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CONSTITUTIONAL LAW: SUPPRESSING THE EXCLUSIONARY RULE

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

Benjamin J. Robinson[*]

Police obtained a warrant to search Petitioner's home and, after announcing their presence, waited only a short time before they entered and discovered drugs and a loaded gun.[1] The State charged Petitioner with unlawful drug and firearm possession.[2] Petitioner moved to suppress all evidence from the search by arguing that police entered his home too soon after their announcement, thereby violating the Fourth Amendment.[3] The trial court granted Petitioner's motion, but the Michigan Court of Appeals reversed on interlocutory review.[4] The Michigan Supreme Court denied Petitioner's application for leave to appeal,[5] and Petitioner was convicted of drug possession.[6] Petitioner challenged his conviction and reasserted his argument that police violated the Fourth Amendment.[7] The Michigan Court of Appeals affirmed Petitioner's conviction, and the Michigan Supreme Court again declined review.[8] The United States Supreme Court

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

2. *Id.* Police delayed their entry approximately three to five seconds after announcing their presence. *Id.*

3. *Id.* The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. *See generally* Jeffrey A. Bekiares, Case Comment, *Constitutional Law: Ratifying Suspicionless Canine Sniffs: Dog Days on the Highways*, 57 FLA. L. REV. 963, 964-65 (2005) (discussing the Supreme Court's evolving Fourth Amendment jurisprudence).

4. *Hudson*, 126 S. Ct. at 2162. The Michigan Court of Appeals held suppression inappropriate when police search under a warrant but fail to properly knock and announce their presence. *Id.*

5. People v. Hudson, 639 N.W.2d 255, 255 (Mich. 2001), *aff'd*, 126 S. Ct. 2159 (2006).

6. Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006). Petitioner was convicted of possession of less than twenty-five grams of cocaine and sentenced to eighteen months of probation. People v. Hudson, No. 246403, 2004 WL 1366947, at *1 (Mich. Ct. App. June 17, 2004).

7. *Hudson*, 126 S. Ct. at 2162.

8. *Id.*

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granted certiorari[9] and, in affirming the decision, HELD that a violation of the knock-and-announce rule[10] does not require a court to suppress all evidence found during the search.[11] In reaching its conclusion, the Court determined that the substantial social costs imposed by the exclusionary rule exceed its deterrent benefits and that alternative remedies provide adequate protection against Fourth Amendment knock-and-announce violations.[12]

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9. Hudson v. Michigan, 545 U.S. 1138 (2005).

10. Michigan's knock-and-announce provision is codified in MICH. COMP. LAWS ANN. § 780.656 (West 2007). The federal knock-and-announce statute is codified at 18 U.S.C. § 3109 (2000). The federal statute provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

Id.; *see also* Wilson v. Arkansas, 514 U.S. 927, 929 (1995) (holding that the common-law knock-and-announce principle "forms a part of the reasonableness inquiry under the Fourth Amendment").

11. *Hudson*, 126 S. Ct. at 2165, 2168. Respondent conceded the knock-and-announce violation. *Id.* at 2163. Therefore, the instant Court limited its inquiry to the proper remedy for violations of the knock-and-announce requirement. *Id.* The Court specifically declined a remedial inquiry in previous knock-and-announce cases. *See, e.g.*, *Wilson*, 514 U.S. at 937 n.4 (declining to address whether exclusion is a constitutionally compelled remedy for violations of the knock-and-announce requirement). But the knock-and-announce requirement is not absolute. Between *Wilson* and the instant case, the Court examined the knock-and-announce requirement on three separate occasions. *See* United States v. Banks, 540 U.S. 31, 33 (2003) (recognizing a fifteen to twenty second delay by police as reasonable following knock-and-announce); United States v. Ramirez, 523 U.S. 65, 70-71 (1998) (holding that the Fourth Amendment does not subject police to a higher standard in knock-and-announce cases than that applicable to "no-knock" entries during which police damage property); Richards v. Wisconsin, 520 U.S. 385, 388 (1997) (rejecting a blanket exception to the knock-and-announce requirement for felony drug investigations).

