

FRUITLESS POISONOUS TREES IN A PARALLEL
UNIVERSE: *HUDSON V. MICHIGAN*,
KNOCK-AND-ANNOUNCE, AND THE
EXCLUSIONARY RULE

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ABSTRACT

On June 15, 2006, the Supreme Court announced in Hudson v. Michigan¹ that the remedy of the exclusionary rule would not be available to suppress evidence found in searches after Fourth Amendment knock-and-announce violations. The decision represents the demise of the knock-and-announce rule and has broad significance for the future of the exclusionary rule. Hudson creates a potentially broad new exception to the exclusionary rule (the parallel universe exception) which relies on what police officers hypothetically could have done instead of what they actually did. It also creates a new class of Fourth Amendment violations (fruitless poisonous trees) which are automatically ineligible for the exclusionary rule. This Article provides a critical analysis of the majority opinion, responding to each argument made and addressing major logical flaws and inconsistencies in the rationales and reasoning offered by Justice Scalia. The Article also places Hudson in the broader context of the Court's jurisprudence and addresses the implications of the decision for the exclusionary rule.

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1. 126 S. Ct. 2159 (2006).

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I. INTRODUCTION

On June 15, 2006, the Supreme Court announced in *Hudson v. Michigan* that the remedy of the exclusionary rule would not be available to suppress evidence found in searches after Fourth Amendment knock-and-announce violations.² The decision was widely seen in the press as the end of the protection afforded by the knock-and-announce rule.³ Although lamentable, the demise of the knock-and-announce requirement is just the beginning of the damage wrought by this significant and far-reaching opinion.

2. *Id.* The Supreme Court has referred to the knock-and-announce rule both with hyphens and without. I shall use the hyphenated version adopted by Justice Scalia in the majority opinion in *Hudson v. Michigan*.

3. See, e.g., David Ashenfelter & Cecil Ange, *Cops Don't Have to Knock*, DETROIT FREE PRESS, June 16, 2006; Joan Biskupic, *Justices Allow No-Knock Searches: 5-4 Decision Backing Police Is Major Shift*, USA TODAY, June 16, 2006, at 1A; Bob Egelko, *Police Intrusion for Evidence Allowed: Knock, Announce Not Always Needed, High Court Rules*, SAN FRANCISCO CHRON., June 16, 2006, at A4; Linda Greenhouse, *Court Limits Protection Against Improper Entry*, N.Y. TIMES, June 16, 2006, at A-28; Charles Lane, *Court Eases 'No Knock' Search Ban: Illegally Collected Evidence Allowed*, WASH. POST, June 16, 2006, at A1; David G. Savage, *Justices Ease Limits on Police Entry*, L.A. TIMES, June 16, 2006, at A1; Jerry Seper, *Evidence Allowed in No-Knock Raid: Court Says Rule Not a Protection*, WASH. TIMES, June 16, 2006, at A6; Bill Mears, *Police Don't Have to Knock, Justices Say*, CNN.com, June 15, 2006, <http://www.cnn.com/2006/LAW/06/15/scotus.search/index.html>.

Hudson is likely to have substantial impacts on law enforcement and the administration of criminal justice in the United States, as it creates both a potentially broad new exception to the exclusionary rule (which I call the *parallel universe* exception) and a new, second-class category of Fourth Amendment violations (which I call *fruitless poisonous trees*). Although Justice Kennedy claimed in his concurring opinion that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt,”⁴ this claim is unconvincing. Indeed, both liberal and conservative scholars consider the case a major blow to the exclusionary rule. Dean David Moran, who represented the petitioner, believes *Hudson* “[k]ills the [k]nock-and-[a]nnounce [r]ule and [p]uts the [e]xclusionary [r]ule on [l]ife [s]upport.”⁵ Professor Akhil Amar views *Hudson* in a positive light, but also considers it a momentous decision: “[T]he victors [in *Hudson*] have now secured a strong base for further action that could broadly reshape the lines of the exclusionary rule.”⁶ This Article provides a critical analysis of the methodology of the majority opinion, responding to each argument made and addressing major logical flaws and inconsistencies in the rationales and reasoning offered by Justice Scalia. The Article also places *Hudson* in the broader context of the Court’s jurisprudence and addresses the implications of the decision for the exclusionary rule.

II. BACKGROUND TO *HUDSON*

A. *Pre-Hudson Knock-and-Announce Cases*

In 1995, in *Wilson v. Arkansas*, the Supreme Court held that the “common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment.”⁷ Justice Clarence Thomas—writing for a unanimous Court—stated that “the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering”⁸ and “in some circumstances an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment.”⁹ Justice Thomas made it clear that a knock-and-announce would not always be required: “This is not to say, of course,

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

5. David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 295.

6. Akhil Reed Amar, *The Battle of Hudson Heights: A Small Case May Portend Big Changes for the Exclusionary Rule*, SLATE, June 19, 2006, <http://www.slate.com/id/2143983>.

7. 514 U.S. 927, 929 (1995).

8. *Id.* at 931.

9. *Id.* at 934.

that every entry must be preceded by an announcement.”¹⁰ Later, in *Richards v. Wisconsin*, the Court elaborated on the circumstances under which the police could dispense with the knock-and-announce requirement.¹¹ According to the Court, “[i]n order to justify a ‘no-knock’ entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.”¹² The Court refined the *Richards* exigency exception in *United States v. Ramirez*, holding that “the lawfulness of a no-knock entry” does not depend “on whether property is damaged in the course of the entry.”¹³ Finally, in *United States v. Banks*,¹⁴ the Court further elaborated on the knock-and-announce rule, holding that in a routine case the police must not only knock and announce before entering, but that the police must allow a “reasonable wait time”¹⁵ to ensure that “an occupant has had time to get to the door”¹⁶ before forcing entry. The Court did not provide a specific test to determine what would be a reasonable period of time, but rather indicated that reasonableness would be determined on a case-by-case basis considering “the totality of the circumstances.”¹⁷

Thus, after *Banks*, it is clear there are two distinct requirements of the knock-and-announce rule and therefore two potential Fourth Amendment violations if the police fail to follow the Court’s admonition to both announce their presence and allow a reasonable time for the occupants to answer the door. What none of these four cases (*Wilson*, *Richards*, *Ramirez*, and *Banks*) specifically addressed is what the remedy for a knock-and-announce violation should be. Of course, the normal consequence for a Fourth Amendment violation is the suppression of all “fruits” of the violation under the exclusionary rule,¹⁸ but none of the knock-and-announce cases explicitly stated that if the trial judge found a Fourth Amendment violation he or she would then be obligated to exclude the fruits of the subsequent search of the residence. In *Wilson v. Arkansas*, Justice Thomas indicated the issue was not properly before the Court:

10. *Id.*

11. 520 U.S. 385 (1997).

12. *Id.* at 394. For an insightful perspective on *Wilson v. Arkansas* and *Richards v. Wisconsin*, see Adina Schwartz, *Homes as Folding Umbrellas: Two Recent Supreme Court Decisions on “Knock and Announce,”* 25 AM. J. CRIM. L. 545 (1998). Professor Schwartz argues that these two cases were hollow rhetorical victories for defendants which provided little meaningful protection of traditional Fourth Amendment values. *Id.* at 567.

13. 523 U.S. 65, 70 (1998).

14. 540 U.S. 31 (2003).

15. *Id.* at 41.

16. *Id.* at 39-40.

17. *Id.* at 42 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

18. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

Respondent and its *amici* also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. . . . [R]espondent and its *amici* argue that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments.¹⁹

In *Ramirez*, Chief Justice Rehnquist hinted that the issue of whether exclusion should flow from a knock-and-announce violation was potentially an open question.²⁰ However, criminal defense counsel around the country assumed that a knock-and-announce violation would require suppression, and they filed numerous motions to suppress on that basis. "The cases reporting knock-and-announce violations are legion."²¹ Likewise, the vast majority of state and federal courts which considered the issue assumed that suppression was required if they found the police conduct unreasonable.²² Indeed, the Supreme Court, in two pre-*Wilson* opinions, found that a knock-and-announce violation of federal search and seizure statutes²³ required exclusion of the evidence found inside the home following the violation.²⁴ In one Sixth Circuit case, when the U.S. Attorney argued that a violation of knock-and-announce did not require exclusion of the evidence, the Court of Appeals barely acknowledged the argument. "The government's argument here is no more than an attempt to circumvent this clear and binding precedent that knock-and-announce violations require suppression We do not find this effort convincing."²⁵ The two exceptions to the prevailing wisdom were the Michigan Supreme Court²⁶ and the Seventh Circuit.²⁷ In 2005, in *Hudson*

19. 514 U.S. 927, 937 n.4 (1995).

20. *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998) (indicating that application of the exclusionary rule depends on the existence of a "sufficient causal relationship between" the unlawful conduct and the discovery of evidence).

21. *Hudson v. Michigan*, 126 S. Ct. 2159, 2174 (2006) (Breyer, J., dissenting) (citing Annual Review, *Investigation and Police Practice: The Warrant Requirement*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 19, 31-35 (2005) (collecting courts of appeals cases); William D. Bremer, Annotation, *What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 85 A.L.R. 5TH 1 (2001) (collecting state court cases)).

22. See *infra* notes 63 and 64.

23. 18 U.S.C. §§ 3101-18 (2000); see also FED. R. CRIM. P. 41.

24. *Sabbath v. United States*, 391 U.S. 585 (1968); *Miller v. United States*, 357 U.S. 301 (1958). The D.C. Circuit recently held that these two precedents were overruled by *Hudson* and do not offer an independent basis for exclusion. *United States v. Southerland*, 466 F.3d 1083, 1085 (D.C. Cir. 2006).

25. *United States v. Dice*, 200 F.3d 978, 984 (6th Cir. 2000).

26. *People v. Stevens*, 597 N.W.2d 53 (Mich. 1999), *cert. denied*, 528 U.S. 1164 (2000).

v. Michigan, the Court decided the issue was ripe for resolution.²⁸ The opinion, issued June 15, 2006, held that the exclusionary rule would not apply to knock-and-announce violations.²⁹ This ruling is both controversial and complex and has implications far beyond the relatively narrow issue decided.

B. Facts of *Hudson v. Michigan*

The facts of *Hudson*, as set forth in the Court's opinion, are straightforward and unremarkable:

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

. . . When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps “three to five seconds”³⁰

Although the state had a good argument under *Richards v. Wisconsin* that the officers acted reasonably in this case (since they might have feared that Hudson would destroy the drugs or pose a threat to them because of the gun) and, perhaps, could have dispensed with knock-and-announce entirely,³¹ Michigan nevertheless “conceded that the entry was a knock-and-announce violation” because the police did not wait a reasonable amount of time after an-

27. *United States v. Langford*, 314 F.3d 892, 894-95 (7th Cir. 2002), *cert. denied*, 540 U.S. 1075 (2003); *see also* *United States v. Espinoza*, 256 F.3d 718 (7th Cir. 2001), *cert. denied*, 534 U.S. 1105 (2002).

28. 125 S. Ct. 2964 (2005) (grant of writ of certiorari). Interestingly, the Court passed on at least four opportunities to address the issue before granting certiorari in *Hudson*. *See Langford*, 314 F.3d 892, *cert. denied*, 540 U.S. 1075; *Espinoza*, 256 F.3d 718, *cert. denied*, 534 U.S. 1105; *Mazepink v. State*, 987 S.W.2d 648, 657-58 (Ark. 1999), *cert. denied*, 528 U.S. 927 (1999); *Stevens*, 597 N.W.2d 53, *cert. denied*, 528 U.S. 1164. Ironically, when it did ultimately grant certiorari, it was effectively reviewing the exact case it had declined to review in 1999, for *People v. Hudson* is nothing more than an application of *People v. Stevens*. *People v. Michigan*, 639 N.W.2d 255 (2001); *Stevens*, 597 N.W.2d 53.

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

30. *Id.* at 2162. Justice Scalia's characterization of “large quantities of drugs” is questionable. *See id.* In fact, twenty rocks of cocaine were found in the search, among seven people who were present in the home. Moran, *supra* note 5, at 297. The trial judge attributed five rocks of cocaine to Hudson and sentenced him to probation. *Id.* at 297-98.

31. 520 U.S. 385, 394 (1997).

nouncing themselves before forcing entry.³² The violation having been conceded, the only issue for the court to decide was the remedy.³³

C. *Procedural History of Hudson v. Michigan*

The procedural history of *Hudson* is noteworthy because the composition of the Court changed while the case was under consideration. The writ of certiorari was granted on June 27, 2005.³⁴ The original oral argument was held on January 9, 2006.³⁵ Before a decision in the case could be reached, Justice O'Connor retired on January 31, 2006; she was replaced the same day by Justice Alito. With Justice O'Connor's departure, the Court was apparently deadlocked 4-4, so the Court granted re-argument on April 19, 2006.³⁶ The case was re-argued on May 18, 2006.³⁷ The case was decided on June 15, 2006, in favor of the State of Michigan by a 5-4 margin.³⁸

D. *Brief Summary of Holding*

The issue in *Hudson*, as framed by Justice Scalia, was "whether violation of the 'knock-and announce' rule require[d] the suppression of all evidence found in the search."³⁹ A five-member majority concluded that evidence found in a search after a knock-and-announce violation would not be considered "fruit" of the violation and therefore need not be suppressed. The Court cited two major reasons. First, the "social costs" of applying the exclusionary rule would outweigh its deterrence value, especially since there were civil remedies available which would have a deterrent effect: "[T]he social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial . . ."⁴⁰

32. *Hudson*, 126 S. Ct. at 2163.

33. *Id.* The apparent reason the prosecutor conceded the violation at the trial court level was that under *People v. Stevens*, there was no remedy for a knock-and-announce violation in Michigan, so there was no harm in conceding one. 597 N.W.2d 53 (1999).

34. *Hudson v. Michigan*, 125 S. Ct. 2964 (2005).

35. *Hudson*, 126 S. Ct. at 2159.

36. *Id.*

37. *Id.*

38. *Id.* According to counsel for petitioner Hudson, David Moran (Associate Dean at Wayne State University College of Law), who agreed to be quoted for this Article, Justice O'Connor appeared to be favorably disposed toward his client's position in the original oral argument, and he felt certain that she would have voted to enforce the exclusionary rule. Based on her prior opinions in exclusionary rule cases, including her dissent in *Murray v. United States*, 487 U.S. 533 (1988) (discussed in Section XXI), this conclusion seems warranted. Thus, the retirement of Justice O'Connor and her replacement by Justice Alito very likely changed the outcome of the case. This view was echoed in several press accounts. See *supra* note 4. Dean Moran provides further support for this position in his article. Moran, *supra* note 5.

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

40. *Id.* at 2168.

Second, the evidence was discovered during a search with a valid warrant.⁴¹ According to the majority, the knock-and-announce violation simply accelerated the finding of the evidence by a few seconds; thus, there was only a limited causal connection between the violation of the rule and the seizure of the evidence.⁴² Accordingly, “[r]esort[ing] to the massive remedy of suppressing evidence of guilt is unjustified.”⁴³

The majority opinion, written by Justice Scalia, was joined by Chief Justice Roberts and Justices Thomas and Alito.⁴⁴ Justice Kennedy concurred in a separate opinion.⁴⁵ Justice Breyer wrote an impassioned and lengthy dissent, which was joined by Justices Souter, Ginsburg, and Stevens.⁴⁶

III. A CRITICAL ANALYSIS OF THE MAJORITY OPINION IN *HUDSON V. MICHIGAN*

The Court’s opinion is deeply flawed, both philosophically and logically; it is not only riddled with inconsistencies and invalid conclusions, but is at times intellectually dishonest. According to Professor LaFave, “*Hudson* deserves a special niche in the Supreme Court’s pantheon of Fourth Amendment jurisprudence, as one would be hard-pressed to find another case with so many bogus arguments piled atop one another.”⁴⁷ In short, the Court is “dead wrong.”⁴⁸ Some of these “bogus arguments” and other weaknesses are explored by the dissent of Justice Breyer;⁴⁹ this Article expands on some of Justice Breyer’s arguments and focuses on additional points not raised by the dissent.

A. *The Causation Argument*

The majority’s most superficially persuasive argument in support of the position that the exclusionary rule should not apply is its causation argument—that is, the knock-and-announce violation did not cause the incriminating evidence to be found and therefore suppression is unwarranted.⁵⁰ But the causation argument depends on the

41. *Id.* at 2162.

42. *Id.*

43. *Id.* at 2168.

44. *Id.* at 2161.

