage action—a *Bivens* type of action if it's the FBI that blunders in,<sup>15</sup> or a Section 1983 civil rights suit if it's state or local police.<sup>16</sup> And punitive damages might issue. I wouldn't mind being on the legal team taking the nightgown-clad plaintiff's case on a contingency fee basis because a local jury may be outraged by the violation of the privacy and dignity. That's the kind of case where the Fourth Amendment would be properly vindicated, not this one where the guy is trying to exclude evidence and where they would have found it anyway ten seconds later.

Those are the two arguments made by the Court. In response, the dissenters, led by Justice Breyer, said that the Fourth Amendment was violated, and what we do in Fourth Amendment violation cases is exclude evidence.<sup>17</sup>

*Hudson* itself directly applies only to a small number of knock-and-announce situations. It can be read in a very narrow way, if we were inclined to do so. On the facts of the case, here is an important thing to reiterate: the police actually had a warrant—a point that the majority

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12. *See id.* at 2166-68.

13. *See id.* at 2167-68.

14. *See id.*

15. A *Bivens* action is the federal analog to constitutional tort suits brought against state officials. *Bivens v. Six Unknown Fed. Narcotics Agents*, established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute or state common law conferring such a right. *See* 403 U.S. 388, 397 (1971).

16. *See* 42 U.S.C. § 1983 (2006).

17. *Hudson*, 126 S. Ct. at 2173.

emphasizes and that Justice Kennedy, who writes a separate concurrence, also emphasizes. We need to understand that. The cops are not just blustering in without a warrant. The defendants say, “Yeah, but they didn’t *comply* with the warrant ‘cause the warrant said to wait fifteen seconds and they didn’t.” So that was the debate.

But with these two lines of argument that the majority put forth, let me give you a couple of future cases, ranging far beyond the facts of *Hudson*, where the majority’s logic might have more sweeping significance. Imagine the very common situation where the cops don’t have a warrant but they do have probable cause. They could have gotten a warrant. Let’s imagine that they didn’t because they thought this case fell into one of the very many exceptions to the so-called “warrant requirement.” So imagine that the police, in good faith, didn’t get the warrant, but they could have easily done so—it would have easily issued. They go, they find the stuff, and now they say, “It’s true that we violated the Fourth Amendment because we were supposed to get a warrant, but we could have gotten one issued. It would have been issued, and if it had, we would have found the stuff just the same way.”

Now, that’s not a small category of cases. That’s a lot of cases. In many, many cases, actually, the Supreme Court has excluded evidence where there was probable cause. A warrant clearly would have issued, but it didn’t on the facts of these cases. Now, are the Justices going to apply *Hudson*’s causation analysis in these cases? If so, this would actually be a pretty big exception to the exclusionary rule.

Justice Kennedy could say, oh, that’s a very different case because in this new case no warrant actually was issued whereas in *Hudson*, it did. On the other hand, I am positing a case in which the cops also were acting in good faith. In *Hudson*, by contrast, the cops didn’t give a reason why they just blustered in.

Here is another possible line of cases that *Hudson* might spawn. Let’s imagine that California or some other state says to itself, “The Supreme Court is telling us the exclusionary rule is not great in a whole bunch of situations. Civil damages are a better way to go. Civil damage suits are actually the way the founders went; no founder believed in the exclusion of evidence. No English court ever excluded evidence on Fourth Amendment grounds at the time of the founding. No American court, state or federal, ever did so for the first 100 years after the Declaration of Independence.<sup>18</sup> The exclusionary rule is distinctly a modern creation and now the *Hudson*

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18. In the U.S. Supreme Court, the exclusionary rule first appeared in *Weeks v. United States*, 232 U.S. 382 (1914). *Weeks* in turn built on *Boyd v. United States*, 116 U.S. 616 (1886).

Court is saying that it is also a very costly one, one that really doesn't fit the Fourth Amendment right. The right is really the right of innocent people to be protected in their dignity, not the right of guilty folks to get away with their crimes."

So suppose California, or some other state, were to say, "You know what we're going to do? We're going to provide more remedies for innocent people. We're going to get rid of sovereign immunity, we're going to waive qualified immunity of government officials, and if we really provide full remedies for the innocent, we'd like to opt out of the regime of exclusion." And you laugh, but I'm not at all sure that the Supreme Court says now that that's impermissible. The Court may actually be encouraging states to consider creating alternative remedial regimes to exclusion, regimes that better fit the real violation, which as I said, is most clearly seen with the innocent homeowner rather than the guilty drug dealer. So that's my take on *Hudson*.