12. *Hudson*, 126 S. Ct. at 2166-68. For example, the Court observed that a damages claim under 42 U.S.C § 1983 provides an adequate remedy for Fourth Amendment knock-and-announce violations. *Id.* at 2167-68. Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

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The exclusionary rule is a judicially created remedy designed to operate as a powerful check against police misconduct.[13] In *Mapp v. Ohio*,[14] the Court considered whether evidence obtained through a search that violated the Fourth Amendment could be admitted in a state criminal proceeding.[15] The petitioner denied entry to state police officers who attempted to search her home without producing a warrant.[16] Police forced their way inside and, after an extensive search, arrested the petitioner for possession of obscene material.[17] The petitioner was convicted, and the Supreme Court of Ohio upheld her conviction.[18] On appeal, the United States Supreme Court reversed the decision and held that all evidence obtained by searches and seizures in violation of the Fourth Amendment is not admissible in a state court.[19]

Mapp expanded the exclusionary rule's scope by applying the rule to the states through the Fourteenth Amendment.[20] The majority emphasized that the exclusionary rule secures the privilege and enjoyment of the Fourth Amendment through deterrence of police misconduct.[21] In fact, the Court emphasized deterrence as the exclusionary rule's undergirding

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13. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court first held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. *Id.* at 398. The Court first adopted the rule to effectuate the Fourth Amendment right of all citizens "'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .'" United States v. Calandra, 414 U.S. 338, 347 (1974) (quoting U.S. CONST. amend IV); *see also supra* note 3 and accompanying text.

14. 367 U.S. 643 (1961).

15. *Id.* at 656-57. The Court had previously rejected application of the exclusionary rule in state criminal proceedings. *See* Wolf v. Colorado, 338 U.S. 25, 33 (1949) (concluding that "in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure").

16. *Mapp*, 367 U.S. at 644. Police responded to information that a person who was wanted for questioning in connection with a recent bombing was hiding in the home and "that there was a large amount of policy paraphernalia being hidden in the home." *Id.* At trial, the prosecution did not enter a search warrant into evidence, nor did it explain the failure to produce a warrant. *Id.* at 645.

17. *Id.* at 644-45.

18. *Id.* at 655-56. The Supreme Court of Ohio acknowledged that the respondent's conviction was "based primarily upon the introduction [of] evidence . . . seized during [the] unlawful search." *Id.*

19. *Id.* at 655. The Court reasoned that because "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment], it is enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Id.*

20. *Id.* at 655-56. The Court further opined: "[O]ur holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense." *Id.* at 657.

21. *Id.* at 648.

principle.[22] The majority reasoned that such deterrence compels respect for Fourth Amendment rights in "'the only effectively available way—by removing the incentive to disregard [them].'"[23] The Court analyzed several alternative remedies, but concluded that such alternatives were either inadequate or illusory.[24]

In *United States v. Leon*,[25] the Court reviewed the scope of the exclusionary rule in light of *Mapp*, and considered whether to recognize a good-faith exception to the rule.[26] Police obtained a warrant to search the respondent's home and discovered a large quantity of drugs.[27] The respondent was indicted for violating federal drug laws, but a district court found that the search warrant's supporting affidavit was insufficient and therefore granted the respondent's motion to suppress the evidence seized under the warrant.[28] The Court of Appeals for the Ninth Circuit affirmed,[29] and the United States Supreme Court granted certiorari.[30] Carving out a significant good-faith exception, the Court held that "evidence obtained in objectively reasonable reliance" upon a facially valid search warrant later shown to violate the Fourth Amendment is admissible in federal and state criminal prosecutions.[31]

In *Leon*, the Court first considered the broad application of the *Mapp* holding[32] and reasoned that the exclusionary rule's deterrent effect would not be achieved by suppressing the illegally obtained evidence.[33] The majority established a cost-benefit analysis for applying the exclusionary rule, limiting the rule's application to instances where its costs, specifically the exclusion of reliable information from the "'truth-finding function[] of the courts,'" do not outweigh its deterrent benefits.[34] The Court observed that the exclusionary rule was designed to deter police misconduct,[35] but that the police had acted objectively and reasonably in

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22. *Id.*

23. *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

24. *Id.* at 670 (dismissing police disciplinary action, prosecution, and private trespass actions as either too lofty or too onerous).

25. 468 U.S. 897 (1984).

26. *Id.* at 900, 905.

27. *Id.* at 902.

28. *Id.* at 903.

29. United States v. Leon, 701 F.2d 187 (9th Cir. 1983).

30. *Leon*, 468 U.S. at 904-05.

31. *Id.* at 922-23.

32. *See id.* at 905-06.

33. *Id.* at 922; *see also* United States v. Janis, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence . . . its use . . . is unwarranted.").

34. *Leon*, 468 U.S. at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)). *But see* James v. Illinois, 493 U.S. 307, 312 n.1 (1990) (noting that in *Leon* several Justices emphasized a broader purpose for the exclusionary rule).