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

46. *Id.* at 2171 (Breyer, J. dissenting).

47. 6 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE 4TH AMENDMENT § 11.4, at 15-16 Supp. (4th ed. 2004 & Supp. 2007).

48. *Id.* at 15 Supp.

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

50. *Id.* at 2164 (majority opinion).

majority's characterization of the constitutional violation and their definition of causation, both of which are flawed.⁵¹

The majority and the minority characterize the constitutional violation quite differently. The majority's characterization of the unconstitutional police conduct in *Hudson* could be summed up as "after an unlawful entry, but during a lawful search, the police found incriminating evidence." Put in these terms, it would seem unfair to penalize the police (or society) by excluding valid evidence that the police discovered during the search. Viewed from a different perspective, exclusion seems much more logical. The minority's characterization of the constitutional violation could be summed up as "during an unreasonably executed search, the police found incriminating evidence." Stated this way, suppression would seem to be inevitable. The minority's view is more consistent with the Court's prior view of the entry as an integral component of the search.⁵² As Justice Breyer states,

[S]eparating the "manner of entry" from the related search slices the violation too finely. As noted . . . we have described a failure to comply with the knock-and-announce rule, not as an independently unlawful event, but as a factor that renders the *search* "constitutionally defective."⁵³ . . . "[A] lawful entry is the indispensable predicate of a reasonable search."⁵⁴

According to Justice Breyer, "[t]he officers' failure to knock and announce rendered the entire search unlawful, . . . and that unlawful search led to the discovery of evidence in petitioner's home."⁵⁵ Put another way, if compliance with knock-and-announce is part of the inquiry into the reasonableness of the search and reasonableness of the search determines whether the exclusionary rule will be applied, then a knock-and-announce violation must trigger the exclusionary rule.⁵⁶ The majority did not see it this way.

The majority and minority also differed in their definition of the term "causation." According to Justice Scalia, "the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."⁵⁷ Justice Kennedy, in a separate concurring opinion, endorsed this view of causation: "In this case the relevant evidence was discovered

51. See *id.* The argument also assumes that the exclusionary rule has a rigid causation requirement, a proposition that is challenged later in this Article. See *infra* Part V.I.

52. *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting).

53. *Id.* (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995)).

54. *Id.* (quoting *Ker v. California*, 374 U.S. 23, 53 (1963) (Brennan, J., dissenting)).

55. *Id.* at 2184.

56. See *id.*

57. *Id.* at 2164 (majority opinion).

not because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant.”⁵⁸ Justice Kennedy further explained, “When . . . a violation results from want of a 20-second pause but an ensuing, lawful search lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence.”⁵⁹ Justice Breyer, writing for the minority, took a decidedly different view of causation:

The majority first argues that “the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence.” . . . But taking causation as it is commonly understood in the law, I do not see how that can be so. . . . Although the police might have entered Hudson’s home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson’s home; and their presence in Hudson’s home was a necessary condition of their finding and seizing the evidence. At the same time, their discovery of evidence in Hudson’s home was a readily foreseeable consequence of their entry and their unlawful presence within the home.⁶⁰

Perhaps the minority would have been better served citing a definition of but-for causation in the criminal law context. Using Professor Dressler’s definition of “actual” or “factual” causation, but-for causation can be summed up as follows: but for the voluntary act(s) of the person in question, the event would not have occurred “*when it did*.”⁶¹ A person who advances the time of an inevitable occurrence even by a few seconds is still said to have caused the event. For example, one who hastens the death of one who has been fatally wounded (for example, by shooting or stabbing them), is still considered to be a “but for” cause of death and is still guilty of murder.⁶² Although the victim would have died, the victim would not have died when he or she did. Using this definition, although the knock-and-announce violation may have gained the police only a few seconds’ advantage, it can be said unequivocally that but for the knock-and-announce violation, they would not have discovered the incriminating evidence *when they did*. The three emphasized words are critical, for without them, the majority can fairly say the knock-and-announce violation was not a but-for cause; had the police not violated the knock-and-announce rule, they still would have found the

58. *Id.* at 2171 (Kennedy, J., concurring).

59. *Id.*

60. *Id.* at 2177 (Breyer, J., dissenting) (citations omitted).

61. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.02, at 196 (4th ed. 2006).

62. *Id.* at 198-99. See *State v. McDonald*, 90 Wn. App. 604, 614 (1998) (collecting “hastening of death” cases); see also *Henderson v. State*, 65 So. 721 (Ala. Ct. App. 1914); *People v. Cox*, 123 Colo. 179 (1951); *State v. Weston*, 155 Ore. 556 (1937).

evidence, just not at the exact moment. Without the “when they did” element of the causation definition, knock-and-announce violations have the air of inevitable discovery about them. Professor Dressler’s definition of causation directly refutes Justice Kennedy’s view. Might a better-framed causation argument on the part of the dissenters have been enough to sway Justice Kennedy to their side? It is an intriguing possibility.

B. *The “Protected Interests” Argument*

A new rationale offered by Justice Scalia for declining to apply the exclusionary rule is what might be called the “protected interests” theory. Under this rule, each requirement of the Fourth Amendment is designed to protect specific discrete interests. Only if the exclusionary rule “vindicates the entitlement” would it be appropriate to apply it. According to Justice Scalia, the knock-and-announce requirement is designed to protect “human life and limb,” “property,” and “privacy and dignity”—not the shielding of potential evidence from the government’s eyes, in contrast to the warrant requirement.⁶³ “[T]he knock-and-announce rule has never protected . . . one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”⁶⁴ In support of this theory, Justice Scalia cited two cases, *United States v. Ceccolini*⁶⁵ and *New York v. Harris*.⁶⁶ Neither case provides convincing support for this argument.

Ceccolini was a straightforward application of the attenuation doctrine.⁶⁷ The case involved a warrantless search.⁶⁸ Evidence discov-

63. *Hudson*, 126 S. Ct. at 2165.

64. *Id.*

65. 435 U.S. 268 (1978).

66. 495 U.S. 14 (1990).

67. 435 U.S. at 268. *See, e.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939). In *Ceccolini*, a police officer lawfully entered a flower shop, the owner of which, Ceccolini, was suspected to be involved in illicit gambling operations. 435 U.S. at 269, 271. The police officer noticed an envelope with some money in it by the cash register and sneaked a look inside. *Id.* at 270. He noticed some “policy slips”—evidence of illegal gambling. *Id.* The officer asked a shop employee to whom the envelope belonged, and she indicated it belonged to Ceccolini. *Id.* The police officer reported this tidbit of information to the FBI. *Id.* Four months later, the FBI approached the flower shop employee and asked if she knew anything about Ceccolini’s involvement in gambling. *Id.* at 272. She volunteered to help and provided information about Ceccolini’s illicit gambling activities. *Id.* Ceccolini was later summoned before a grand jury and testified that he was not involved in illegal gambling activities. *Id.* The employee testified at the grand jury to the contrary. *Id.* Ceccolini was charged with perjury. *Id.* At his criminal trial, he moved to suppress the evidence of the envelope and its contents as well as the testimony of the employee. *Id.* The trial judge excluded the envelope and its contents but permitted the witness to testify and found Ceccolini guilty of perjury. *Id.* The Court of Appeals for the Second Circuit reversed, finding that the employee’s testimony was fruit of the poisonous

ered during the search was excluded, but a witness that was discovered as a result of the unlawful search was allowed to testify.⁶⁹ Although the Court did speak of protected interests, it did so in the context of the interests the exclusionary rule was designed to protect, rather than the interests the warrant requirement was designed to protect.⁷⁰ “[C]onsiderations relating to the exclusionary rule and the constitutional principles which it is designed to protect must play a factor in the attenuation analysis”⁷¹ The point of *Ceccolini* was that the exclusionary rule was designed to deter constitutional violations. Thus, it was reasonable to consider whether exclusion of evidence in a given case would deter constitutional violations.⁷² The Court made it clear that it was proper to apply the exclusionary rule to deter constitutional violations, but found that the deterrence value of applying the exclusionary rule to the testimony of this specific witness was “speculative and very likely negligible.”⁷³

New York v. Harris does appear, at first glance, to provide limited support for the protected interests theory.⁷⁴ In *Harris*, the Court declined to suppress statements made by an arrested suspect in the station house after full rights advisement when the police had probable cause for the arrest, but had arrested the suspect in his home without an arrest warrant as required by *Payton v. New York*.⁷⁵ The Court agreed that statements made to the police in *Harris*’ home were properly suppressed, but declined

to apply the exclusionary rule [to the other statement] because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like *Harris*, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime.⁷⁶

tree, as her knowledge about *Ceccolini*’s gambling activities was discovered as a result of the police officer’s unlawful search. *Id.* at 273. The Supreme Court reversed. *Id.* Applying the attenuation doctrine, the Court held that the taint of the police officer’s unlawful search had been dissipated by the passage of time and by the “free will” of the voluntarily cooperating witness. *Id.* at 279.

68. *Ceccolini*, 435 U.S. at 272.

69. *Id.*

70. *Id.* at 279.

71. *Id.* Although Justice Scalia purports to apply a form of attenuation analysis in *Hudson*, the case clearly does not fit the mold of prior attenuation cases; as Justice Breyer notes in dissent, “the majority gives the word ‘attenuation’ a new meaning.” *Hudson v. Michigan*, 126 S. Ct. 2159, 2180 (2006) (Breyer, J., dissenting).

72. *Ceccolini*, 435 U.S. at 280.

73. *Id.*

74. 495 U.S. 14 (1990).

75. *Id.* at 16-17; *Payton v. New York*, 445 U.S. 573 (1980).

76. *Harris*, 495 U.S. at 17.

Although couched in “protected interests” language, the opinion makes clear that Harris’ rights were not violated at all by taking the statement in the station house because the arrest essentially became legal once the suspect was removed from his home.⁷⁷ According to the Court, the evidence sought to be excluded was not even “in some sense the product of illegal government activity.”⁷⁸ The *Harris* Court made it clear that evidence obtained in a home after an unlawful invasion of the home should be suppressed.⁷⁹ Ironically, Justice Scalia cites *Harris* to bolster his argument that evidence obtained in the home after an unlawful invasion of the home should be admitted.⁸⁰

The Court’s prior precedents offer such scant support for the protected interests theory that Professor LaFave concluded that this “totally new interest-based attenuation doctrine” was “created out of whole cloth.”⁸¹ Although the doctrine may well have been created out of whole cloth, it does not seem to have been created by Justice Scalia. Although not cited by him, the “protected interests” rationale was first used as a basis for declining to apply the exclusionary rule to a knock-and-announce violation several years earlier in *United States v. Espinoza*.⁸² In a section of the opinion headed, “The Exclusion of Evidence Is a Disproportionately Severe Sanction in Cases Where the Police Conduct Does Not Actually Harm Protected Interests,” Judge Coffey wrote:

[W]here the violation of the Fourth Amendment in a particular case causes no discernable harm to the interests of an individual protected by the particular constitutional prohibition at issue (in the present case the knock and announce requirement), the exclusion of evidence for the trial is a disproportionately severe and inappropriate sanction.⁸³

According to Judge Coffey, “[t]he core interest protected by the knock and announce requirement is . . . the receipt of notice by occupants of the dwelling sufficient to avoid the degree of intrusiveness attendant to a forcible entry as well as any potential property damage that may result.”⁸⁴ Judge Coffey concluded, “The [o]fficers’ [c]onduct [d]id [n]ot [h]arm Espinoza’s [i]nterests [p]rotected by the [k]nock and [a]nnounce [r]ule.”⁸⁵

77. *Id.* at 18.

78. *Id.* at 19.

79. *Id.* at 20.

80. *Hudson v. Michigan*, 126 S. Ct. 2159, 2169 (2006).

81. LAFAVE, *supra* note 47, at 16 Supp.

82. 256 F.3d 718 (7th Cir. 2001).

83. *Id.* at 725 (citation omitted).

84. *Id.* at 727.

85. *Id.* at 726.

Judge Coffey's approach was criticized in a vigorous dissent by Judge Wood⁸⁶ and by the *Harvard Law Review*.⁸⁷ Professor LaFave called the opinion "troublesome" and "wrong."⁸⁸ But the protected interests theory was not Judge Coffey's brainchild. Judge Coffey was relying on an opinion by Judge Posner, who appears to have originated the theory. In *United States v. Stefonek*, the police searched Stefonek's home using a defective warrant.⁸⁹ The warrant failed to state with particularity the items to be seized, stating only that "evidence of crime" should be seized.⁹⁰ Although the application for the warrant stated with specificity what the police wished to seize, the application was not incorporated by reference into the warrant.⁹¹ Thus, the warrant was plainly defective on its face.⁹² According to Judge Posner, "[s]o open-ended is the description that the warrant can only be described as a general warrant."⁹³ Not even the good-faith exception could salvage such a plainly defective search.⁹⁴ As Judge Posner acknowledged, it would be "difficult" for the officers to "squeeze themselves into the exception to the exclusionary rule that the Supreme Court created in *United States v. Leon*, 468 U.S. 897 (1984), for unconstitutional searches conducted in good-faith reliance on a warrant. . . . because the defect in the warrant was patent"⁹⁵

Nevertheless, Judge Posner found a way to circumvent the exclusionary rule and allow the evidence in. One rationale advanced by Judge Posner was the protected interests theory.⁹⁶ According to Judge Posner, "there must be a causal relation between the violation of the Fourth Amendment and the invasion of the defendant's interests for him to be entitled to the remedy of exclusion."⁹⁷ Judge Posner cited no authority for this extraordinary proposition. According to Judge Posner, Stefonek's interest protected by the particularity requirement was the right not to be subjected to a search that would exceed the scope that a magistrate could have lawfully authorized.⁹⁸ Judge Posner concluded that this interest was not violated because "[t]he search would . . . have been identical in scope, and exactly the same evidence would have been seized, had the warrant complied

86. *Id.* at 729 (Wood, J., dissenting).

87. Recent Cases, *United States v. Espinoza*, 115 HARV. L. REV. 709 (2001).

88. LAFAVE, *supra* note 47, at 274.

89. 179 F.3d 1030 (7th Cir. 1999).

90. *Id.* at 1032.

91. *Id.* at 1032-33.

92. *Id.* at 1034.

93. *Id.* at 1033.

94. *Id.* at 1033-34.

95. *Id.* (citations omitted).

96. *Id.* at 1035.

97. *Id.*

98. *Id.* at 1033.

with the Constitution, which is to say, had the warrant repeated the application's description of the things to be seized."⁹⁹

The problem with the protected interests theory is that the application of the exclusionary rule depends entirely on the way that the judge chooses to characterize the interests. It invites judges to circumvent application of the exclusionary rule by creative and narrow characterization of the interests protected by each requirement previously imposed by the Court. A broad interpretation of Fourth Amendment interests, such as "the interest in being free from unreasonable police activity," leads to exclusion, while a narrow interpretation does not. This creates a powerful incentive to narrowly interpret the Fourth Amendment.

For example, consider the warrant requirement. Justice Scalia characterized the right protected by the warrant requirement as an "entitlement" of citizens "to shield 'their persons, houses, papers, and effects,' from the government's scrutiny."¹⁰⁰ Thus, according to Justice Scalia's logic, the fruits of a warrantless search would generally be subject to exclusion. However, under Judge Posner's analysis, the warrant requirement could be characterized as protecting the interest in being subjected only to a search that a magistrate could (or would) have authorized. Under this interpretation, so long as the police could have applied for a warrant (that is, had probable cause) and the search was limited in scope to what a magistrate would have lawfully authorized if presented with a proper warrant application, then applying the exclusionary rule would not be necessary. This is exactly the scenario proposed by Professor Akhil Amar as the next logical step in dismantling the exclusionary rule.¹⁰¹ According to Professor Amar, "[w]ith *Hudson* on the books, state and federal prosecutors should now try to find the Next Perfect Test Case."¹⁰² Professor Amar's ideal of the "Next Perfect Test Case" is one where the police had probable cause to search but failed to obtain a warrant under a good-faith mistaken belief that they did not need one because they believed that an exception to the warrant requirement (such as consent or exigent circumstances) existed.¹⁰³ However novel and unsupported it may be, the protected interests theory is a potentially powerful weapon in the arsenal of those seeking to limit or destroy the exclusionary rule.

99. *Id.* at 1034.

100. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (citing U.S. CONST. amend. IV).