In another important criminal procedure set of cases, last Term, the Supreme Court clarified the Confrontation Clause.<sup>19</sup> The Sixth Amendment says, "In all criminal prosecutions, the accused shall enjoy the right to be confronted with witnesses against him."<sup>20</sup> If you read that language, it's absolute. It says, "The accused shall enjoy the right." But for a long time, courts didn't read it in an absolute way. They basically said, "Well, you know, you can't really always allow the defendant to confront the witnesses against him. In all sorts of situations, although hearsay evidence is often impermissible, the government may create exceptions to the hearsay rule, and if those exceptions are reasonable, then we're going to deem the confrontation right satisfied."<sup>21</sup>

In response, Justice Scalia and others said, "Well, where does it say that in the Sixth Amendment? Isn't this an absolute right? And if it is, how could it ostensibly be an absolute right given that we have all sorts of exceptions to the hearsay rule—reasonable exceptions? Answer: The hearsay rule is actually different from the Confrontation Clause. We need to have a better definition of who is the witness within the meaning of the Confrontation Clause."<sup>22</sup>

To illustrate this new approach, let's imagine that Bob sees Doug and starts chatting and says, "You know, I saw Akhil running across the street yesterday, and he was acting weird." And then later on, it becomes apparent that a crime was committed on that day and the government decides to put me (Akhil) on trial. But Bob is now off trekking in Nepal. He's unreachable. So Doug takes the stand and says, "Well, Bob told me that he

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19. See *Davis v. Washington*, 126 S. Ct. 2266 (2006).

20. U.S. Const. amend VI.

21. See *Ohio v. Roberts*, 488 U.S. 56, 65 (1980).

22. See *Davis*, 126 S. Ct. at 2274-77.

saw Akhil running around that day.” Now, when Doug takes the stand, that’s hearsay. That hearsay might fall into an exception or not, but if the hearsay is admitted, would it be a Confrontation Clause violation?

On the one hand, I’m not getting to look Bob in the eye. But on the other hand—and this is the key point stressed by Scalia and others in the new understanding—Bob is really not a “witness” within the meaning of the Sixth Amendment. He never took the stand. He never talked to the police, he never swore an oath. At the time that he was talking to Doug, the crime may not have even have fully occurred. Maybe actually I was running across the street as part of a plan where the last criminal act was done several days later. Bob may not have even known that there was anything criminal about my conduct when he was talking to Doug—so it is a mistake to treat Bob as a “witness” within the meaning of the Sixth Amendment.

This is the new approach to a Confrontation Clause, and the Supreme Court is moving to this more textualist approach. The Confrontation Clause is absolute, but not everything is really witnessing. Certain out-of-court statements (like Bob’s) are not properly understood as witnessing.

So how should we think about witnessing? Let’s start with an easy case: It would be wrong for a state or the federal government to try me as a defendant, have Bob testify under oath to the jury, and just exclude me from the proceeding. That’s obviously a violation of the Confrontation Clause. Now, it would be equally obvious if instead of that, on the day before the trial, the government videotaped Bob under oath. He gives a full deposition, an affidavit, but I’m not there. The government excludes me, and then the government introduces that affidavit and deposition to the jury. That too seems like a textbook violation of the Confrontation Clause.

If you’re with me so far, how about if the deposition or the affidavit that the police get isn’t the day before the trial, but a month before the trial, and it takes place in the police station? Maybe the result would be the same. The police are in effect getting his testimony, getting his affidavit, and not letting me look him in the eye. They are treating him really as the witness because he’s acting as a witness under oath and with full transcription.

Well, what if he’s not under oath at the police station? Is that a violation? Now we’re starting to get a little closer to the line. But what is clear on the other side is that when Bob talks to Doug, and when the police weren’t remotely involved, and when Bob may not even have known that there was a crime going on, and indeed when the crime may not have even occurred—in that situation, there is no Confrontation Clause issue. There is no improper Sixth Amendment witnessing. That situation raises a hearsay question but not Confrontation Clause issues.

And that is the basic approach of the current Court. So the Court is now trying to draw some fine lines. Justices Thomas and Scalia, who both actually led this revolution away from a hearsay approach toward a more categorical approach, are now beginning to disagree amongst themselves in these close cases. Let me just give you the facts of the cases before the Court last Term. They are 911 cases. In one situation, a woman calls up, tells the cops that something bad is happening to her, begs them to please come immediately, and later this 911 recording is introduced at trial.<sup>23</sup> Is that like an affidavit or not?