35. *Leon*, 468 U.S. at 916.

responding to the warrant.[36] Further, the Court rejected the notion that exclusion should be used to discipline judges and magistrates who erroneously approve search warrants.[37] The Court found no basis to believe that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge's or magistrate's future actions.[38]

Eleven years later, the Court once again narrowed the exclusionary rule's scope and application. In *Arizona v. Evans*,[39] the Court encountered the intersection of advancing computer technology, Fourth Amendment violations, and the narrowing scope of the exclusionary rule. In *Evans*, the Court considered whether suppression is compulsory when police conduct a good faith search based on an electronic record subsequently deemed erroneous.[40] When police stopped respondent for a traffic violation, a computer check revealed an outstanding arrest warrant.[41] Police arrested respondent, and the search incident to his arrest revealed drugs.[42] The State charged the respondent with drug possession but later learned that respondent's warrant had been quashed prior to his arrest.[43] The respondent moved to suppress the drug evidence as "fruit of an unlawful arrest," and the trial court granted his motion.[44] The Arizona Court of Appeals reversed,[45] observing that the exclusionary rule was not designed to deter court or sheriff's office employees who are not directly connected to the arresting officers.[46] On appeal, the Arizona Supreme Court vacated the appellate court's decision,[47] and rejected the distinction between clerical errors made by court employees and those made by law enforcement.[48]

The United States Supreme Court granted certiorari[49] and created a categorical exception to the exclusionary rule for "clerical errors of court

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36. *Id.* at 926.

37. *Id.* at 916. The Court found no support to suggest that exclusion would deter judges and magistrates from ignoring or subverting the Fourth Amendment. *Id.*

38. *See id.* at 907 n.6. *Leon* reaffirmed that the exclusionary rule operates as a judicially crafted remedy to protect against future constitutional violations through its general deterrent effect. *Id.* at 906. The Court underscored the rule's general deterrent purpose as directed toward police misconduct, rather than serving as a tool to preserve judicial integrity. *Id.* at 921 n.22.

39. 514 U.S. 1 (1995).

40. *Id.* at 3-4.

41. *Id.* at 4.

42. *Id.*

43. *Id.*

44. *Id.*

45. State v. Evans, 836 P.2d 1024, 1024 (Ariz. Ct. App. 1992).

46. *Id.* at 1027.

47. State v. Evans, 866 P.2d 869, 870 (Ariz. 1994).

48. *Evans*, 866 P.2d at 871.

49. Arizona v. Evans, 511 U.S. 1126, 1126 (1994).

employees."[50] The Court applied the *Leon* cost-benefit analysis and reasoned that an inaccurate electronic record was not the type of misconduct that the rule was designed to deter.[51] The Court strongly rejected any notion that judicial employees are inclined to subvert or ignore the Fourth Amendment, or that lawlessness among those employees required sanction through exclusion.[52] The Court reasoned that because court employees have no direct participation in the "competitive enterprise of ferreting out crime," they have no incentive in the outcome of individual prosecutions.[53] The Court thus decided that applying the exclusionary rule could not and should not be expected to deter court employees from making mistakes when performing their clerical duties.[54]

In affirming Petitioner's conviction, the instant Court applied the cost-benefit analysis of *Leon* but largely avoided the stakeholder deterrence analysis employed in *Evans*.[55] Instead, the instant Court relied primarily on the substantial social cost factor of the *Leon* cost-benefit analysis to hold a knock-and-announce violation insufficient to trigger exclusion.[56] Tracing the exclusionary rule's broad application back to its expansion in *Mapp*, the instant Court observed a more recent shift away from "'reflexive application.'"[57] The instant Court further asserted that exclusion was never automatic and required a causal connection not too remote from the interests violated.[58]

The Court then applied the *Leon* cost-benefit analysis. Evaluating the rule and its concomitant social costs, the instant Court first stressed the grave risk of releasing dangerous criminals when excluding incriminating

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50. *Evans*, 514 U.S. at 16.

51. *Id.* at 14. As in *Leon*, the Court emphasized that "the exclusionary rule was . . . designed as a means of deterring police misconduct, not mistakes by court employees." *Id.*; *see* United States v. Leon, 468 U.S. 897, 916 (1984).

52. *Evans*, 514 U.S. at 14-15; *see Leon*, 468 U.S. at 916.