101. Amar, *supra* note 6.

102. *Id.*

103. *Id.*

C. *The Costs of the Exclusionary Rule*

The majority's primary justification for declining to apply the exclusionary rule is not lack of causation, but the "costs" of its application.¹⁰⁴ According to Justice Scalia,

[t]he costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that "[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded."¹⁰⁵

Thus, according to Justice Scalia, there are actually multiple types of costs involved. The first is the classic argument against the exclusionary rule—"the risk of releasing dangerous criminals into society" or, as famously put by Justice (then Judge) Cardozo, "the criminal is to go free because the constable has blundered."¹⁰⁶ This argument was rebutted by Justice Brennan in dissent in the case of *U.S. v. Leon*.¹⁰⁷

[T]he Court has frequently bewailed the "cost" of excluding reliable evidence. In large part, this criticism rests upon a refusal to acknowledge the function of the Fourth Amendment itself. If nothing else, the Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways. In practical terms, of course, this restriction of official power means that some incriminating evidence inevitably will go undetected if the government obeys these constitutional restraints. It is the loss of that evidence that is the "price" our society pays for enjoying the freedom and privacy safeguarded by the Fourth Amendment. Thus, some criminals will go free *not*, in Justice (then Judge) Cardozo's misleading epigram, "because the constable has blundered," but rather because official compliance with Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed the cost.¹⁰⁸

104. *Hudson*, 126 S. Ct. at 2165-66.

105. *Id.* (citations omitted).

106. *People v. Defore*, 150 N.E. 585, 587 (N.Y. Ct. App. 1926).

107. 468 U.S. 897 (1984).

108. *Id.* at 941 (Brennan, J., dissenting) (quoting *Defore*, 150 N.E. at 587).

This argument did not sway Justice Scalia, who speaks only of the costs of the exclusionary rule. Even if we assume that there are “costs” associated with the exclusionary rule, what about the countervailing costs? As Justice Stevens has stated, “the more relevant cost is that imposed on society by police officers who decide to take procedural shortcuts instead of complying with the law.”¹⁰⁹ Justice Stevens was referring to the costs of litigation and delays to justice occasioned by police misconduct.¹¹⁰ The majority has simply removed this cost from the balance sheet by eliminating the availability of the exclusionary remedy.¹¹¹ Without the availability of the exclusionary remedy, there will be no litigation,¹¹² no delay, and no costs to society.

Justice Scalia also gives short shrift to the most important countervailing cost—the costs to society and to individuals when the police fail to follow the strictures of the Fourth Amendment. In discussing “the interests protected by the knock-and-announce requirement,” Justice Scalia notes three: first, “the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”¹¹³ He is presumably concerned about the police officers who may be shot, as well as the resident who may mistakenly shoot at the police, then be shot himself in response.¹¹⁴ The second interest is “the protection of property,” since requiring the police to knock-and-announce and wait a few moments gives the residents a chance to open the door before the police break it down.¹¹⁵

And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the “opportunity to prepare themselves for” the entry of the police. “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.”¹¹⁶

Justice Scalia minimized the significance of the privacy interests protected by knock-and-announce by characterizing the requirement of delayed entry merely as an “opportunity to collect oneself before answering the door.”¹¹⁷ There is no mention of the right to be secure in one’s own home, the fear and anxiety and shock created when the

109. *Nix v. Williams*, 467 U.S. 431, 457 (1984) (Stevens, J., concurring).

110. *Id.* at 457-58.

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

112. As suppression will be unavailable, there will be no point in defense counsel filing suppression motions. This argument is further developed in Part VI.C, *infra*.

113. *Hudson*, 126 S. Ct. at 2165.

114. *See id.*

115. *Id.*

116. *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

117. *See id.*

police suddenly invade an individual's or family's personal domain without warning, or the larger cost to society of living in a country where the police need not knock and announce their presence before entering homes to search. Professor Gerald Uelman mentions another important omission by Justice Scalia: "I found it somewhat remarkable that the U.S. Supreme Court made no reference at all to one of the most important interests served by the knock-and-announce requirement: the protection of victims of 'wrong door' raids by law enforcement officers."¹¹⁸ Greater consideration of these costs might have tipped the balance in favor of giving the knock-and-announce rule the teeth of the exclusionary rule.

D. Costs to Judicial Economy: The Potential for a Flood of Litigation

The other cost that Justice Scalia cites is a burden to judicial economy.¹¹⁹ He speculates that imposing the remedy of exclusion for a violation of the knock-and-announce rule would "generate a constant flood"¹²⁰ of litigation. "Courts would experience as never before the reality that [t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded."¹²¹

Aside from the obvious point that courts exist for the purpose of resolving issues of constitutional rights, there is another reason that this argument is disingenuous. When Justice Scalia states that allowing an exclusionary remedy would suddenly open the floodgates "as never before,"¹²² he fails to mention that the floodgates already were open and there was no flood. If there were going to be a substantial amount of frivolous litigation, then this problem would already have manifested itself, since the vast majority of courts have been open to suppression motions based on knock-and-announce violations for several years.

Although the Supreme Court had not explicitly stated that a knock-and-announce violation would automatically lead to exclusion of evidence, the assumption of most lower courts has been that it would. The Supreme Court itself had on two occasions prior to *Wilson v. Arkansas*¹²³ found that a knock-and-announce violation required exclusion of the evidence found inside the home following the violation.¹²⁴ When the U.S. Attorney argued before the Sixth Circuit that

118. Gerald F. Uelman, *Knock and Announce Violations After Hudson v. Michigan*, THE CHAMPION, Sept./Oct. 2006, at 62.

119. *Hudson*, 126 S. Ct. at 2165-66.

120. *Id.* at 2166.

121. *Id.* (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 366 (1998)).

122. *Id.*

123. 514 U.S. 927 (1995).

124. *Sabbath v. United States*, 391 U.S. 585 (1968); *Miller v. United States*, 357 U.S. 301 (1958).

a violation of knock-and-announce did not require exclusion of the evidence, the Court did not even consider it a close issue: "The government's argument here is no more than an attempt to circumvent this clear and binding precedent that knock-and-announce violations require suppression We do not find this effort convincing."¹²⁵ Conspicuously absent in Justice Scalia's opinion is any mention of the fact that the overwhelming majority of courts to consider the issue, both state and federal, had determined that violations of knock-and-announce did require the suppression of evidence, although the petitioner's brief had made this plain.¹²⁶

In addition to the circuits noted by petitioner (Fifth, Sixth, Eighth, and Tenth),¹²⁷ the First and Ninth Circuits also applied the exclusionary rule to knock-and-announce violations or indicated that they would in the appropriate case.¹²⁸ Justice Breyer noted that there had been many reported cases.¹²⁹ It is instructive that Justice Scalia did not note any of these prior decisions or even that there was a circuit split on the issue. It would have been more difficult for the Justice to flatly state his conclusion that the courts would be inundated if he had to acknowledge that a knock-and-announce exclusionary rule in so many courts had not resulted in an unmanageable flood of litigation.

Justice Scalia does not actually say that criminal defendants would make frivolous suppression motions, but this must be what he means because no Justice would announce an intent to discourage legitimate claims of constitutional violations. The clear implication by Justice Scalia is that criminal defendants would readily bend the truth about the nature of the police entry into their home, falsely claiming that they failed to knock-and-announce or falsely claiming that they did not wait a reasonable time before entering. When the

125. *United States v. Dice*, 200 F.3d 978, 984 (6th Cir. 2000).

126. Brief for Petitioner at 16-17, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360), 2005 WL 2072141 (According to Petitioner's brief, "[a]t least ten federal and state appellate courts have rejected the position of the Michigan Supreme Court by squarely holding that the inevitable discovery doctrine does not exempt knock and announce violations from the exclusionary rule [ten listed cases omitted]. Only one appellate court, the Seventh Circuit, has endorsed the Michigan Supreme Court's position. *United States v. Langford*, 314 F.3d 892, 894-895 (7th Cir. 2002), *cert. denied*, 540 U.S. 1075 (2003). Courts in many other jurisdictions have assumed that evidence seized inside a home after a knock and announce violation is the fruit of the violation and have therefore suppressed such evidence [fourteen listed cases omitted]. The clear majority of state and federal courts thus continue to suppress evidence seized from homes immediately after knock and announce violations").

127. *United States v. Cantu*, 230 F.3d 148, 153 (5th Cir. 2000); *United States v. Dice*, 200 F.3d 978, 984-86 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1993); *United States v. Gallegos*, 314 F.3d 456, 458 (10th Cir. 2002).

128. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002), *rev'd on other grounds*, 540 U.S. 31, 41 (2003). See *United States v. Boulanger*, 444 F.3d 76 (1st Cir. 2006).

129. *Hudson*, 126 S. Ct. at 2174 (Breyer, J., dissenting).

police admitted to dispensing with knock-and-announce, Justice Scalia implies that defendants would frivolously challenge the government's proffered justifications for doing so. Justice Scalia offers no evidence to support these conclusions, nor does he explain why the danger of superfluous suppression motions is greater in the knock-and-announce context than any other. Justice Scalia also seems to be assuming that criminal suspects have a sophisticated knowledge of Fourth Amendment rights; this may not be warranted. Criminal defendants would only know to make up a phony story about a knock-and-announce violation if they knew the knock-and-announce rules. But many accused criminals would probably assume that a valid search warrant gives the police the right to enter the home and would not be attuned to the subtleties of knock-and-announce.

There is an additional reason to be skeptical about Justice Scalia's concern about a flood of frivolous claims. Motions to suppress are filed by criminal defense attorneys. They are not invented from whole cloth, but must be based on the police reports or supported by affidavits by witnesses. Justice Scalia ignores defense attorneys' ethical obligation not to raise meritless claims or to knowingly allow their clients or any other witness to commit perjury.¹³⁰ Assuming the good faith of the defense bar, courts would be flooded with motions to suppress for knock-and-announce violations only if the police conduct routinely violated the Fourth Amendment or if there was at least a colorable claim.

Even Justice Scalia's claim of an enormous "jackpot" "amounting in many cases to a get-out-of-jail-free card" must be viewed with considerable skepticism.¹³¹ The exclusionary rule requires suppression of the evidence from a particular search; it does not require suppression of all evidence from the entire investigation. Particularly in the knock-and-announce context, there is reason to believe that application of the exclusionary rule would not preclude prosecution, allowing criminals to go free. By definition, in order to have a knock-and-announce violation, the police must have a warrant, as knock-and-announce is a requirement in executing a warrant.¹³² A valid search warrant can only be issued based on probable cause.¹³³ Thus, the police must have significant evidence of criminality prior to the search. For example, a warrant to search for drugs is often based on an in-

130. See, e.g., AM. BAR ASS'N, *ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION* (3d ed. 1993) (standard 4-1.2(f): "[d]efense counsel should not intentionally misrepresent matters of fact or law to the court"; standard 4-7.5(a): "[d]efense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity").

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

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

133. U.S. CONST. amend. IV.

formant's or undercover officer's testimony that they purchased drugs (or observed drugs being purchased) from a specific individual at a specific location. Although exclusion of the drugs found in an improperly executed search might preclude prosecution based on the specific quantity of drugs found in the home, it would certainly not preclude prosecution for the previously transacted sale.¹³⁴ Of course, in some cases, the exclusionary rule does have a significant impact. If all, or virtually all, of the admissible evidence in a given case is excluded, then exclusion may well prevent a conviction and allow a criminal to go free. But in most knock-and-announce cases there will still be ample evidence on which to prosecute. In these cases, some charges might have to be dropped, but a conviction on some counts, or lesser counts may still be achieved.¹³⁵ Realistically, application of the exclusionary rule to knock-and-announce violations in most cases would simply put the defendant and his counsel in a better position to negotiate a favorable plea bargain.

Justice Scalia cites two different types of knock-and-announce claims that would lead to extensive litigation "as never before": "alleged failures to observe the rule, and claims that any asserted *Richards* justification for a no-knock entry had inadequate support."¹³⁶ They will be addressed separately.

Alleged failures to observe the rule would generally fall into two categories: complete failure to knock-and-announce or failure to wait a reasonable period of time after knocking and announcing before entering forcibly. Obviously a motion to suppress on these grounds could be made only if someone was in fact home and did not, in fact, answer the door. (If no one were home, the police could claim that they had knocked and announced whether they had or not and there would be no one to contradict them.¹³⁷) In order to make such a motion, the occupants (or others on the premises) would have to testify either that they did not answer the door because they did not hear the police knock-and-announce or because they could not get to the door before the police barged in. If the police testimony matched that of the occupants, then the matter would be resolved. If the police tes-

134. I have personally prosecuted and defended cases where an individual was convicted of drug distribution without any evidence that drugs were found in their home or indeed, even in their possession.

135. For articles and studies discussing the empirical impact of the exclusionary rule, see the bibliographical essay in CAROLYN N. LONG, *MAPP v. OHIO: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES* 213-15 (Peter Charles Hoffer & N.E.H. Hull eds., 2006).

136. *Hudson*, 126 S. Ct. at 2166 (citing *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)).

137. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996); see also ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982) ("Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.").

timony contradicted the occupants' (for example, "we did knock on the door and announce our presence, and then we waited a reasonable period of time before entering"), the trial judge would have to determine the relative credibility of the witnesses, make findings of fact, and, if she concluded that the police had properly announced their presence, determine whether they had waited a reasonable period of time under the totality of the circumstances.¹³⁸ According to Justice Scalia,

[W]hat constituted a "reasonable wait time" in a particular case, (or, for that matter, how many seconds the police in fact waited), or whether there was "reasonable suspicion" of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.¹³⁹

E. The Alleged Difficulty of Resolving Knock-and-Announce Issues

Why does the Justice believe these issues would be "difficult for the trial court to determine"?¹⁴⁰ Why would the issues be "even more difficult for an appellate court to review"?¹⁴¹ As for "how many seconds the police in fact waited,"¹⁴² this is a simple factual determination, no more difficult for the trial court than any other fact based on testimony. As for the legal issue involved (the reasonableness of the wait time), the "totality of the circumstances" test is one that criminal courts use routinely to evaluate a variety of different issues, such as whether consent to search was voluntarily given,¹⁴³ whether anonymous tips furnish probable cause,¹⁴⁴ and whether a confession was voluntary.¹⁴⁵ Justice Scalia offers no explanation of why the totality of the circumstances test of reasonableness would be particularly difficult to apply in the knock-and-announce context other than to say that "it is not easy to determine precisely what officers must do" because our "reasonable wait time" standard is "necessarily vague."¹⁴⁶ He appears to conclude that since the Supreme Court has

138. *United States v. Banks*, 540 U.S. 31 (2003).

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

140. *Id.*

141. *Id.*

142. *Id.* If the length of time that the police waited is an issue that is frequently in contention, the police could easily eliminate this issue by videotaping their execution of the warrant, or at least the entry. This could be done through the use of a police videographer, a small camera attached to one of the executing officer's clothes, or, in some cases, a dash-mounted video camera from a squad car. On the use of video cameras in police work, see generally Matthew D. Thurlow, *Lights, Camera, Action: Video Cameras as Tools of Justice*, 23 J. MARSHALL J. COMPUTER & INFO. L. 771 (2005). Another simple option would be for the police to use a stopwatch.

143. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

144. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

145. *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

146. *Hudson*, 126 S. Ct. at 2163 (citing *United States v. Banks*, 540 U.S. 31, 41 (2003)).

enunciated a standard for Fourth Amendment violations that is difficult to apply, the lower courts should not have to apply it at all.¹⁴⁷ Ironically, Justice Scalia's concern about the difficulty of applying the standard appears to be limited to the context of a motion to suppress; he does not seem to be concerned about the lower courts having difficulty applying the exact same standard in the context of civil damage claims, which he concludes are an effective remedy for knock-and-announce violations.¹⁴⁸

The other legal issue that courts might have to determine does not seem particularly difficult either. In *Richards v. Wisconsin*, the Court held that if the police had reasonable suspicion "that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence," the police could dispense with the knock-and-announce requirement.¹⁴⁹ In many jurisdictions, as Justice Breyer notes in his dissent, no-knock warrants are available if the police have reasons that would justify dispensing with knock-and-announce.¹⁵⁰ In such cases, the failure to knock-and-announce would be virtually impossible to challenge since the police could rely in good faith on the warrant.¹⁵¹ In *Richards*, the Court discussed no-knock warrants approvingly: "The practice of allowing magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time."¹⁵² Where the police have chosen to dispense with knocking and announcing without prior judicial approval, they simply had to provide "some minimal level of objective justification" for their decision.¹⁵³ The "reasonable suspicion" standard prescribed by *Richards* is routinely applied by courts in a variety of contexts, such as evaluating the legality of *Terry* stops and frisks,¹⁵⁴ weapon searches of automobiles,¹⁵⁵ protective sweeps of residences,¹⁵⁶ and temporary seizures of property.¹⁵⁷ It is unclear why Justice Scalia believes the reasonable suspicion standard would be any more difficult to apply in this context.¹⁵⁸ Logic suggests that it would not be.