The Court last Term said no, no, that really wasn't like an affidavit.<sup>24</sup> That was trying to help out someone in an emergency. That wasn't a criminal interrogation. It was not like an affidavit or a deposition. But it might be different if, after the emergency has passed, the police go to her house and start questioning her about what happened, and then introduce that transcript. That looks more like an affidavit.<sup>25</sup>

One other thing in these cases that's interesting: suppose the victim does not want to testify at trial because the defendant beat her up and threatened her and she is afraid for her life. Has the defendant by his own conduct forfeited his right to the confrontation? Should he be estopped from complaining if the reason she is not testifying is that he really threatened her? It's tricky, of course, because whether he threatened her or not is very closely connected to whether he is guilty of the underlying offense for which he's been charged, but the Justices have now opened up the possibility that they are going to take forfeiture and estoppel very seriously in future cases.

Two more issues, and then I am going to sit down. One is the issue of peremptory challenges. In a case that came out of California, *Rice v. Collins*,<sup>26</sup> a question arose whether the prosecutor had used race impermissibly in challenging a would-be juror. Everyone now agrees that it is unconstitutional to exclude you from being a juror because of your race, whether the person trying to exclude you is the prosecutor or the defense attorney, for that matter.<sup>27</sup> Lawyers are not supposed to use race in picking jurors. (But see the O.J. Simpson case.)

In the *Rice* case, everybody agrees that the prosecutor was not supposed to use race.<sup>28</sup> The question, though, was: Did the prosecutor in fact do so? The state courts, after looking carefully at the issues, said they were convinced that the prosecutor really wasn't excluding Juror Sixteen for racial reasons. He was instead excluding her because she rolled her eyes and

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23. *Id.* at 2276-78.

24. *Id.*

25. *Id.* at 2278-79.

26. 126 S. Ct. 969 (2006).

27. *Id.* at 972-73.

28. *See Rice*, 126 S. Ct. at 972-73.

she seemed young and maybe soft on crime, not because of her race as such.<sup>29</sup> And the Ninth Circuit said, “We don’t buy it. We think it was race.”<sup>30</sup> And the Supreme Court overruled the Ninth Circuit. They do that a lot. And they said, “No. You’re supposed to take seriously reasonable determinations of fact made by state courts, and this was a reasonable call,” and that was unanimous.<sup>31</sup> So far, that’s not exactly headline news: The Supreme Court often slaps down the Ninth Circuit unanimously. (There’s one judge, for example, on the Ninth Circuit, who, if memory serves, was unanimously struck down five times in a single Term several years ago. This judge is a graduate of the Yale Law School.)

But what is new and notable is that Justice Breyer, joined now by Justice Souter, said we should get rid of peremptory challenges altogether.<sup>32</sup> We should be abolitionists about this, because as long as we allow peremptory challenges, they are going to be used in race-based or gender-based ways that are going to be difficult to prevent or to smoke out after the fact.<sup>33</sup>

By the way, what was the supposedly *permissible* justification for bouncing Juror Sixteen? That she was young. But she was over eighteen, old enough to vote. Think how intolerable it would be if the registrar basically stated, “Well, you’re over eighteen, but you look too young. So we’re not going to let you vote.” If you’re old enough to vote, why aren’t you old enough to vote on a jury—free from discrimination? There’s a constitutional amendment on this issue—the Twenty-sixth Amendment, to be precise. You can’t discriminate against someone in the vote because they are nineteen as opposed to twenty-nine.

Why should we be discriminating against people in jury service because they are nineteen instead of twenty-nine? Why shouldn’t all Americans who have a right to vote also have a corresponding right to serve without discrimination in the courtroom itself? This is what Thurgood Marshall said a generation ago.<sup>34</sup> Justice Breyer two Terms ago first took up this cause. Now Justice Souter has joined him. So you might hear more about this. When two Justices agree—whenever two or more gather in the name of a certain idea—sometimes things follow. So keep an eye on that for the future.

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29. *Id.* at 973.

30. *See generally* Collins v. Rice, 365 F.3d 667 (9th Cir. 2004).

31. *See Rice*, 126 S. Ct. at 972-73.

32. *See id.* at 977 (Breyer, J., concurring).

33. *Id.*

34. *See generally* Batson v. Kentucky, 476 U.S. 79, 102-08 (1986) (Marshall, J., concurring).