53. *Evans*, 514 U.S. at 15; *cf. Leon*, 468 U.S. at 917 (observing that "[j]udges and magistrates are not adjuncts to the law enforcement team [and] have no stake in the outcome of particular criminal prosecutions").

54. *Evans*, 514 U.S. at 14-15.

55. Hudson v. Michigan, 126 S. Ct. 2159, 2165-66 (2006).

56. *See id.* (recognizing the adverse consequences of releasing dangerous criminals into society).

57. *Id.* at 2163-64 (quoting Arizona v. Evans, 514 U.S. 1, 13 (1995)).

58. *Id.* at 2163-65. The instant Court observed that the violation of Petitioner's interests had "nothing to do" with the seized evidence. *Id.* at 2165. Thus, because the relationship between the knock-and-announce violation and Petitioner's proposed remedy was too attenuated, the instant Court held exclusion inapplicable. *Id.* at 2164-65; *see also id.* at 2170-71 (Kennedy, J., concurring) (arguing that suppression is inappropriate when the causal link between a knock-and-announce violation and a subsequent search is too attenuated); *cf.* Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting the doctrine of inevitable discovery as an exception to the exclusionary rule).

evidence.[59] Additionally, the instant Court expressed concern for an administrative flood, fearing that every no-knock entry might trigger an exclusionary claim.[60] Finally, the instant Court reasoned that the consequences of exclusion would weigh so heavily upon police that it would induce excessively delayed entries.[61] Such delays, the instant Court concluded, would result in preventable violence against the police and would encourage the destruction of evidence.[62]

Finding considerable social costs, the instant Court reasoned that the social value of deterring knock-and-announce violations "depends upon the strength of the incentive to commit [such violations]."[63] While observing that warrantless searches occasionally reveal incriminating evidence, and thus increase the incentive to search without a warrant, the instant Court distinguished knock-and-announce violations, concluding that such violations do nothing more than prevent the destruction of evidence and avoid "life-threatening resistance."[64] The instant Court therefore found the exclusionary rule's deterrence value nominal in knock-and-announce situations and shifted its inquiry. Noting the evolution of post-*Mapp* alternative remedies, the instant Court strongly emphasized the viability of civil liability under 42 U.S.C. § 1983[65] and increasing police professionalism and internal discipline.[66]

In a lengthy dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, criticized the majority for removing the "strongest legal incentive" to comply with the knock-and-announce rule and displacing well-established principles of deterrence.[67] Observing several exceptions to exclusion for Fourth Amendment violations, Justice Breyer concluded

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59. *Hudson*, 126 S. Ct. at 2165. *But see* James v. Illinois, 493 U.S. 307, 311 (1990) ("The occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values . . . .").

60. *Hudson*, 126 S. Ct. at 2165-66. The instant Court expressed concern for increased suppression hearings, analogizing an extension of the exclusionary rule to creating a lottery, where many defendants might win the "jackpot" and receive a "get-out-of-jail-free card." *Id.* at 2166.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *See supra* note 12 (providing the text of 42 U.S.C. § 1983 (2000)).

66. *Hudson*, 126 S. Ct. at 2167-68. Concurring in the final judgment, Justice Kennedy observed that the criminal justice system's training and internal disciplinary procedures supplement § 1983. *Id.* at 2170 (Kennedy, J., concurring). The concurring opinion concluded that alternatives to the exclusionary rule are more appropriate because the government "fortifie[s]" its procedures with more specific regulations and legislation when ineffective. *Id.* However, Justice Kennedy noted that a broad pattern of knock-and-announce violations would require further attention. *Id.* at 2171.

67. *Id.* at 2173-74 (Breyer, J., dissenting). Justice Breyer argued that in light of foundational Fourth Amendment protections, the Court's knock-and-announce decisions required application of the exclusionary rule. *Id.* at 2173.

that the Court should not refuse to apply the rule when its application will result in "'appreciable deterrence.'"[68]

The instant Court's holding retains the knock-and-announce requirement, but it departs fundamentally from its precedent method of enforcement. By exchanging the exclusionary rule for federal tort liability, the instant Court signals a preference for special deterrence and a corresponding withdrawal from the rule's general deterrence rationale.[69] Thus, the instant Court inserts a newer remedy, which seeks to redress the rights of one defendant, for a remedy designed to protect the interests of all. A broader, more reflective analysis would have demanded a conclusion different from that reached by the instant Court.