147. *See id.*

148. *Id.* at 2167-68.

149. 520 U.S. 385, 394 (1997).

150. *Hudson*, 126 S. Ct. at 2182 (Breyer, J., dissenting).

151. *United States v. Leon*, 468 U.S. 897, 905 (1984).

152. 520 U.S. at 396 n.7.

153. *INS v. Delgado*, 466 U.S. 210, 217 (1984).

154. *Terry v. Ohio*, 392 U.S. 1 (1968).

155. *Michigan v. Long*, 463 U.S. 1032, 1034-35 (1983).

156. *Maryland v. Buie*, 494 U.S. 325, 337 (1990).

157. *United States v. Place*, 462 U.S. 696, 698 (1983).

158. *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006).

Justice Scalia also claims that knock-and-announce motions to suppress are harder to resolve than other types of motions to suppress:

Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not) . . . [knock-and-announce issues are] difficult for the trial court to determine and even more difficult for an appellate court to review.¹⁵⁹

Scrutiny of this argument quickly exposes its shortcomings. Determining compliance with the requirements of *Miranda*¹⁶⁰ is rarely a simple matter of whether *Miranda* warnings were given. There are frequently more complex issues involved in motions to suppress statements under *Miranda*. First, there are the threshold issues of whether *Miranda* warnings are required. Was the suspect in custody when he made the statement?¹⁶¹ Was the suspect subjected to interrogation prior to making the statement?¹⁶² Then, once it has been determined that *Miranda* warnings should have been given, there is frequently litigation over not only whether the warnings were given, but whether they were adequately given¹⁶³ and understood. If the *Miranda* warnings were given, there may be litigation over whether the rights were knowingly and intelligently waived¹⁶⁴ or properly invoked.¹⁶⁵ On all these issues, the police officers and the suspect rarely agree on the facts surrounding how a confession was obtained. Thus, it is up to the judge to determine the relative credibility of the witnesses and make findings of facts to support his or her conclusions of law. It cannot be seriously argued that the issues surrounding knock-and-announce are more difficult for courts to handle than issues surrounding the admissibility of confessions.

Similarly, Justice Scalia's claim that compliance with the Court's warrant requirements is "readily determined" is a conclusion without a factual basis.¹⁶⁶ Motions to suppress based on Fourth Amendment

159. *Id.*

160. *Miranda v. Arizona*, 384 U.S. 436 (1966).

161. *Stansbury v. California*, 511 U.S. 318, 322 (1994); *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984); *California v. Beheler*, 463 U.S. 1121, 1123 (1983).

162. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (stating that interrogation is not only "express questioning," but its "functional equivalent"—"any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect"); see also *Arizona v. Mauro*, 481 U.S. 520, 526 (1987).

163. *Duckworth v. Eagan*, 492 U.S. 195, 200-02 (1989); *California v. Prysock*, 453 U.S. 355, 358-59 (1981).

164. *Colorado v. Connelly*, 479 U.S. 157, 163 (1986); *Oregon v. Elstad*, 470 U.S. 298, 315 (1985); *Fare v. Michael C.*, 442 U.S. 707, 717-18 (1979).

165. *Davis v. United States*, 512 U.S. 452, 459 (1994) (ambiguous request for counsel); *Smith v. Illinois*, 469 U.S. 91, 95-96 (1984) (ambiguous request for counsel); *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (assertion of right to counsel); *Michigan v. Mosley*, 423 U.S. 96, 100-02 (1975) (assertion of right to remain silent).

166. *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006).

search issues rarely are as easy as determining whether there was a warrant, a fact which would be readily ascertainable. If there was not a warrant for a search, then the courts must deal with the threshold question of whether a search was conducted at all; that is, whether there was a “reasonable expectation of privacy” in the place the evidence was observed.¹⁶⁷ This can involve difficult questions such as whether the police used technology not generally in public use¹⁶⁸ and whether the area observed was “curtilage” or “open fields.”¹⁶⁹ Assuming there was a search without a warrant, the court must determine whether the warrantless search or entry was justified by one of the ever-expanding list of exceptions to the warrant requirement, such as search incident to arrest,¹⁷⁰ exigent circumstance searches,¹⁷¹ certain vehicle and container searches,¹⁷² or entry for emergencies or public safety.¹⁷³ Another frequently contested issue is whether consent was given for a warrantless search.¹⁷⁴ If there was a warrant, the courts must still deal with the issues of whether the warrant was issued by a neutral and detached magistrate,¹⁷⁵ whether there was probable cause to support the warrant¹⁷⁶ (or the police believed in good faith that there was),¹⁷⁷ whether the warrant stated the place to be searched¹⁷⁸ and the items to be seized¹⁷⁹ with sufficient particularity, and whether the police exceeded the scope of the warrant during their search.¹⁸⁰ Can it credibly be maintained that these issues are simpler to resolve than knock-and-announce issues? In short, the alleged difficulty of resolving knock-and-announce issues in motions to suppress compared to other types of Fourth and Fifth Amendment issues is not a convincing argument for declining to apply the exclusionary rule to this category of Fourth Amendment violations.

167. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

168. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

169. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

170. *Chimel v. California*, 395 U.S. 752, 754-55 (1969).

171. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967).

172. *California v. Acevedo*, 500 U.S. 565, 569 (1991); *California v. Carney*, 471 U.S. 386, 390 (1985); *United States v. Chadwick*, 433 U.S. 1, 11-12 (1977).

173. *Brigham City, Utah v. Stuart*, 126 S. Ct. 1943, 1947 (2006).

174. *Georgia v. Randolph*, 126 S. Ct. 1515, 1520 (2006); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973).

175. *See, e.g., Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-27 (1979); *Johnson v. U.S.*, 333 U.S. 10, 14 (1948).

176. *Brinegar v. United States*, 338 U.S. 160 (1949).

177. *United States v. Leon*, 468 U.S. 897, 909 (1984).

178. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Steele v. United States*, 267 U.S. 498, 501 (1925).

179. *Andresen v. Maryland*, 427 U.S. 463, 479 (1976); *Marron v. United States*, 275 U.S. 192, 195 (1927).

180. *Horton v. California*, 496 U.S. 128, 140 (1990); *United States v. Ross*, 456 U.S. 798, 817-18 (1982).

F. The Danger of Over-Deterrence

Justice Scalia next argues that applying the exclusionary rule (“the incongruent remedy”) would lead to “police officers’ refraining from timely entry after knocking and announcing” because “officers would be inclined to wait longer than the law requires” since it would be hard for them to decide exactly how long they must wait.¹⁸¹ Justice Scalia suggests that this unnecessary delay in entry would “produc[e] preventable violence against officers in some cases, and the destruction of evidence in many others.”¹⁸² Of course, if the police have any indication of a threat to themselves or of the destruction of evidence, they do not have to knock and announce at all.¹⁸³ If they develop reasonable suspicion after they knock (from sounds they hear from within the home, for example) they do not have to wait before entering.¹⁸⁴ What Justice Scalia apparently envisions is a situation where the police have no suspicion whatsoever of danger and have no reason to believe that evidence will be destroyed, but the danger exists nonetheless. Justice Scalia suggests that the police should wait the absolute bare minimum amount of time permitted by the Constitution—an amount of time that he has characterized as “necessarily vague”¹⁸⁵—and not a moment longer. What Justice Scalia really seems to be saying is that knowledge that the exclusionary rule could be applied would cause the police to be too cautious in respecting the Fourth Amendment rights of citizens.

There are no other contexts where the Court has refused to apply the exclusionary rule because it would cause the police to go beyond constitutional requirements, although one could make a similar argument almost any time the exclusionary rule is applied. Under this view, out of fear that evidence of a search will be excluded, police will go beyond the absolute bare minimum in gathering evidence to support probable cause for a search warrant. The delay would increase the danger that evidence would be hidden or destroyed. Similarly, because an arrest without probable cause will lead to suppression of fruit of the arrest (such as incriminating statements made by the suspect or evidence found on the suspect), police will be reluctant to arrest people and will wait until they have more than probable cause. This would also leave dangerous suspects on the loose to commit more crimes or perhaps to flee, never to be brought to justice. In short, Justice Scalia concludes that the exclusionary rule is dangerous because it may cause officers to be too sensitive to Fourth

181. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006).

182. *Id.*

183. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

184. *Id.* at 396.

185. *Hudson*, 126 S. Ct. at 2163.

Amendment concerns, thereby hampering their crime-fighting efforts. Assuming for the moment that Justice Scalia is right about the risks to efficient law enforcement, there is another problem with this argument. According to Justice Scalia, the appropriate remedy to prevent knock-and-announce violations is a suit for civil damages.¹⁸⁶ If the threat of a civil suit is an equally effective deterrent to the police going into homes too early, why would it not also cause them to hesitate too long? In other words, any effective deterrent could theoretically cause the police to err on the side of caution, thus this “cost” is simply unavoidable. If Justice Scalia believes that the threat of a civil suit would not cause police to hesitate beyond the minimum time required to the same extent as exclusion of the evidence, then that is essentially an admission that civil remedies are not as effective a deterrent.

G. The Need for Deterrence and the Effectiveness of the Exclusionary Rule as a Deterrent

After considering the “social costs” of applying the exclusionary rule, Justice Scalia then weighs these costs against the benefit of the exclusionary rule: deterrence of police misconduct.¹⁸⁷ “Next to these ‘substantial social costs’ we must consider the deterrence benefits, existence of which is a necessary condition for exclusion.”¹⁸⁸ According to the Justice, deterrence is not required because the police have no good reason to violate knock-and-announce rules in the first place, especially compared to other Fourth Amendment requirements that they might violate:

To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even “reasonable suspicion” of their existence, *suspend the knock-and-announce requirement anyway*. Massive deterrence is hardly required.¹⁸⁹

186. *Id.* at 2167-68.

187. *Id.* at 2166.

188. *Id.*

189. *Id.*

There are a number of flaws with this argument.¹⁹⁰ One obvious flaw is that over a decade after *Wilson v. Arkansas*¹⁹¹ was decided, during which both the exclusionary rule (in many jurisdictions) and civil remedies (in all jurisdictions) were available, knock-and-announce violations are still occurring with some regularity.¹⁹² So, obviously there is some reason the police choose to violate knock-and-announce. Justice Scalia can think of only two reasons why the police might ignore the requirement: prevention of destruction of evidence and the avoidance of life-threatening resistance.¹⁹³ But, as Justice Scalia himself notes, if the police have a reasonable suspicion of either of these dangers, knock-and-announce is suspended.¹⁹⁴ So, logically, there must be some reason why the police violate knock-and-announce when they do not have a reasonable suspicion of danger. Justice Breyer offers one possibility: “[S]ome government officers will find it easier, or believe it less risky, to proceed with what they consider a necessary search immediately and without the requisite constitutional (say, warrant or knock-and-announce) compliance.”¹⁹⁵

Another, less innocuous possibility is that police may believe that breaking in and catching a suspect unaware (without a chance to “collect oneself,” as Justice Scalia characterized it¹⁹⁶) will give the police an investigatory edge. Feeling overwhelmed and vulnerable, a suspect might make spontaneous admissions, or, if arrested after the search yields incriminating evidence, the suspect, still reeling from being caught off guard, might be more inclined to cooperate and confess. Other police may be more concerned with exercising their authority than they are about the evidentiary issues and may have little regard for the personal dignity of those whom they investigate.

Professor Gerald Uelman raises another possible incentive for police to violate knock-and-announce. Responding to Justice Scalia’s argument that the police have no evidentiary incentive for knock-and-announce violations, he notes that “[w]ith an arrest warrant, however, the incentive may actually be quite different. An unan-

190. One problem with Justice Scalia’s argument is that it assumes that the only justification or value of the exclusionary rule is deterrence of police misconduct—a debatable point, but one which has been debated at great length by other scholars, so I will not discuss it here. See *supra* note 135. For articles discussing the merits of the exclusionary rule, or lack thereof, see ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 124-30 (2003) (bibliographic essay listing leading articles) and LONG, *supra* note 135, at 211-13 (bibliographic essay listing leading articles); see also generally 1 LAFAVE, *supra* note 47, §§ 1.1-1.2 (summarizing the debate surrounding the exclusionary rule).

191. 514 U.S. 927 (1995).

192. See *supra* note 21.

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

194. *Id.*

195. *Id.* at 2174 (Breyer, J., dissenting).

196. *Id.* at 2165 (majority opinion).

nounced entry can expand the scope of the permissible search.¹⁹⁷ Similar to a search warrant, the police are required to knock and announce their purpose when executing an arrest warrant at a private home.¹⁹⁸ If the suspect surrenders himself at the front door, the police have no authority to search the home, other than perhaps a cursory search around the entry.¹⁹⁹ However, if the police ignore knock-and-announce and enter the home to arrest the suspect within, in an upstairs bedroom for example, then the police can get a free search of everything in plain view on the way in and out, plus additional areas incident to arrest, or as part of a protective sweep.²⁰⁰ Although *Hudson* did not specifically state that it would apply to arrest warrants, according to Professor Uelman, there is “little hope of limiting the rationale of *Hudson* to search warrants.”²⁰¹

Clearly, recognition that the tendency to abuse power is inevitable in any organization which has authority over the citizenry was one of the underlying bases for both Fourth Amendment protections and the application of the exclusionary rule to enforce them. These abuses are inevitably most often applied to those whom the police may view as undesirable—for example, criminal suspects or members of minority groups. Justice Scalia not only discounts these possibilities, but implies that he does not care whether the police are deterred by civil suits.²⁰² As he makes clear, even if the threat of suit has no deterrent effect, he would still not be willing to apply the exclusionary rule:

It seems to us not even true, as *Hudson* contends, that without suppression there will be no deterrence of knock-and-announce violations at all. Of course *even if this assertion were accurate, it would not necessarily justify suppression*. Assuming (as the assertion must) that civil suit is not an effective deterrent, one can think of many forms of police misconduct that are similarly “undeterred.” When, for example, a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded, since that is the only “effective deterrent”? And what, other than civil suit, is the “effective deterrent” of police violation of an already-confessed suspect’s Sixth Amendment rights by denying him prompt access to counsel? Many would regard these violated rights as more significant than the right not to be intruded upon in one’s nightclothes—and yet nothing but “ineffective” civil

197. Uelman, *supra* note 118, at 62.

198. *Miller v. United States*, 357 U.S. 301 (1958).

199. *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

200. *Id.*; *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

201. Uelman, *supra* note 118, at 62.

202. *See Hudson v. Michigan*, 126 S. Ct. 2159, 2166-67 (2006).

suit is available as a deterrent. And the police incentive for those violations is arguably greater than the incentive for disregarding the knock-and-announce rule.²⁰³

The gist of Justice Scalia's argument is that we cannot or do not deter all forms of police misconduct through use of the exclusionary rule, so why should we bother to apply the rule to deter this particular form of police misconduct, which is not even that serious?²⁰⁴ To bolster his position, Justice Scalia provides two examples of police misconduct where the exclusionary rules do not apply.²⁰⁵ In the first example, a confessed suspect who has killed a police officer is arrested, and during a lawful warranted search the police find additional incriminating evidence.²⁰⁶ The police then abuse the suspect at the stationhouse.²⁰⁷

Let's look at this example more closely. It appears that the police have an airtight case: a lawful confession, plus corroborating physical evidence.²⁰⁸ According to Justice Scalia, the police, nevertheless, still have an "arguably greater" incentive to physically abuse the suspect while in police custody.²⁰⁹ But the Justice has just stated that "the value of deterrence depends upon the strength of the incentive to commit the forbidden act."²¹⁰ The normal incentive for the police to violate the Constitution is presumably the desire to gather incriminating evidence to convict criminals, what the Court has referred to as the "competitive enterprise of ferreting out crime."²¹¹ Indeed, Justice Scalia notes that violating the "warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained."²¹² This suggests that he believes that the incentive to violate the Constitution is to gather evidence. Justice Scalia also seems to be alluding to another incentive—the desire to beat a suspect out of anger, frustration, or vengeance, even though it will not advance the investigation in any way and could surely hinder it. Justice Scalia does not account for the strong disincentives to abuse a suspect, such as the credibility problems this will create for the officers involved, the risk of personal liability, the loss of employment, and the disciplinary and criminal sanctions that may follow.