Finally, what about the issues that Justice Alito was being asked about in the video clip—the issues of actual innocence, DNA, and the death penalty?

The Supreme Court decided several cases this Term, and I really wonder whether we've got the big picture right here. In one case, *Kansas v. Marsh*,<sup>35</sup> the question was whether when the aggravating factors are balanced perfectly against the mitigating factors, you can ever have the death penalty, and the Supreme Court said, "Yes, you can," and the dissenters said, "You know, there's a lot of recent evidence that innocent people may be being executed and that means that we should be very careful about the death penalty, and maybe in any close case we should side with the defendant."<sup>36</sup> And Justice Scalia, responding to the dissenters, says this case at hand has nothing to do with innocence.<sup>37</sup> He says—and I quote—"The dissenters' proclamation of their policy agenda in the present case is especially striking because it's nailed to the door of the wrong church; that is, set forth in a case litigating a rule that has nothing to do with the evaluation of guilt or innocence."<sup>38</sup>

OK. So this is about aggravating and mitigating factors. There's no debate about whether the person did it or not. Maybe Justice Scalia has a point. But now take cases where there *is* a real debate about whether the person did it or not. In fact, let's imagine a case where it's pretty clear that *no* reasonable juror could decide beyond reasonable doubt that he did it. Can we still execute him?

That was the question that Justice Alito tried to field in the video clip.<sup>39</sup> There was a lot of discussion about procedure, but what about innocence?

In a case called *House v. Bell*,<sup>40</sup> there was DNA evidence. It was a death penalty case, and here's what the Court said. Some Justices in dissent said that actually the person's DNA evidence doesn't prove that he's innocent.<sup>41</sup> The Court thought at the very least that the DNA proved that there was clearly reasonable doubt.<sup>42</sup> Here's what they said, per Justice Kennedy: While "[t]his is not a case of conclusive exoneration," and the issue is close, "this is the rare case where had the jury heard all the conflicting testimony," including some DNA evidence that they didn't get a chance to hear that pointed away from the defendant, "it is more likely than

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35. 126 S. Ct. 2516 (2006).

36. *See id.* at 2523, 2544-45.

37. *Id.* at 2532 (Scalia, J., concurring).

38. *Id.* (Scalia, J., concurring).

39. *See supra* note 1.

40. 126 S. Ct. 2064 (2006).

41. *See id.* at 2096 (Roberts, C.J., concurring in part and dissenting in part).

42. *Id.* at 2078-79.

not that no reasonable juror viewing the record as a whole would lack reasonable doubt.”<sup>43</sup>

So if they had had this evidence at the trial, none of the jurors should have voted to convict, and a judge should have ordered an acquittal as a matter of law. What happens to the defendant in this case? Does he get acquitted as a matter of law? No. Does the court even say, “Well, at very least, you can’t put him to death”? No. Does he automatically get a new trial? No. All that follows when no reasonable juror could have found more likely than not that this person did it beyond reasonable doubt is that he gets to argue his procedural technicalities.

That’s what Justice Alito, then Judge Alito, was beginning to tell you in that video clip,<sup>44</sup> and I wonder whether we’re missing the basic point, which is—or should be, I think—about innocence. It should be about guilt or innocence in the exclusionary rule context, but it should also be about guilt or innocence in the case of newly discovered evidence, especially, I think in death cases. Also I’ve argued that our trials should be about non-discrimination, and we should, in fact, get rid of the peremptory challenge. We should take up the challenge that Thurgood Marshall offered up a generation ago. Thank you.

#### QUESTIONS BY DAVID G. SAVAGE

DAVID G. SAVAGE: Well, Akhil, how about giving an answer to the sort an intriguing proposition you throw out. Should the Court overturn the exclusionary rule, and what would take its place? I can imagine, as you said, that there’s a lot of good arguments against the exclusionary rule, but what if I’m a member of the LAPD, the Court overturns the exclusionary rule, and I say, “From now on, with these drug cases, let’s go out there. Let’s break into the house, break down the door. Most of the time the occupants are going to be drug dealers, and we’re home free. Maybe one out of twenty are not, but let them sue. It will take a long time.”

But if the police take that—if there’s no penalty for violating the Fourth Amendment, they could just routinely violate the Fourth Amendment and then maybe occasionally have to deal with a lawsuit down the road.

AKHIL REED AMAR: So let me flip it around and talk about all the cases where right now, unless you have a robust regime of simple damages, there’s no remedy. If the cops know I’m innocent and they just want to

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43. *Id.* at 2086.