Although appearing technically consistent with the cost-benefit analysis applied in *Leon* and *Evans*, the instant Court's decision deviates from the rationale used to craft previous exceptions to the exclusionary rule. *Leon* and *Evans* held that even when suppression might effectively deter some police misconduct, the exclusionary rule cannot be expected and should not be applied to deter "objectively reasonable law enforcement activity."[70] Yet, the instant Court "[h]appily" side-steps the reasonableness inquiry.[71] This preliminary conclusion largely removes the constitutional violation as an influence within the *Leon* cost-benefit analysis,[72] which empowers the instant Court to collapse the deterrence inquiry into a cursory inspection.

Prior to the instant decision, the Court seemed to be developing a suppression exception rule that emphasized deterrence in light of relevant stakeholder interests. In *Leon*, the Court observed that when police action is taken "'in complete good faith . . ., the deterrence rationale loses much of its force.'"[73] Yet, the instant Court forecloses the good faith exception and therefore departs from an established line of exclusionary exceptions.[74]

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68. *Id.* at 2175 (quoting United States v. Janis, 428 U.S. 433, 454 (1976)). Justice Breyer noted that the Court also declined to apply the exclusionary rule when its inquiry concerned the admission of evidence in non-criminal trials. *Id.*

69. *See id.* at 2167 (majority opinion).

70. United States v. Leon, 468 U.S. 897, 918-19 (1984); *accord* Arizona v. Evans, 514 U.S. 1, 15 (1995).

71. *Hudson*, 126 S. Ct. at 2163 (stating that Respondent conceded the constitutional knock-and-announce violation and made no claim that the instant knock-and-announce comported with constitutional police behavior).

72. *See Leon*, 468 U.S. at 918-20 (examining whether the exclusionary rule could be expected to alter police behavior).

73. *Id.* at 919 (quoting Michigan v. Tucker, 417 U.S. 433, 447 (1974)); *see also Evans*, 514 U.S. at 13-14.

74. The dissent identified several good faith exclusionary exceptions. *Hudson*, 126 S. Ct. at 2175 (Breyer, J., dissenting) (citing *Evans*, 514 U.S. at 14-15 (providing an exception to the exclusionary rule for clerical errors by court employees); *Leon*, 468 U.S. at 919-20 (declining to apply the exclusionary rule when the searching officer, in good faith, executes a defective search

Consequently, the instant Court's analysis of the rule's deterrent benefits appears unnecessary and arguably constitutes only an afterthought. Nevertheless, the Court concludes that deterrence of knock-and-announce violations is "not worth a lot" because no realistic incentive exists to commit the forbidden act.[75]

Yet, the instant Court underestimates the deterrent benefits of applying the exclusionary rule. While the instant Court recognizes general deterrence as the bedrock and principal benefit of suppression, the Court arguably ignores the stakeholder deterrence inquiry of *Evans*. Thus, the instant Court fails to fully consider whether admitting Petitioner's evidence will encourage future violations of Fourth Amendment rights.[76]

By substituting § 1983 damages for the exclusionary rule, the instant Court missed an opportunity to achieve the optimal level of deterrence while at the same time increasing police professionalism and internal discipline.[77] Although not explicit, the instant Court approaches the exclusionary rule's application as if it barred individuals from further recovery under § 1983.[78] These two remedies, however, are not mutually exclusive. Thus, the instant Court fails to observe that knock-and-announce violations are not just private wrongs. Knock-and-announce violations are serious public wrongs that affect many besides the chance suspect.[79] An appropriate remedy for the public wrong demands the official, systemic disapproval that only the state can express. Victims, on

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warrant); United States v. Janis, 428 U.S. 433, 454 (1976) (declining to apply the exclusionary rule when doing so would "not result in appreciable deterrence").

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

76. *See Janis*, 428 U.S. at 453-54 (noting that whether the admission of the evidence encourages Fourth Amendment violations is essentially the same inquiry as whether exclusion would serve a deterrent purpose).

77. *See Hudson*, 126 S. Ct. at 2167-68 ("[Because] lower [federal] courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity. . . . civil liability is an effective deterrent here . . . ." (citations omitted)). The majority finds that § 1983 has a unique role in influencing internal police discipline and professionalism. *Id. But see Evans*, 514 U.S. at 18-19 (Stevens, J., dissenting) (arguing that the exclusionary rule "imposes costs on [the government], motivating it to train all of its personnel to avoid future violations"). It is difficult, however, to measure the deterrent impact of any of these remedies. *See, e.g., Janis*, 428 U.S. at 450 n.22 (observing the lack of data and difficulty in measuring whether the exclusionary rule reduces lawless searches and seizures).