Is a jury likely to believe the word of police officers who physically attack a suspect? Will they believe that the confession allegedly ob-

203. *Id.* (emphasis added).

204. *See id.*

205. *Id.*

206. *Id.*

207. *Id.* at 2167.

208. *Id.* at 2166-67.

209. *Id.* at 2167.

210. *Id.* at 2166.

211. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

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

tained before the beating was truly voluntarily given and that the evidence was found where it was claimed to be found? Would not a jury or judge be suspicious of the actions of a police department that would allow a suspect in custody to be physically abused? Would the police really run the risk of losing the prosecution of a vicious criminal just to have a chance to beat him up? Justice Scalia seems to think so. Yet he can not seem to imagine any dark motives the police might have to violate knock-and-announce. In a confusing part of the opinion, Justice Scalia refers to the highly professional nature of the modern police force and concludes that the exclusionary rule is unnecessary because police are unlikely to violate citizen's rights.²¹³ It is as if any argument that would bolster the conclusion that knock-and-announce is not significant will be cited without either analysis or even concern that it might contradict other aspects of the opinion's reasoning.

There is another problem with this example. Justice Scalia suggests that if a civil suit is, as Hudson argued, an ineffective remedy for a violation of the knock-and-announce rule, then it must also be an ineffective remedy for police abuse of prisoners.²¹⁴ There are obvious differences in these two situations which might make a civil remedy more effective in one versus the other. The main difference is that when the police physically abuse a suspect, there is physical evidence; it is not simply a matter of the testimony of the suspect that his or her rights were violated. The victim of police brutality can prove the abuse through concrete factual evidence. Second, it is far easier to prove damages in a police brutality case as opposed to a knock-and-announce case. It is hard to put a monetary value on a violation of privacy, and a jury is unlikely to be sympathetic to a criminal suspect's hurt feelings. Thus, any damages would likely be nominal and of little interest to private attorneys. In contrast, damage awards in police brutality cases are frequently substantial.²¹⁵ While there would undoubtedly be plaintiffs' attorneys eager to represent a physically abused suspect, few attorneys would as readily agree to pursue a knock-and-announce civil suit.

213. *Id.* at 2168.

214. *Id.* at 2166-67.

215. For example, in the infamous Rodney King case in Los Angeles, a jury in 1994 awarded Mr. King \$3.8 million in compensatory damages. *Rodney King Is Awarded \$3.8 Million*, NY TIMES, Apr. 20, 1994, at A14. The King beating, memorably caught on videotape, precipitated major race riots when the officers involved were acquitted of police brutality charges on April 29, 1992. *Riots in Los Angeles*, NY TIMES, May 2, 1992, at A1, 1. More recently, in the high profile case of Abner Louima, the Haitian immigrant who was abused by members of the New York Police Department, the case was settled out of court in July 2001 for \$8.75 million. *City Settles Suit in Louima Torture*, NY TIMES, Jul. 13, 2001, at A1.

Justice Scalia asks, “[W]ould it seriously be suggested that the evidence must be excluded” in this instance (the beaten suspect)?²¹⁶ Although the answer is obviously “no,” the question is irrelevant. The exclusionary rule is clearly not appropriate in this instance because the evidence was obtained lawfully, prior to the beating.²¹⁷ Since the situations being compared are not comparable, the use of the example is misleading.

The second example given by Justice Scalia is “police violation of an already-confessed suspect’s Sixth Amendment rights by denying him prompt access to counsel.”²¹⁸ It is not clear exactly what the Justice is referring to. The Sixth Amendment right to counsel does not attach until adversary judicial criminal proceedings have commenced²¹⁹—typically, when a person has been formally charged with a crime. After this point, the police may not deliberately elicit incriminating information from the accused in the absence of defense counsel.²²⁰ If the police deliberately elicit incriminating information, the Sixth Amendment exclusionary rule does apply—the statements are inadmissible.²²¹ Justice Breyer apparently also found this example confusing. Justice Breyer thought Justice Scalia was referring to a situation where a “suspect confesses, *then* police apparently arrest him, take him to [sic] station, and refuse to tell him of his right to counsel.”²²² Of course, informing a suspect of his right to counsel is part of the *Miranda* right to counsel to prevent compelled self-incrimination.²²³ This right to counsel is generally considered separate from the Sixth Amendment right to counsel.²²⁴ Failure to inform a suspect of his *Miranda* right to counsel would render any subsequent statement in response to questioning inadmissible.²²⁵

So what exactly is the police incentive to deny prompt access to counsel to which Justice Scalia refers? It cannot be to continue to try to extract information from the suspect which would inevitably be suppressed. The only other possibility would be that the police deny prompt access to counsel simply because it would interfere with their dominion over suspects in custody. There is no explanation of why Justice Scalia feels the incentive to deny prompt access to counsel is “arguably greater” than the incentive to violate knock-and-

216. *Hudson*, 126 S. Ct. 2167.

217. *Id.* at 2166-67.

218. *Id.*

219. *Massiah v. United States*, 377 U.S. 201, 205 fn.6 (1964).

220. *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

221. *Id.*

222. *Hudson*, 126 S. Ct. at 2176 (Breyer, J., dissenting).

223. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

224. *McNeil v. Wisconsin*, 501 U.S. 171, 177-78 (1991).

225. *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

announce.²²⁶ According to Justice Scalia, violating knock-and-announce could be a life-or-death matter.²²⁷ What equivalent value is there to the police to refuse access to counsel? And why would a highly professional police force that respects citizens' rights (as Justice Scalia characterizes modern officers)²²⁸ want to deny this right, especially when they already had enough evidence for the prosecutor to file formal charges? Justice Scalia does not address these questions.

H. *The Adequacy of Other Deterrents*

After explaining why there is little need for deterrence of knock-and-announce violations and little deterrence value in using the exclusionary rule, Justice Scalia next explains that there are already adequate deterrents to knock-and-announce violations: "[T]he extant deterrents against them are substantial."²²⁹ The primary deterrents he refers to are civil damage suits under 42 U.S.C. § 1983 (for suits against state officers and municipalities)²³⁰ and *Bivens* actions (for suits against federal officers).²³¹ "As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."²³² Here, Justice Scalia seems to be borrowing from Judge Posner's opinion in *United States v. Langford*:²³³

[W]e hold that violation of the [knock-and-announce] rule does not authorize exclusion of evidence seized pursuant to the ensuing search. . . . There are contrary decisions. . . . The concern that animates those decisions is that unless evidence obtained in a search that violates the knock-and-announce rule is excluded, there will be no deterrent to such violations. But that is not true now that 42 U.S.C. § 1983 and the *Bivens* doctrine have made tort damages an effective remedy for constitutional violations by federal or state law enforcement officers.²³⁴

Judge Posner did not offer any support for the proposition that tort damages are an effective remedy;²³⁵ Justice Scalia at least tried.²³⁶ However, the case cited by Justice Scalia for the proposition

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

227. *Id.* at 2165.

228. *Id.* at 2168.

229. *Id.*

230. 42 U.S.C. § 1983 (2000).

231. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

232. *Hudson*, 126 S. Ct. at 2167-68 (citing *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 70 (2001)).

233. 314 F.3d 892 (7th Cir. 2002).

234. *Id.* at 894-95 (citations omitted).

235. For two useful critiques of *United States v. Langford*, see Amy Garzon, Comment, *United States v. Langford*, 48 N.Y.L. SCH. L. REV. 353 (2003), and Loly Garcia Tor, Note, *Mandating Exclusion for Violations of the Knock and Announce Rule*, 83 B.U. L. REV. 853 (2003).

236. *Hudson*, 126 S. Ct. at 2167-68.

that civil damages are an effective remedy is not relevant to the issue in *Hudson*. The case of *Correctional Services Corp. v. Malesko* addressed whether *Bivens* actions should be extended to allow an inmate to sue a private contractor operating a halfway house on behalf of the Federal Bureau of Prisons when the inmate alleged that he had been treated in a cruel and unusual way.²³⁷ The Court held that they should not.²³⁸ Not only did this case not involve a choice of whether to apply the exclusionary rule, it did not even involve police investigation of a crime or even police misconduct.

Is it appropriate for the Supreme Court simply to “assume” that civil remedies are an adequate substitute for the exclusionary rule, without requiring any evidence that they are? Is it a reasonable assumption, supported by logic and common sense? Professors Christopher Slobogin and Charles Whitebread cite several reasons why this assumption is dubious, including the relative rarity of damages actions.²³⁹ In addition, according to these scholars,

[u]nder current law, a damages suit is not feasible when damages are negligible, as is the case with many Fourth Amendment (and other constitutional) violations, and the victim poor, as are most persons investigated by the police. Even if damages are sizeable, a civil suit is unlikely to be attractive; since constitutional violations will often be the result of idiosyncratic misconduct rather than government policy, the (often judgment proof) officer will usually be the only legitimate defendant, at least in state litigation. Moreover, most individuals with possible damages claims will be charged with a criminal offense; because they will be incarcerated or feel estopped by some notion of “unclean hands” they will seldom bring a civil suit.²⁴⁰

These authors also note the proven impact of the exclusionary rule in leading to changes in police training.²⁴¹

Ironically, among the class of people who are victims of knock-and-announce violations, those who would potentially benefit from the exclusionary rule (those against whom incriminating evidence is found in the subsequent search) are the least likely to take advantage of the civil remedies available. It is not just the difficulty of bringing suit while incarcerated or a notion of “unclean hands” that is likely to prevent guilty victims from filing suit. These individuals, who most likely will become criminally accused shortly after the search is completed, have distinct disincentives to sue the police offi-

237. 534 U.S. 61, 63 (2001).

238. *Id.*

239. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 58-59 (Found. Press 4th ed. 2000).

240. *Id.*

241. *Id.* at 59.

cers and the government that the innocent victims of knock-and-announce violations do not have. The fate of the accused criminal depends, in large measure, on the goodwill of (or at least a lack of strong negative attitude by) the police and prosecutors—local government officials. Favorable charging decisions and plea bargains are matters of discretion for these officials, and an accused criminal would be foolish to antagonize the police and government by suing them at a time when his fate was in their hands. Even if the accused criminal could wait until after the case had been resolved before filing suit, there are still matters of parole and probation decisions, place of incarceration, treatment by prison guards, and the like. Law enforcement officers, including corrections officers, are a brotherhood, and there are myriad ways they can make a troublesome defendant's or prisoner's life difficult. Retaliation and harassment would be easy for the police to undertake and extremely difficult to prove. For example, the Supreme Court recently decided that police may conduct suspicionless searches of parolees at any time, an unprecedented invitation to police harassment.²⁴² The Court has also decided that a citizen can be arrested for the slightest infraction (even a fine-only offense such as a seat-belt violation) and subjected to a search of their person incident to arrest, an inventory search of their belongings, and detention for forty-eight hours.²⁴³ The Court will not consider the subjective motivation of the officers in such a case, so an officer bent on harassing an individual could do so with little fear of being second-guessed.²⁴⁴ In short, an accused or convicted criminal would have strong incentives to avoid the unwanted attention from law enforcement that a civil lawsuit might bring. The majority fails to account for this.

Justice Breyer strongly refuted the majority's assumption that civil damages are adequate, calling it, in unusually direct language, "a support-free assumption."²⁴⁵ Justice Breyer noted that

the majority, like Michigan and the United States, has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation. Even Michigan concedes that, "in cases like the present one . . . , damages may be virtually non-existent."²⁴⁶

242. *Samson v. California*, 126 S. Ct. 2193, 2202 (2006).

243. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *see also Whren v. United States*, 517 U.S. 806 (1996).

244. *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

245. *Hudson v. Michigan*, 126 S. Ct. 2159, 2175 (2006) (Breyer, J., dissenting).

246. *Id.* at 2174 (quoting Brief for Respondent at 35, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No.4-1360)). The United States submitted a brief and argued in support of Michigan's position that the exclusionary rule should not apply. Brief for United States as Amicus Curiae Supporting Respondent, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 4-1360).

Justice Scalia responded to the argument that it would be difficult to find a lawyer to take on a case where minimal damages would be involved:

42 U.S.C. § 1988(b) answers this objection. Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs. This remedy was unavailable in the heydays of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, "very few lawyers would even consider representation of persons who had civil rights claims against the police," but now "much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct." The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.²⁴⁷

Although Justice Scalia's general observations may arguably be true, he has overlooked some issues specific to knock-and-announce that cast doubt on the premise that lawyers and citizens are likely to sue for damages for such violations. For example, although attorney's fees are available for civil rights plaintiffs, they are not available to all plaintiffs equally. The Prison Litigation Reform Act (PLRA) limits the recovery of attorney's fees to 150% of actual damages in any suit brought by a prisoner.²⁴⁸ If the damages from a knock-and-announce violation are too small to justify the expense of a lawsuit, then the prospect of multiplying those damages one and a half times for attorney's fees is still unlikely to entice many attorneys to take the case.²⁴⁹

247. *Hudson*, 126 S. Ct. at 2167 (majority opinion) (quoting MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, *POLICE MISCONDUCT: LAW AND LITIGATION* v (West 3d ed. 2005) (second quote)) (citations omitted). The reference to the Avery, Rudovsky, and Blum text is another example of Justice Scalia's citation of a scholarly work on a specific point in support of a broader proposition not supported by the authors. *See id.* David Rudovsky, a nationally prominent criminal defense and civil rights attorney and a Senior Fellow at the University of Pennsylvania Law School, has criticized the exceptions to the exclusionary rule and the limited nature of civil rights damages and injunctive relief. *See* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199. Mr. Rudovsky, who agreed to be quoted for this Article, states, "[T]he cite to our book is disingenuous. The fact that there may be some remedies for police misconduct in some contexts does not begin to answer the question as to remedies for knock and announce violations. Particularly where contraband is found, I can state quite categorically there are no realistic remedies." E-mail from David Rudovsky, Senior Fellow, University of Pennsylvania Law School, to author (Oct. 19, 2006, 8:36 EST) (on file with author).

248. 42 U.S.C. § 1997e(d) (2000).

249. *See, e.g.,* *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006) (holding that when prisoner's suit based on Fourth Amendment violation yielded \$1.00 in nominal damages, the PLRA limited the award of attorney's fees to \$1.50; district court's award of attorney's fees in amount of \$9680 was reversed); *see also* *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001) (reversing award of \$34,493.72 in attorney's fees when prisoner was awarded \$426 in damages and PLRA limited recoverable attorney's fees at \$629).

Also, before consulting a lawyer about pursuing a knock-and-announce suit, citizens have to know or at least suspect that their rights have been violated. The average citizen knows that the police are not supposed to physically abuse them; they may not know that the police are required to announce their presence and wait a reasonable time when executing a search warrant. Police television shows frequently feature SWAT teams breaking into suspects' homes unannounced; the average American may assume this is standard operating procedure. The exclusionary remedy is effective because the criminally accused, regardless of their ability to pay, are guaranteed counsel to closely scrutinize the actions of the police, explain to defendants their rights, and help them to exercise their rights. Although beyond the scope of their representation, a few criminal defense attorneys (especially those in private practice) might inform their clients about the possibility of filing suit. But the average public defender or appointed counsel can hardly be expected to do so, given the limited time they are likely to have to spend with their clients. As there is no comparable cadre of attorneys who are paid by the government to monitor the actions of the police with an eye toward filing civil damage suits for constitutional violations, many innocent victims of knock-and-announce violations may never get legal advice.

Justice Scalia fails to address another obvious point. *Bivens* suits have been available since 1971,²⁵⁰ and § 1983 claims have been available since *Monroe v. Pape*²⁵¹ was decided in 1961. If the threat of civil suits were as effective a deterrent as Justice Scalia suggests,²⁵² one would assume that police violations of constitutional rights should have been virtually eliminated by now. But Justice Scalia offers no empirical evidence that the threat of being sued has deterred the police or resulted in a measurable diminution of serious violations of the rights of criminal suspects.

A popular criminal procedure treatise treats the notion that civil damages are an adequate substitute for the exclusionary rule succinctly:

In sum, although civil actions are sometimes available—and successful—as a remedy in damages for some specific instances of especially egregious police misconduct, experience has demonstrated that such civil lawsuits are too sporadic and idiosyncratic to serve to effectively prevent law enforcement officers from engaging in unconstitutional activity or to otherwise remedy this problem.²⁵³

250. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

251. 365 U.S. 167 (1961).

252. *Hudson*, 126 S. Ct. at 2167-68.