44. *See supra* note 1.

harass me because of my race, politics, or gender; if they strip search me, humiliate me, yet they know I'm innocent, so there will be nothing there to exclude; if they rough me up, via police brutality; for me and for many others like me, damages may be the only possible approach. As the Court put the point in a famous case involving Webster Bivens, an innocent man degraded by police officers, it is "damages or nothing" for innocent people who have already been abused.<sup>45</sup>

The way we vindicate constitutional rights across the board is by using techniques of damages, including punitive damages. For example, this is how we vindicate a wide range of due process, equal protection, and First Amendment cases. So you can never rely solely on exclusion just because it would be open season on the innocent people of the world.

Now, I actually think we're not doing right by the innocent people of the world. We've created too many governmental immunities, even in cases of clear constitutional violation. But once we actually start to remedy that situation—and cases like *Hudson* are perhaps encouraging federal lawmakers, state legislatures and even state judges to think about remedial alternatives—then the question is, if we really do have robust forms of deterrence and punitive damages in these other areas, do we need to rely as heavily on exclusion as we have in the past?

So what gets the LAPD's attention? Well, they brutalized Rodney King, and a civil damage action was brought and millions of dollars of punitive damages<sup>46</sup> were assessed and taxpayers began to ask, "Should we be paying for this? Should our police department be doing this?" Because when you start adding zeros to the end of these awards, eventually it starts to get people's attention.

I think the problem right now is the old style of thinking that the exclusionary rule is actually a pretty good remedy, when in fact, it isn't.

I'll say it one other way. James Madison was no dope. Neither was James Wilson, Alexander Hamilton, or any of the guys present at the founding. Not one of them ever believed in the exclusion of evidence. They did very much believe in the Fourth Amendment. After all, they drafted it. They did pretty much believe in some of these remedies that the courts in the 20th Century actually cut back, even as modern courts were creating more opportunities for guilty defendants.

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45. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

46. In 1991, Rodney King, an African American, had a violent confrontation with officers of the Los Angeles Police Department, which was videotaped by a bystander. The four officers charged with using excessive force in subduing King were acquitted. King received \$3.8 million in a civil suit against the LAPD. *Curtain Closes on King Case; With Final Ruling Made, Ex-Sgt/ Is Free—And Rich*, L.A. TIMES, Sept. 30, 1996, at 4.

DAVID G. SAVAGE: If you were on the Court would you—

AKHIL REED AMAR: God forbid.

DAVID G. SAVAGE: Would you vote to overturn the exclusionary rule and assume states are going to come up with remedies, or would you just talk about it and say that maybe someday—you know, this is really not a good remedy—someday we ought to do something. I mean, should the Court overturn the exclusionary rule and allow states, or say to states, “Hey, you ought to come up with a better remedy”?

AKHIL REED AMAR: So let’s rewrite the question in a way focusing not on what I would do but what a proper Court should do, a Roberts Court, a Court that believes in a certain kind of judicial restraint. First, note that judicial restraint can come in different ways. If you’re restrained vis-à-vis the Constitution, you just say that the Constitution actually doesn’t require exclusion. It really doesn’t. This was a made-up judicial rule, and so we should abandon it because we are imposing a rule on states and the federal government that just ain’t in the Constitution. That’s one aspect of judicial restraint.

But Chief Justice Roberts says, “Well, you know, precedent and gradualism are also important and I don’t want to preside over radical changes in a standard operating procedure.”<sup>47</sup> Thus, there are distinguished proponents of both versions of judicial restraint. Some people say, “It’s the Constitution and we have to follow it and that’s it,” and other people say, “Precedent is important too, and gradualism is important as well.”

The *Hudson* case, it seems to me, blends in both versions of judicial restraint. I know my old boss Steve Breyer would totally disagree with me. He dissented in the case. But as I see it, while Justice Scalia hints in the opinion at the lack of strong constitutional foundations in the exclusionary rule, all he does is simply begin a process by which exclusion will be whittled down in some cases and other remedial schemes will start to build up.

Ultimately, not a lot was actually done in *Hudson*. It was very subtle, and it’s possible over the next decade we’ll see a little bit less exclusion and a little bit more use of other remedial mechanisms. In my view that would

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47. *Confirmation Hearing on Nomination of John Roberts, Jr. to be Chief Justice of the United States Before S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. (2005) (statement of John Roberts, Chief Justice of the Supreme Court nominee).

be good trade-off if it could be done. I'm sure, however, that Erwin thinks that that would not be a good trade-off.