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

79. A recent botched raid and fatal shooting of an eighty-eight-year-old woman in Atlanta, Georgia illustrates the potentially devastating impact of unnecessary violence accompanying both the execution of no-knock warrants and knock-and-announce violations. *See* Saeed Ahmed & Adrianne M. Murchison, *Woman's Shooting Sparks Angry Protest: One of City's Worst Tragedies, Franklin Says*, ATLANTA J.-CONST., Nov. 29, 2006, at 14A. At least one commentator suggests that the increasing use of paramilitary style forced-entry raids makes such avoidable violence "neither uncommon nor unpredictable." Radley Balko, Editorial, *Botched Raids Not Rare: Little Oversight, Bad Information a Deadly Mix*, ATLANTA J.-CONST., Dec. 4, 2006, at 13A.

the other hand, require an additional response.[80]

While exclusion may amount to a "get-out-of-jail-free card" for many blameworthy defendants,[81] the rule does nothing to restore the blameless victim. Because the ruptured privacy of Petitioner's home cannot be restored by exclusion, the instant Court reasons that a § 1983 damages claim provides a superior remedy.[82] The instant Court therefore sees § 1983 as a win-win result, in which the criminal is put behind bars, and the officer is punished for the knock-and-announce violation. The problem is that the substituted remedy has practical limitations.[83]

The instant Court's reasoning operates on an implicit assumption that victims of constitutional violations will know the rules and adjust their behavior accordingly. Thus, the Court assumes that victims are either well-informed or will receive information that motivates them to pursue damages under § 1983.[84] Yet, this introduces a further dilemma. In substituting § 1983 for the exclusionary rule, the instant Court could encourage perverse incentives. Arguably, the threat of damages will encourage police to minimize personal liability, not misconduct. Thus, exposure under § 1983 may bring the adverse effects of encouraging police to conceal information about violations, commit perjury, resist legitimate claims, or use public power to wage a war of attrition against claimants.[85]

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80. The *Leon* Court explicitly rejected the notion that exclusion vindicates a personal constitutional right of the aggrieved. United States v. Leon, 468 U.S. 897, 906 (1984) (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).

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

82. *See id.* at 2167-68. The majority provides no support to suggest that a § 1983 plaintiff might collect more than nominal damages for a knock-and-announce violation. *Id.* at 2174 (Breyer, J., dissenting) ("Even Michigan concedes that, 'in cases like the present one . . ., damages may be virtually non-existent.'" (citation omitted)).

83. *See id.* at 2175. A § 1983 damages claim may be expensive to initiate and maintain, *id.* at 2174-75, regardless of applicable fee-shifting provisions. *See* 42 U.S.C.A. § 1988 (West 2007); *see also* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("Few responsible lawyers and plaintiffs are likely to choose the course of litigation if the statistical chances of success are truly de minimis."). Even assuming plaintiffs can overcome the qualified immunity defense, § 1983 claims may require more time than victims are willing to indulge. *Hudson*, 126 S. Ct. at 2174-75 (Breyer, J., dissenting).

84. *Id.* at 2167-68 (majority opinion). The instant Court premises this conjecture on a contextual leap from formal assumptions to the substantive realities of constitutional violations. Yet, in reality, police, rather than victims, are considerably more likely to change their behavior in response to the instant decision; *cf.* Mapp v. Ohio, 367 U.S. 643, 652-53 (1961) (observing the problem of permitting state use of evidence unconstitutionally seized by federal agents following the Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914)).

85. Similarly, perverse incentives may already taint related judicial proceedings long before a search warrant issues. *See, e.g.*, Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 81-83 (1992) (detailing a perception among Chicago judges, public defenders, and prosecutors that

The instant case presented the Court with an opportunity to fortify constitutional protections by acknowledging both a means to redress personal rights and an existing prophylactic remedy designed to protect the public at large. Yet by further restricting suppression, the instant Court signals its growing disdain for the exclusionary rule and a willingness to reexamine its use across a broad spectrum of constitutional violations. It is difficult to forecast whether the instant decision will allow police to exploit the benefits of increasingly efficient law enforcement without the corresponding burden of constitutional responsibilities.[86] But for now, the instant Court's withdrawal from general deterrence principles, and its substituted preference for alternative remedies, portends an uncertain future for the exclusionary rule.

"pervasive police perjury" exists to obtain search warrants and "avoid the requirements of the Fourth Amendment").

86. *See* Arizona v. Evans, 514 U.S. 1, 17-18 (1995) (O'Connor, J., concurring) ("With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities.").