253. WEAVER, ABRAMSON, BURKOFF & HANCOCK, *PRINCIPLES OF CRIMINAL PROCEDURE* 242 (2004).

Another commentator, focusing specifically on the use of civil actions in the knock-and-announce context, concludes, “various legal hurdles and limitations make lodging a sustainable claim for breach of the ‘knock and announce’ rule an arduous proposition.”²⁵⁴

I. *The Professionalism of Modern Police Forces*

Lacking any hard evidence to suggest that civil damages deter police, Justice Scalia offers an alternative argument: the exclusionary rule is no longer necessary because “modern police forces are staffed with professionals.”²⁵⁵

Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline. . . . [W]e now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been “wide-ranging reforms in the education, training, and supervision of police officers.” Numerous sources are now available to teach officers and their supervisors what is required of them under this Court’s cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline.²⁵⁶

There can be no question that modern police forces are, by and large, more professional, better trained, and more concerned with the constitutional rights of citizens than their predecessors. What Justice Scalia overlooks is *why* this change has occurred. The single largest driving force behind this trend has been the exclusion of evidence under the Fourth, Fifth, and Sixth Amendments’ exclusionary rules.²⁵⁷ Concern over losing valid incriminating evidence in a sup-

254. E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce Rule” and the Sacred Castle Door*, 16 U. FLA. J.L. & PUB. POL’Y 77, 79 (2005). See generally Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284-86 (1988).

255. *Hudson*, 126 S. Ct. at 2168.

256. *Id.* (quoting SAMUEL E. WALKER, *TAMING THE SYSTEM* 51 (1993)).

257. Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at 5, available at 2006 WLNR 10986191. Professor Walker made this point in an editorial shortly after *Hudson* was announced, accusing Justice Scalia of violating Walker’s “intellectual integrity” because “[Scalia] twisted [Walker’s] main argument to reach a conclusion the exact opposite of what [he] spelled out in [*Taming the System*] and other studies.” *Id.* He continued on to say:

Scalia’s opinion suggests that the results I highlighted have sufficiently removed the need for an exclusionary rule to act as a judicial-branch watchdog over the police. I have never said or even suggested such a thing. To the contrary, I have argued that the results reinforce the Supreme Court’s continuing importance in defining constitutional protections for individual rights and requiring the appropriate remedies for violations, including the exclusion of evidence.

Id.

pression motion, thereby allowing a criminal to go free, is the reason that police departments “teach officers and their supervisors what is required of them under this Court’s cases” and “how to respect constitutional guarantees in various situations.”²⁵⁸

However professional modern police forces may be, it is clear that the police will continue to press the constitutional boundaries in their understandable drive to arrest and convict criminals. The police monitor Supreme Court decisions in the criminal procedure area the way accountants monitor changes to the Internal Revenue Code. They are constantly looking for any advantage or loophole. Good examples of this can be seen in the cases of *Oregon v. Elstad*²⁵⁹ and *Missouri v. Seibert*.²⁶⁰ In *Elstad*, the Court held that the Fifth Amendment does not require “the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.”²⁶¹ “[T]he officer’s initial failure to warn” in *Elstad* was characterized in *Seibert* as an “oversight” and “a good-faith *Miranda* mistake.”²⁶² Yet in direct response to *Elstad*, many police departments dramatically changed their interrogations tactics to intentionally omit *Miranda* warnings during initial interrogations.²⁶³ This disturbing trend was later addressed by the Court:

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistently with the officer’s testimony, the Police Law Institute, for example, instructs that “officers may conduct a two-stage interrogation. . . . At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court.” The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to department policy.²⁶⁴

258. *Hudson*, 126 S. Ct. at 2168.

259. 470 U.S. 298 (1985).

260. 542 U.S. 600 (2004).

261. 470 U.S. at 303.

262. *Seibert*, 542 U.S. at 614-15.

263. *See id.* at 609-11.

264. *Id.* (citations omitted).

The police procedures adopted by many police departments in response to *Elstad* would have subjected them to potential liability in § 1983 civil suits because they encouraged clear constitutional violations.²⁶⁵ The police recognized they were violating *Miranda* because they knew any incriminating statements made during pre-*Miranda* interrogations would be suppressed. As Justice Kennedy commented in concurrence in *Seibert*, “[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*.”²⁶⁶

The *Seibert* case demonstrates that the police will adopt whatever tactics they can aggressively implement if they can increase their conviction rate and not be overturned on appeal, even to the point of intentionally violating constitutional mandates, without regard to the potential for civil damage suits.²⁶⁷ A similar change in police tactics can be expected in light of *Hudson*. Of course, police departments will still provide training on knock-and-announce consistent with *Wilson*, *Banks*, *Ramirez*, and *Richards*, thereby eliminating the risk of municipal liability suggested by Justice Scalia as an additional deterrent,²⁶⁸ but this training will be undoubtedly be supplemented with an explanation that violations of knock-and-announce no longer will result in suppression of evidence. It will be up to individual police officers to weigh the risks of a civil lawsuit and internal discipline against whatever perceived advantage they may derive from violating knock-and-announce. This is an invitation to abuse by unscrupulous officers. Indeed, by citing the salutary effects of violating knock-and-announce (protecting the lives of officers and avoiding the destruction of evidence), Justice Scalia almost seems to be encouraging violations of knock-and-announce.²⁶⁹

IV. PLACING *HUDSON* IN THE CONTEXT OF SUPREME COURT EXCLUSIONARY RULE JURISPRUDENCE

A. *The Trend of the Court to Minimize the Potential for Police Abuses and Limit the Scope of the Exclusionary Rule*

Justice Scalia’s lack of concern about the incentive for unscrupulous officers to violate knock-and-announce reflects a deep division between the attitudes of the most conservative and most liberal factions of the Court toward the police, a division that can be seen in numerous cases. The more liberal wing, led by Justice Stevens and including Justices Breyer and Ginsburg, is far more concerned about

265. 42 U.S.C. § 1983 (2000).

266. *Seibert*, 542 U.S. at 620 (Kennedy, J., concurring in judgment).

267. See generally *id.*

268. *Hudson v. Michigan*, 126 S. Ct. 2159, 2168 (2006) (“Failure to teach and enforce constitutional requirements exposes municipalities to financial liability.”)

269. *Id.* at 2166.

officers acting in bad faith; the more conservative Justices, led by Justice Scalia and currently including Justices Thomas and Alito and Chief Justice Roberts, are more inclined to tolerate broad police discretion if it will result in greater police efficiency and higher conviction rates.²⁷⁰ The more centrist Justices—Justice Souter, Justice Kennedy, and recently retired Justice O'Connor—have tended to be the swing votes in these cases.²⁷¹ This divide is by no means a new phenomenon. The issue of balancing the need for effective law enforcement against the potential incentives for police misconduct, especially where the admissibility of incriminating evidence rule is involved, has been a recurring theme on the Court for decades.

Consider the dissent of Justice Byron White in *Rakas v. Illinois*.²⁷² The case concerned the issue of who had standing to raise Fourth Amendment violations—specifically, whether passengers in a car that was illegally searched had standing to raise the issue of the illegal search even though they did not own the car.²⁷³ If they had standing, then the evidence would be suppressed under the exclusionary rule; if not, the evidence would not be suppressed despite the illegality.²⁷⁴ The Court held that passengers had no standing.²⁷⁵ Justice White, in dissent, commented,

[T]he ruling today undercuts the force of the exclusionary rule in the one area in which its use is most certainly justified—the deterrence of bad-faith violations of the Fourth Amendment. This decision invites police to engage in patently unreasonable searches every time an automobile contains more than one occupant. . . .

Of course, most police officers will decline the Court's invitation and will continue to do their jobs as best they can in accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. . . .

In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the Court ignores precedent, logic and

270. Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *Criminal Justice and the 2005-2006 United States Supreme Court Term*, 25 QUINNIPIAC L. REV. 495 (1997); see JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007).

271. See sources cited *supra* note 270.

272. 439 U.S. 128, 156 (1978) (White, J., dissenting). Justice White was joined in this dissent by Justice Stevens, the only current member of the Court who participated in the *Rakas* decision. *Id.*

273. *Id.* at 129-30 (majority opinion).

274. See *id.* at 133-34.

275. *Id.* at 128.

common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.²⁷⁶

Justice White cautioned that "some deterrent is needed" because "[s]ome policemen simply do act in bad faith, even if for understandable ends."²⁷⁷ Justice White concluded that, "[a]fter this decision, police will have little to lose by unreasonably searching."²⁷⁸ These words apply with equal force to the decision in *Hudson*.

The trend to limit the scope of the exclusionary rule accelerated in the mid-1980s, with the Court creating two new exceptions to the rule: the "good-faith" exception²⁷⁹ and the "inevitable discovery" exception,²⁸⁰ causing Justice Brennan to bemoan the Court's "zealous efforts to emasculate the exclusionary rule"²⁸¹ and "the Court's gradual but determined strangulation of the rule."²⁸² Dissenting in *Leon*, Justice Stevens expressed concern about the incentives the Court was creating for the police:

Today's decisions do grave damage to that deterrent function [served by the exclusionary rule]. . . .

. . . The Court's approach—which, in effect, encourages the police to seek a warrant even if they know the existence of probable cause is doubtful—can only lead to an increased number of constitutional violations.²⁸³

The trend to limit the scope of the exclusionary rule was furthered with the appointment of Justice Scalia to the Court in 1986. A review of leading cases since that year reveals that he and his conservative brethren consistently discount the potential for police abuses. For example, serious concerns about police incentives to violate the Fourth Amendment were expressed in the 1988 case of *Murray v. United States*.²⁸⁴ In *Murray*, the police had unlawfully searched a private warehouse without a warrant and observed contraband (bales of marijuana).²⁸⁵ The police then sought and received a warrant to search the warehouse, not mentioning in the warrant application that they had already been inside and observed the drugs.²⁸⁶ The issue was whether the evidence seized during the search pursuant to the warrant should be suppressed because of the prior illegal en-

276. *Id.* at 168-69 (White, J., dissenting).

277. *Id.*

278. *Id.*

279. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Leon*, 468 U.S. 897 (1984).

280. *Nix v. Williams*, 467 U.S. 431 (1984).

281. *Id.* at 459 (Brennan, J., dissenting).

282. *Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting).

283. *Id.* at 973-76 (Stevens, J., dissenting).

284. 487 U.S. 533 (1988).

285. *Id.* at 533.

286. *Id.*

try.²⁸⁷ The opinion of the Court, written by Justice Scalia, held that the taint of the illegal search was erased by the subsequent lawful search; thus, the drugs, although found initially during an illegal search, were admissible because they were seized pursuant to a lawful “independent source.”²⁸⁸ The dissent, written by Justice Marshall and joined by Justices Stevens and O’Connor, expressed grave concern over the incentives the new “independent source” exception to the exclusionary rule would create for the police:

[A]dmission of the evidence “re seized” during the second search severely undermines the deterrence function of the exclusionary rule. Indeed, admission in these cases affirmatively encourages illegal searches. The incentives for such illegal conduct are clear. Obtaining a warrant is inconvenient and time consuming. Even when officers have probable cause to support a warrant application, therefore, they have an incentive first to determine whether it is worthwhile to obtain a warrant. Probable cause is much less than certainty, and many “confirmatory” searches will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant. If contraband is discovered, however, the officers may later seek a warrant to shield the evidence from the taint of the illegal search. The police thus know in advance that they have little to lose and much to gain by forgoing the bother of obtaining a warrant and undertaking an illegal search.²⁸⁹

Justice Scalia dismissed this concern:

We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it.²⁹⁰

Justice Scalia did not consider the possibility that the police would simply neglect to mention the first illegal search to the magistrate or in their police report, so the defense would not have the information on which to raise a suppression motion with the trial court. But if the officers were unethical enough to engage in a search without a warrant, why would he expect them to be honest about their illegal behavior?

Two years later, in *Alabama v. White*, the conservative majority (including Justices Scalia and Thomas) found that an anonymous tip

287. *Id.* at 535.

288. *Id.* at 533.

289. *Id.* at 546-47 (Marshall, J., dissenting).

290. *Id.* at 540 (majority opinion).

was sufficient to provide reasonable suspicion to conduct a *Terry* stop.²⁹¹ Justice Stevens, joined by Justices Brennan and Marshall, argued in dissent that the ruling gave the police incentive to fabricate anonymous tips:

[U]nder the Court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed. Fortunately, the vast majority of those in our law enforcement community would not adopt such a practice. But the Fourth Amendment was intended to protect the citizen from the overzealous and unscrupulous officer as well as from those who are conscientious and truthful. This decision makes a mockery of that protection.²⁹²

The following year, in *California v. Hodari D.*, the Court considered the issue of what constituted a seizure within the meaning of the Fourth Amendment.²⁹³ Hodari D. had fled on foot when he saw the police approaching.²⁹⁴ The police instructed him to stop and began pursuing him.²⁹⁵ During the pursuit, Hodari D. abandoned some drugs, which the police recovered.²⁹⁶ Hodari D. argued that he had been seized at the moment the police pursued him and instructed him to stop (even though he did not obey the instruction) and that this seizure was illegal, as it was not based on probable cause.²⁹⁷ If the Court agreed that he had been seized, the evidence that Hodari D. had dropped while fleeing from the police would have been subject to suppression under the exclusionary rule,²⁹⁸ but the Court did not rule this way. Rather, the majority opinion, written by Justice Scalia and joined by Justices Souter and Kennedy, held that a "show of authority" alone was not a seizure, and therefore the police officers' action in instructing Hodari D. to stop and chasing him were not subject to the reasonableness requirement of the Fourth Amendment.²⁹⁹ The dissent, written by Justice Stevens, raised concerns about the incentives for abuse that this would create for police:

In an airport setting, may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a "baggage search," and rely on the passengers' reactions to justify his investigative stops? The holding of today's majority fails to recognize the

291. 496 U.S. 325, 326-27 (1990). For a discussion of the implication of *Hudson* in the *Terry* stop context, see Part V.C.

292. *Id.* at 333 (Stevens, J., dissenting).

293. 499 U.S. 621, 623 (1991).

294. *Id.* at 622-23.

295. *Id.* at 623, 626.

296. *Id.* at 623.

297. *Id.*

298. *Id.* at 623-24.

299. *Id.* at 629.

coercive and intimidating nature of such behavior and creates a rule that may allow such behavior to go unchecked.

. . . .

It is too early to know the consequences of the Court's holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they may still have. . . . Today's qualification of the Fourth Amendment means that innocent citizens may remain "secure in their persons . . . against unreasonable searches and seizures" only at the discretion of the police.³⁰⁰

More recently, in *United States v. Patane*, the Court had to "decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires suppression of the physical fruits of the suspect's unwarned but voluntary statements."³⁰¹ The Court, in an opinion by Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, held that suppression was not required.³⁰² The dissenters, in an opinion by Justice Souter, joined by Justices Stevens and Ginsburg, again expressed concern about the incentives this would provide for the police to violate citizens' constitutional rights:

The issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings, before custodial interrogation. In closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*, the plurality adds an important inducement for interrogators to ignore the rule in that case.

. . . .

There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained.³⁰³

B. *A Trio of Cases: Leading Cases Cited by the Majority in Hudson v. Michigan*

Hudson is consistent with the trend of the conservative wing of the Court in recent years to minimize the impact and applicability of the exclusionary rule and to discount police incentives to violate the Constitution. But is *Hudson* consistent with Supreme Court precedent or is it true, as Justice Breyer states, that the opinion "represents a significant departure from the Court's precedents"?³⁰⁴ In Section IV of his opinion, Justice Scalia attempts to demonstrate that

300. *Id.* at 645-47 (Stevens, J., dissenting).

301. 542 U.S. 630, 633-34 (2004) (citation omitted).

302. *Id.* at 633.

303. *Id.* at 645 (Souter, J., dissenting).

304. *Hudson v. Michigan*, 126 S. Ct. 2159, 2171 (2006) (Breyer, J., dissenting).

his opinion is consistent with the prior precedents of the Court.³⁰⁵ According to Justice Scalia, “[a] trio of cases—*Segura v. United States*, *New York v. Harris*, and *United States v. Ramirez*—confirms our conclusion that suppression is unwarranted in this case.”³⁰⁶ Let us consider each of these cases.