AUDIENCE QUESTIONS FACILITATED BY PROFESSOR MCGOLDRICK

PROFESSOR MCGOLDRICK: One student asks, "Is it not true that the *Hudson* case will lead to more violations of the knock and announce rule, more imperialistic tactics?"

AKHIL REED AMAR: Imagine you're the cop, and you're going to bust in or not. I'd want you, in fact, to try to think about what's the likelihood that you are going to be busting in on an innocent woman in her nightgown, because that's actually where the Fourth Amendment harm would be most severe.

If the likelihood of that is zero, well, then if you did bust in ten seconds too soon, I'm not sure what the harm would be. You would simply be finding the cocaine ten seconds earlier than otherwise. Let's be clear what we're talking about here. That's all that happens when you don't wait for ten seconds in the case of guilty defendants who don't raise any special claim of nightgown-like privacy.

Now, I'd want you (the cop) to actually be thinking about, "Well, this person may seem guilty, but he's also likely to be in his underwear." Guilty people might be in their underwear, too, and guilty people have constitutional rights the same as anyone else—but no more. Exclusion should not be some special get-out-of-jail-free card. I'd want anyone, guilty or innocent, to be able to say, "You intruded on my privacy. There was a harm when you failed to wait the ten seconds, and here's what the harm was."

In *Hudson*, I didn't quite see what the harm was because they just found the cocaine ten seconds earlier than they otherwise would have and there was apparently no underwear issue. But in a case where people are busted in upon in ways that do violate their privacy and dignity, there might be serious harm, and I'd want the cops to really think about, anticipate that and be ever more careful if there's any possibility of that. And damage actions—especially if the law provides for sufficient punitive damages—do begin to get the cops' attention, as well as the attention of the police departments if their budgets are being devoted to paying off damage awards rather than paying for good police work.

PROFESSOR KMIEC: We're going to turn civil rights, and as we do, we do welcome back, as the Dean said, a great friend of the law school who's visited with us many times for the Judicial Clerkship Institute who's a superb teacher and who will give us an overview of the civil rights cases from the past term, but those will be introduced by the Chief Justice as well. Let's hear a word from John Roberts.

**(Video clip shown)<sup>1</sup>**

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1. From Judge Roberts's Confirmation Hearings:

SENATOR EDWARD KENNEDY: Do you have any concerns or reservations about the constitutionality of the 1964 Civil Rights Act that outlawed racial discrimination in public accommodations, employment and other areas?

JUDGE ROBERTS: I don't think any issue has been raised concerning those. I'm cautious, of course, about expressing an opinion on a matter that might come before the Court. I don't think that's one that's likely to come before the Court. So I'm not aware of any questions that have been raised concerning that, Senator.

SENATOR EDWARD KENNEDY: So I'll assume that you don't feel that there are any doubts on the constitutionality of the '64 Act. Do you have any doubts as to the constitutionality of the '65 Voting Rights Act?

JUDGE ROBERTS: Well, now, that's an issue, of course, as you know, its up for renewal. And that is a question that could come before the Court; the question of Congress' power – Again, without expressing any views on it, I do know that it's going to be ...

SENATOR EDWARD KENNEDY: Well, that's gone up and down the Supreme Court – the 1965 Act and again the 1982 Act extension.

JUDGE ROBERTS: Yes, and the issue would be ...

SENATOR EDWARD KENNEDY: I'm just trying to find out, on the Voting Rights Act, whether you have any problem at all and trouble at all in terms of the constitutionality of the existing Voting Rights Act that was extended by the Congress.

JUDGE ROBERTS: Oh. Well, the existing Voting Rights Act: the constitutionality has been upheld. And I don't have any issue with that.

SENATOR EDWARD KENNEDY: OK.

JUDGE ROBERTS: There's a separate question that would be raised if the Voting Rights Act were extended, as I know Congress is considering. And those arguments have been raised about whether or not particular provisions should be extended or should not be extended. And since those questions might well come before the Court, I do need to exercise caution on that.

SENATOR EDWARD KENNEDY: But with regards to the act that we passed, the bipartisan act – I'm going to come back to it – and about your position on the 1982 Act – I know you had concerns and I'm going to come back to those – but you're not suggesting that there's any constitutional issue with that.

JUDGE ROBERTS: Again, I don't want to express conclusions on hypothetical questions, whether as applied in a particular case, where there would be a challenge in that respect. Those cases come up all the time and I do need to avoid expressing an opinion on those issues.