C. *Segura v. United States Does Not Support Hudson*

The facts of *Segura* are complex and unique. Acting on information that Segura and his associate Colon were trafficking in cocaine from their apartment, New York Drug Enforcement Task Force agents placed them under surveillance.³⁰⁷ They observed Colon deliver a bulky package to Ms. Parra at a restaurant parking lot while petitioner Segura and Mr. Rivudalla-Vidal visited inside the restaurant.³⁰⁸ The agents followed Parra and Rivudalla-Vidal to their apartment and stopped them.³⁰⁹ Parra was found in possession of cocaine, and she and Rivudalla-Vidal were immediately arrested.³¹⁰ After being advised of his constitutional rights, Rivudalla-Vidal admitted that he had purchased the cocaine from Segura and confirmed that Colon had made the delivery at the restaurant.³¹¹ Task Force agents were then authorized by an Assistant United States Attorney to arrest petitioners and were advised that since a search warrant for petitioners’ apartment probably could not be obtained until the following day, the agents should secure the premises to prevent destruction of evidence.³¹² Later that same evening, the agents arrested petitioner Segura in the lobby of his apartment building, took him to the apartment, knocked on the door, and, when it was opened by Colon, entered the apartment without requesting or receiving permission.³¹³ The agents conducted a limited security check of the apartment and observed various drug paraphernalia in plain view.³¹⁴ Colon was then arrested, and both Colon and Segura were taken into custody.³¹⁵ Two agents remained in the apartment awaiting the warrant, but because of administrative delay the search warrant was not issued until some nineteen hours after the initial entry.³¹⁶ In the search pursuant to the warrant, the agents discovered cocaine and

305. *Id.* at 2168-70 (majority opinion).

306. *Id.* at 2168 (citing *United States v. Ramirez*, 523 U.S. 65 (1998); *New York v. Harris*, 495 U.S. 14 (1990); *Segura v. United States*, 468 U.S. 796 (1984)) (internal citations omitted).

307. *Segura*, 468 U.S. at 799.

308. *Id.*

309. *Id.* at 800.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 800-01.

315. *Id.* at 801.

316. *Id.*

records of narcotics transactions.³¹⁷ These items were seized together with those items observed during the security check.³¹⁸

The district court granted petitioners' pretrial motion to suppress all the seized evidence.³¹⁹ The court of appeals held that the evidence discovered in plain view on the initial entry should be suppressed, but not the evidence seized during the warrant search.³²⁰ The Supreme Court affirmed the court of appeals ruling.³²¹ The majority opinion was, in the words of its author, Chief Justice Burger, "carefully limited":³²²

Specifically, we hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.³²³

Thus, *Segura* can be readily distinguished from *Hudson*. First, evidence was suppressed in *Segura* as a result of the illegal entry into the home.³²⁴ All drug paraphernalia evidence the police observed in plain view during their protective sweep of the apartment was suppressed.³²⁵ By applying the exclusionary rule to the fruits of the unlawful entry,³²⁶ the Court kept in place a significant deterrent for police to enter homes without warrants. What the Court did not exclude was evidence that was found pursuant to a lawful, warranted search the following day.³²⁷ It was not alleged that the search that yielded the additional evidence was conducted in an unreasonable manner. Thus, the issue in *Hudson*, the manner of execution of a warrant,³²⁸ was neither raised nor considered in *Segura*. Justice Scalia's comparison of the two cases—"[]ike today's case, *Segura* involved a concededly illegal entry"³²⁹—is inapt. After *Segura*, one could still say that the police must have a valid search warrant and

317. *Id.*

318. *Id.*

319. *Id.* at 801-02.

320. *Id.* at 802-03.

321. *Id.* at 816.

322. *Id.* at 798.

323. *Id.*

324. *Id.* at 802-03.

325. *Id.* at 802.

326. *Id.*

327. *Id.* at 803-04.

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

329. *Id.* at 2168.

must execute it in compliance with the Fourth Amendment in order to introduce evidence found in the search.³³⁰

D. New York v. Harris Does Not Support Hudson

Justice Scalia's reliance on *New York v. Harris*³³¹ is similarly misplaced. In *Harris*, the police entered petitioner's home to arrest him.³³² While they had probable cause, they had not obtained a warrant, in violation of *Payton v. New York*.³³³ Harris was advised of his rights under *Miranda* while inside his home and made an incriminating statement.³³⁴ He was then taken to the police station where he was again advised of his *Miranda* rights and made another incriminating statement.³³⁵ The issue before the Court was whether the second confession, made at the stationhouse after a re-advisement of rights, was so tainted by the initial illegal entry into Harris' home that it must be excluded as well as the first statement.³³⁶ The Court held:

[T]he station house statement in this case was admissible because Harris was in legal custody . . . and because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else.³³⁷

As in *Segura*, the *Harris* Court did not question the propriety of suppressing evidence acquired in the home as a result of an illegal entry. The message to the police was that if they entered a home without a warrant, any evidence obtained therein (in this case, incriminating statements) would be suppressed and even the reading of *Miranda* rights would not dissipate the taint of the illegal entry.³³⁸ Similarly, any spontaneous statements Harris might have made would have been suppressed along with any physical evidence found in the home during the illegal arrest, including evidence from a

330. Justice Stevens, in dissent, still worried about the incentives for abuse that the *Segura* decision was creating:

The Court's disposition, I fear, will provide government agents with an affirmative incentive to engage in unconstitutional violations of the privacy of the home. The Court's disposition is, therefore, inconsistent with a primary purpose of the Fourth Amendment's exclusionary rule—to ensure that all private citizens—not just these petitioners—have some meaningful protection against future violations of their rights.

Segura, 468 U.S. at 817 (Stevens, J., dissenting).

331. 495 U.S. 14 (1990).

332. *Id.* at 15-16.

333. *Id.* at 16 (citing *Payton v. New York*, 445 U.S. 573 (1980)).

334. *Id.*

335. *Id.*

336. *Id.* at 16-17.

337. *Id.* at 20.

338. *Id.* at 20-21.

search of his person and the area under his immediate control,³³⁹ evidence found during a protective sweep of the home,³⁴⁰ and any other evidence found in plain view.³⁴¹ Indeed, if Harris had remained silent while in police custody on the way to the stationhouse, the police would not have had any usable confession and conviction would have been problematic. Thus, although *Harris* may have diluted the deterrent effect of the exclusionary rule to enter a home to make an arrest without a warrant, it did not eliminate it.³⁴²

A careful reading of *Segura* and *Harris* reveals that they do not support the *Hudson* decision. The four dissenters rejected Justice Scalia's reasoning: "It should be apparent by now that the three cases upon which Justice Scalia relies—*Segura v. United States*; *New York v. Harris*; and *Ramirez*—do not support his conclusion."³⁴³ And Justice Kennedy specifically disagreed with Part IV of Justice Scalia's opinion, stating, "I am not convinced that *Segura v. United States* and *New York v. Harris* have as much relevance here as Justice Scalia appears to conclude."³⁴⁴

E. *United States v. Ramirez Does Not Support Hudson*

The final case Justice Scalia cites in support of his position in *Hudson* is *United States v. Ramirez*.³⁴⁵ At first glance, *Ramirez* does appear to support his argument. Justice Breyer refers to *Ramirez* as "offer[ing] the majority its last best hope."³⁴⁶ According to Justice Scalia,

United States v. Ramirez involved a claim that police entry violated the Fourth Amendment because it was effected by breaking a window. We ultimately concluded that the property destruction was, under all the circumstances, reasonable, but in the course of our discussion we unanimously said the following: "[D]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression." Had the breaking of the window been unreasonable, the Court said, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." What clearer

339. *Chimel v. California*, 395 U.S. 752 (1969).

340. *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

341. *Horton v. California*, 496 U.S. 128, 130 (1990); see also *Arizona v. Hicks*, 480 U.S. 321, 323 (1987); *Coolidge v. New Hampshire*, 403 U.S. 443, 468-71 (1971).

342. Nevertheless, Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens in dissent, bemoaned the majority's "apparent blindness to the incentives the Court's ruling creates for knowing and intentional constitutional violations by the police." *Harris*, 495 U.S. at 21-22 (Marshall, J., dissenting).

343. *Hudson v. Michigan*, 126 S. Ct. 2159, 2183 (Breyer, J., dissenting) (citations omitted).

344. *Id.* at 2171 (Kennedy, J., concurring) (citations omitted).

345. *Id.* at 2170 (majority opinion); *United States v. Ramirez*, 523 U.S. 65 (1998).

346. *Hudson*, 126 S. Ct. at 2185 (Breyer, J., dissenting).

expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?³⁴⁷

In order to understand the context of the quotations taken from Chief Justice Rehnquist's opinion, the facts of *Ramirez* must be considered. A Deputy U.S. Marshal sought and received a "no-knock" warrant granting permission to enter and search Ramirez's home for Alan Shelby, an escaped convict who was believed to be hiding there.³⁴⁸ Before executing the search warrant, the officers were informed by a reliable confidential informant that Ramirez "might have a stash of guns and drugs hidden in his garage."³⁴⁹ However, they did not seek a warrant to search for these items at the time as they were focused on capturing Shelby.³⁵⁰ After receipt of the search warrant, law enforcement officers proceeded to Ramirez's home, where

[i]n the early morning of November 5, approximately 45 officers gathered to execute the warrant. The officers set up a portable loud speaker system and began announcing that they had a search warrant. Simultaneously, they broke a single window in the garage and pointed a gun through the opening, hoping thereby to dissuade any of the occupants from rushing to the weapons the officers believed might be in the garage.

Respondent and his family were asleep inside the house at the time this activity began. Awakened by the noise, respondent believed that they were being burglarized. He ran to his utility closet, grabbed a pistol, and fired it into the ceiling of his garage. The officers fired back and shouted "police." At that point respondent realized that it was law enforcement officers who were trying to enter his home. He ran to the living room, threw his pistol away, and threw himself onto the floor. Shortly thereafter, he, his wife, and their child left the house and were taken into police custody. Respondent waived his *Miranda* rights, and then admitted that he had fired the weapon, that he owned both that gun and another gun that was inside the house, and that he was a convicted felon. Officers soon obtained another search warrant, which they used to return to the house and retrieve the two guns.³⁵¹

Ramirez argued that breaking his garage window was unreasonable.³⁵² The Supreme Court rejected this contention.³⁵³ The police had obtained a no-knock warrant and had, in fact, announced their presence over a loudspeaker.³⁵⁴ They did not gain entry through the bro-

347. *Id.* at 2170 (majority opinion) (quoting *United States v. Ramirez*, 523 U.S. 65, 71, 72 n.3 (1998)).

348. *Ramirez*, 523 U.S. at 68.

349. *Id.* at 68-69.

350. *Id.*

351. *Id.* at 69.

352. *Id.*

353. *Id.* at 70.

354. *Id.* at 68-69.

ken window in the garage.³⁵⁵ Furthermore, the police did not enter the home until they heard a gunshot within.³⁵⁶ After a fully Mirandized confession in which Ramirez admitted to possessing firearms, the police sought a search warrant specifically to search for the guns.³⁵⁷ Despite these facts, the Ninth Circuit held that knock-and-announce was violated and the seizure of the guns was a direct result of the unreasonable conduct of the police.³⁵⁸ Chief Justice Rehnquist, in response to this, inserted this footnote in his opinion:

After concluding that the Fourth Amendment had been violated in this case, the Ninth Circuit further concluded that the guns should be excluded from evidence. Because we conclude that there was no Fourth Amendment violation, we need not decide whether, for example, there was sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence.³⁵⁹

By alluding in his footnote to the leading cases for the inevitable discovery and attenuation exceptions to the exclusionary rule, Chief Justice Rehnquist seems merely to be saying that before excluding evidence, the Court must determine if any exceptions to the exclusionary rule apply.³⁶⁰ Under the facts of Ramirez, a plausible argument could be made that Ramirez' intervening act of firing the gun broke the chain of causation.³⁶¹ Furthermore, his voluntary confession and the subsequent search with a second search warrant arguably attenuated the taint of any illegality on the part of the officers.³⁶² It may also be suggested that the police would have inevitably discovered the firearms because they would have sought a search warrant based on the reliable confidential informant's tip that Ramirez had guns and drugs.³⁶³

In short, although Chief Justice Rehnquist did indicate that unreasonably breaking a window during the execution of a search warrant would not necessarily lead to suppression of evidence,³⁶⁴ he did not state that "an impermissible manner of entry does not necessar-

355. *Id.* at 69.

356. *Id.*

357. *Id.*

358. *Id.* at 69-70.

359. *Id.* at 72 n.3 (citing *Nix v. Williams*, 467 U.S. 431 (1984); *Wong Sun v. United States*, 371 U.S. 471 (1963)).

360. *See id.*

361. This argument was made by Judge Kozinski in dissent in the Ninth Circuit decision *United States v. Ramirez*, 91 F.3d 1297, 1307 (1996) (Kozinski, J., dissenting), where he cited what he believed to be controlling Ninth Circuit precedent: *United States v. Garcia*, 516 F.2d 318 (1975).

362. *See Ramirez*, 523 U.S. at 69.

363. *See id.* at 68-69.

364. *Id.* at 72 n.3.

ily trigger the exclusionary rule.”³⁶⁵ The alleged unnecessary destruction of property in *Ramirez* was a single pane of glass in a garage door.³⁶⁶ The police did not “enter” through the broken window, but rather one officer pointed a gun through the broken garage window while others entered the home.³⁶⁷ All that the *Ramirez* dicta really stands for is that the unreasonable breaking of a window by police will not necessarily lead to suppression, an unremarkable proposition.³⁶⁸ Even the most ardent supporter of the exclusionary rule would be hesitant to suppress evidence merely because the police gratuitously broke a window on the way in the house.

In short, none of the primary trio of cases cited by the majority offer any compelling support for their decision.

F. Established Exceptions to the Exclusionary Rule

Prior to *Hudson*, there were four established exceptions to the exclusionary rule: attenuation,³⁶⁹ independent source,³⁷⁰ inevitable discovery,³⁷¹ and good-faith.³⁷² The first three exceptions are generally considered to be related and are collectively referred to as the “fruit of the poisonous tree,” or “derivative evidence,” doctrine. Justice Scalia drew heavily on the derivative evidence doctrine in his opinion, particularly the attenuation and inevitable discovery exceptions,³⁷³ his reliance on this doctrine was misplaced.

The attenuation exception to the exclusionary rule was first expressed in *Nardone v. United States*³⁷⁴ and was more fully developed

365. *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006).

366. *Ramirez*, 523 U.S. at 69.

367. *Id.*

368. *See id.* at 72 n.3. The unreasonable breaking of a window is not necessarily a knock-and-announce violation. The police might be perfectly justified in entering the home to conduct a search, but if there were obvious ways to enter the home without damaging private property, such as through an unlocked window or door, it would be unreasonable for them to break a window to gain entry. If the police discovered guns in a subsequent search, there would be a legitimate question as to whether there was a “sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence.” *Id.* This would be an example where “unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful.” *Id.* at 71.

369. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939).

370. *Murray v. United States*, 487 U.S. 533 (1988); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

371. *Nix v. Williams*, 467 U.S. 421 (1984).

372. *United States v. Leon*, 468 U.S. 897 (1984). The majority does not rely on this exception in *Hudson*, but does cite *Leon* twice in support of its “social costs” argument and as proof that the Court does not reflexively apply the exclusionary rule. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165-66 (2006).

373. *Hudson*, 126 S. Ct. at 2179-80.

374. 308 U.S. 338 (1939).

in *Wong Sun v. United States*.³⁷⁵ In *Wong Sun*, the defendant was the subject of an unconstitutional arrest.³⁷⁶ Several days after the arrest, he voluntarily returned to the police station and made an inculpatory statement.³⁷⁷ The Court cited both the passage of time (“temporal proximity”) and the voluntary act (“free will”) of the defendant in determining that the statement had “become so attenuated as to dissipate the taint.”³⁷⁸ In determining whether the attenuation exception applies, courts must determine “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”³⁷⁹

The independent source exception to the exclusionary rule was first set forth in *Silverthorne Lumber Co. v. United States*³⁸⁰ and more fully developed in *Murray v. United States*.³⁸¹ In *Murray*, the police violated the Fourth Amendment by entering a warehouse without a search warrant; inside, they discovered bales of marijuana.³⁸² The police then left the warehouse and obtained a search warrant for the warehouse.³⁸³ The warrant was based on probable cause that the police had obtained lawfully prior to entering the warehouse.³⁸⁴ The Court remanded the case to the lower court to determine if “the warrant-authorized search of the warehouse was an independent source of the challenged evidence,” with a plurality of the Court strongly suggesting that it should be.³⁸⁵ The independent source doctrine is designed to put

the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.³⁸⁶

The inevitable discovery exception was created in *Nix v. Williams*.³⁸⁷ In *Nix*, the police found the body of a victim after the mur-

375. 371 U.S. 471 (1963).

376. *Id.* at 479, 490.

377. *Id.* at 476-77.

378. *Id.* at 491 (quoting *Nardone*, 308 U.S. at 341).

379. *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1982)).

380. 251 U.S. 385 (1920).

381. 487 U.S. 533 (1988).

382. *Id.* at 535.

383. *Id.* at 535-36.

384. *Id.*

385. *Id.* at 543-44.

386. *Nix v. Williams*, 467 U.S. 431, 443 (1984) (citations omitted). One is tempted to ask why should not the police be placed in a worse position because they violated the law? Are not the rest of us placed in a worse position when we violate the law?

387. *Id.* at 444.

der suspect, Williams, informed them of its location.³⁸⁸ Although the Court acknowledged that the police had obtained the information from Williams in violation of his Sixth Amendment right to counsel and that his statement was thus inadmissible, the Court nevertheless admitted the evidence relating to the victim's body.³⁸⁹ Although the body was a "fruit" of the statement, the Court held that the body would have been discovered within a short time even without Williams' cooperation because there was a search team already searching the area prior to his disclosure of the body's location.³⁹⁰ The inevitable discovery exception created a sort of hypothetical independent source doctrine based on the same rationale as independent source: "[E]xclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place."³⁹¹

*G. Application of the Derivative Evidence Doctrine in Hudson:
Attenuation*

There was no evidence of an act of free will or the passage of any appreciable period of time between the "primary illegality" in *Hudson* and the discovery of the evidence. The rocks of cocaine sought to be suppressed by the petitioner were discovered within a few seconds of the illegal entry.³⁹² Nevertheless, Justice Scalia applies the concept of attenuation, citing *Wong Sun*.³⁹³ He suggests that attenuation can occur not only "when the causal connection is remote" but also "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."³⁹⁴ Justice Scalia cites *New York v. Harris*³⁹⁵ as an example of application of this meaning of attenuation, disregarding the fact that the Court in *Harris* had explicitly declined to apply the attenuation doctrine in that case by stating,

[A]ttenuation analysis is only appropriate where, as a threshold matter, courts determine that "the challenged evidence is in some sense the product of illegal governmental activity." . . .

Harris' statement taken at the police station was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else. The case is

388. *Id.* at 436.

389. *Id.* at 432.

390. *Id.* at 449-50.

391. *Id.* at 444.

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

393. *Id.* at 2164.

394. *Id.*

395. 495 U.S. 14 (1990).

analogous to *United States v. Crews*. In that case, we refused to suppress a victim's in-court identification despite the defendant's illegal arrest. The Court found that the evidence was not " 'come at by exploitation' of . . . the defendant's Fourth Amendment rights," and that it was not necessary to inquire whether the "taint" of the Fourth Amendment violation was sufficiently attenuated to permit the introduction of the evidence. Here, likewise, the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into Harris' home.³⁹⁶

Justice Scalia concluded that the evidence seized in *Hudson* was attenuated "[s]ince the interests that *were* violated in this case have nothing to do with the seizure of the evidence."³⁹⁷ Although Justice Kennedy distanced himself from Justice Scalia's dubious invocation of *New York v. Harris*, he nevertheless ultimately endorses his view of attenuation.³⁹⁸ According to Justice Kennedy, "[u]nder our precedents the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression."³⁹⁹ Thus, under the majority's logic, attenuation can occur instantly. According to Justice Scalia, the moment the constitutional violation ended and the police stepped inside the home to begin their lawful search, the taint of the failure to properly knock-and-announce was dissipated.⁴⁰⁰ This instant attenuation concept is a clear deviation from prior precedent.⁴⁰¹ Justice Breyer correctly states that "the majority gives the word 'attenuation' a new meaning."⁴⁰²

H. Application of Derivative Evidence Doctrine in Hudson: Inevitable Discovery

The Michigan Supreme Court relied exclusively on the inevitable discovery exception in deciding that the exclusionary rule should not be applied to knock-and-announce violations in *People v. Stevens*:

Given that the evidence would have been inevitably discovered, allowing the evidence in does not put the prosecution in any better position than it would be in had the police adhered to the knock-and-announce requirement. However, excluding the evidence puts the prosecution in a worse position than it would have been in had there been no police misconduct. Therefore, the inevitable discov-

396. *Id.* at 19 (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)) (internal citation omitted).

397. *Hudson*, 126 S. Ct. at 2165.

398. *Id.* at 2171 (Kennedy, J., concurring) ("I am not convinced that . . . *New York v. Harris* ha[s] as much relevance here as Justice Scalia appears to conclude . . .").

399. *Id.* at 2170-71.

400. *Id.* at 2179-80.

401. *See supra* note 378.

402. *Id.* at 2180 (Breyer, J., dissenting).

ery exception to the exclusionary rule should be available to the prosecution in the present case.⁴⁰³

Professor LaFave has called the *People v. Stevens* decision an “absurdity” and an “Alice-in-Wonderland version of inevitable discovery.”⁴⁰⁴ Perhaps that is one reason the *Hudson* majority opinion, although affirming the Michigan Supreme Court’s decision not to apply the exclusionary rule, never once mentions the term “inevitable discovery” nor cites *People v. Stevens*, *Silverthorne*, or *Nix*. But while not explicitly using the phrase, the majority uses the description of inevitable discovery: “Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house.”⁴⁰⁵ This is a misapplication of the inevitable discovery doctrine.⁴⁰⁶ As Justice Breyer noted in his dissent:

The Court nonetheless accepts Michigan’s argument that the requisite but-for-causation is not satisfied in this case As support for this proposition, Michigan rests on this Court’s inevitable discovery cases.

This claim, however, misunderstands the inevitable discovery doctrine. Justice Holmes in *Silverthorne*, in discussing an “independent source” exception, set forth the principles underlying the inevitable discovery rule. That rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, “independent” or “inevitable” discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior.⁴⁰⁷

403. 597 N.W.2d 53, 62 (1999). For a useful critique of *People v. Stevens*, see Robin L. Gentry, Note, *Why Knock? The Door Will Inevitably Open: An Analysis of People v. Stevens and the Michigan Supreme Court’s Departure from Fourth Amendment Protection*, 46 WAYNE L. REV. 1659 (2000). See generally Jenny Dobrovoles, Note, *People v. Stevens: The Michigan Supreme Court Applies the Inevitable Discovery Exception to the Exclusionary Rule When Officers Violate the Knock and Announce Statute*, 78 U. DET. MERCY L. REV. 569 (2001).

404. 6 LAFAVE, *supra* note 47, at 274-73.

405. *Hudson*, 126 S. Ct. at 2164.

406. For contrasting perspectives on the appropriateness of applying inevitable discovery to knock-and-announce violations, see Estrada, *supra* note 254; Mattias Luukkonen, *Knock, Knock. What’s Inevitably There? An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations*, 35 MCGEORGE L. REV. 153 (2004); and Randall S. Bethune, Note and Comment: *The Exclusionary Rule and the Knock-and-Announce Violation: Unreasonable Remedy for Otherwise Reasonable Search Warrant Execution*, 22 WHITTIER L. REV. 879 (2001).

407. *Hudson*, 126 S. Ct. at 2177-78 (Breyer, J., dissenting) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)).

V. THE SIGNIFICANCE AND FUTURE IMPLICATIONS OF *HUDSON*A. *The New Parallel Universe Exception to the Exclusionary Rule*

Despite the majority's efforts to shoehorn the knock-and-announce exception into existing precedent, *Hudson* does not fit into any of the established exceptions to the exclusionary rule. Rather, by relying on not what did happen, but what could have happened, *Hudson* in effect creates a whole new exception—what might be called the *parallel universe exception* to the exclusionary rule. Under this exception, courts must ask the following question: if the same officers had conducted the same search, but doing only what they were authorized to do under the Constitution, would they have found the same evidence? If the answer is “yes,” the evidence will be deemed admissible. Therefore, if the officers in *Hudson* had simply conducted a lawful search (with no knock-and-announce violation), as they were authorized by warrant to do, they would have found the same evidence. Justice Scalia has thus created a fictional parallel universe⁴⁰⁸ in which the police always act in good faith. In the real world, the police may violate the Constitution with impunity without fear of having evidence suppressed (so long as they do so in ways which do not enhance their chances of finding evidence) because they can rely on their hypothetical doppelgangers in the parallel universe to behave themselves.⁴⁰⁹

B. *The Dimensions of the Parallel Universe Exception*

The parallel universe exception could potentially exempt a variety of unconstitutional police behaviors from the reach of the exclusionary rule. First, it seems clear that any violations in the manner of execution of a warrant would be subject to this exception. So long as the warrant itself is valid, the officers may engage in wholesale destruction of private property, both inside and outside the home, because the good parallel universe cops would have found the exact same evidence without damaging the property at all. Similarly, the timing of the execution of the search warrant could become largely irrelevant. Officers intent on frightening or embarrassing the occupants of a home could execute a daytime warrant at nighttime, knowing that their imaginary counterparts would wait until the morning

408. For a nonscientists' guide to the quantum physics-based cosmological theory of parallel universes, see generally M.R. FRANKS, *THE UNIVERSE AND MULTIPLE REALITY* (2003) and Max Tegmark, *Parallel Universes*, *SCI. AM.*, May 2003, at 41.

409. Once again, Justice Scalia owes an unacknowledged ideological debt to Judge Posner for the parallel universe concept, which Judge Posner introduced in *United States v. Stefonek*, 179 F.3d 1030 (7th Cir. 1999). See *supra* notes 89-99 and accompanying text. In *Stefonek*, Chief Judge Posner admitted evidence seized pursuant to a patently defective warrant because “[t]he search would thus have been identical in scope, and exactly the same evidence would have been seized, had the warrant complied with the Constitution.” *Id.* at 1034.

and seize the same incriminating items.⁴¹⁰ Even a stale warrant could conceivably be revived in the parallel universe. The Court long ago suggested that the Fourth Amendment prohibits excessive delay in execution of a warrant even if no time constraints are imposed by statute or the warrant itself.⁴¹¹ The court recently reaffirmed this view:

[P]robable cause may cease to exist after a warrant is issued. . . . [T]he probable-cause showing may have grown “stale” in view of the time that has passed since the warrant was issued. (“[T]he facts in an affidavit supporting a search warrant must be sufficiently close in time to the issuance of the warrant and the subsequent search conducted so that probable cause can be said to exist as of the time of the search and not simply as of some time in the past.”).⁴¹²

Consider this hypothetical. Suppose the police apply for a warrant to search a home. The application for the warrant provides probable cause to believe that a crate of illegal arms was recently delivered to a suspect’s home, and the police have reliable information that the

410. The Supreme Court has not explicitly held that nighttime searches are governed by a higher standard than daytime searches, but Justice Marshall, joined in dissent by Justices Douglas and Brennan, expressed the view that nighttime searches should require more than standard probable cause:

This Court has consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search. . . . “[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home.” . . . And our decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), was in large part based upon our revulsion at the thought of nighttime searches of the marital bedroom to discover evidence of illegal contraceptive use.

. . . .

. . . As even the Government in this case concedes, “searches conducted in the middle of the night . . . involve a greater intrusion than ordinary searches and therefore require a greater justification.” In my view, this principle may well be a constitutional imperative.

Gooding v. United States, 416 U.S. 430 (1974) (Marshall, J., dissenting) (internal citations omitted).

Justice Marshall also noted that “most of the States’ laws provide that search warrants may only be served during the day unless express authorization for a nighttime search is obtained, and such authorization can generally be obtained only by meeting special requirements for a nighttime search.” *Id.* at 464 n.1. The Supreme Court has not revisited this issue in the past thirty-two years, but numerous lower courts have. See generally Claudia G. Catalano, Annotation, *Propriety of Execution of a Search Warrant at Nighttime*, 41 A.L.R. 5TH 171 (1996). At the reargument in *Hudson v. Michigan*, Justice Souter suggested that a nighttime search could violate the Fourth Amendment: “[N]ighttime searches when only a daytime search is authorized amounts to an unreasonable search.” Transcript of Oral Argument at 57-58, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360), 2006 WL 1522979; see *United States v. Hurn*, 2006 U.S. Dist. LEXIS 42768 (W.D. Wis. 2006) (denying motion to suppress based on nighttime execution of warrant and citing *Hudson*).

411. *Sgro v. United States*, 287 U.S. 206, 210-11 (1932).

412. *United States v. Grubbs*, 126 S. Ct. 1494, 1499 n.2 (2006) (quoting *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993)).

shipment will be moved to another location in eight days. The magistrate issues the warrant. The investigating officers then go on vacation for a week. On the ninth day, the officers decide to execute the warrant even though they believe that the contraband was moved the day before. There is a strong argument that the officer's decision is unconstitutional because, at the time the warrant is executed, there is no probable cause to believe that items subject to seizure will be found. But the officers are lucky, and they find the guns; the crate has not been moved as they believed it had been. Was the entire search improper because the warrant was no longer valid or was it merely the manner of execution of the warrant (the timing) that was improper? According to the *Hudson* Court, a knock-and-announce violation is just a matter of arriving a few seconds early, so what is the difference if the timing is a few hours late? In the parallel universe, the hypothetical good cops would have arrived exactly on time and would have found the exact same crate of guns. Being late did not "cause" the police to find the evidence, so the evidence should not be suppressed.

C. *Application of the Parallel Universe Exception to Terry Stops*

The parallel universe exception is not logically limited to searches of homes. It could, for example, apply to searches of persons conducted under *Terry v. Ohio*.⁴¹³ Suppose an officer has reasonable suspicion that a young woman is planning to rob a store and that she is armed. He is thus authorized, under *Terry*, to stop and frisk her.⁴¹⁴ The officer asks the young woman to turn around and put her hands on the wall, then proceeds to fondle and squeeze her entire body, paying special emphasis to her private parts, as he searches her from head to toe. The officer finds a gun stuck in the top of the suspect's sock under her trousers. Similarly, suppose an officer (again, with reasonable suspicion that a suspect is armed) throws a suspect to the ground, wrenches his arm up behind his back, and grinds his face into the sidewalk while his partner searches him, finding a gun tucked in the suspect's waistband. Clearly, in both cases, the officers' actions were unreasonable and exceeded the scope of an authorized pat-down. But, in both cases, the officers were authorized to do a *Terry* frisk, and had they patted down the suspects properly, they would have found the weapons. Again, under the logic of *Hudson*, there would be no reason to exclude the evidence.

There are cases which suggest that exceeding the scope of a *Terry* frisk will result in the application of the exclusionary rule, but a close reading of the cases reveals that these cases can be distinguished

413. 392 U.S. 1 (1968).

414. *Id.* at 27.

from the preceding examples. Consider, for example, *Sibron v. New York*,⁴¹⁵ which involved a motion to suppress drugs found in Sibron's pocket:

[A]ssuming *arguendo* that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them.⁴¹⁶

Sibron is different than the hypotheticals because Patrolman Martin essentially skipped the frisk and reached straight into Sibron's pocket.⁴¹⁷ Thus, Patrolman Martin conducted a completely unauthorized search as opposed to conducting an authorized search in an unauthorized manner. If the hypothetically good Patrolman Martin had conducted the pat-down of Sibron, he would not have found a weapon (or anything that would have justified a more intrusive search).

The Court addressed another improper *Terry* search in *Minnesota v. Dickerson*.⁴¹⁸ The evidence sought to be suppressed in *Dickerson* was a lump of cocaine found in the suspect's pocket:

[T]he officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon.

. . . [T]he police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry*. . . . Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under *Terry*:] . . . the protection of the police officer and others nearby." It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize⁴¹⁹

As in *Sibron*, the Court suppressed the cocaine.⁴²⁰ Also like *Sibron*, had the officer conducted a proper *Terry* search, he would not

415. 392 U.S. 40 (1968).

416. *Id.* at 65.

417. *Id.*

418. 508 U.S. 366 (1993).

419. *Id.* at 378 (citations omitted).

420. *Id.* at 366.

have reached into Dickerson's pocket and found drugs. Because the hypothetical good cop would not have discovered any evidence at all, it would be consistent with *Hudson* to apply the exclusionary rule in this case while still leaving room to decline to apply it in the hypothetical situations posed above.

D. *A Bad-Faith Exception to the Exclusionary Rule*

As these examples demonstrate, what is fundamentally different about the parallel universe exception from the established exceptions to the exclusionary rule is that it is a true "bad-faith" exception.⁴²¹ At the time the police are faced with the choice of acting reasonably and following the Constitution or acting unreasonably and intentionally violating the Constitution, they can choose the latter course knowing that there is no chance that any evidence will be excluded. Although the inevitable discovery, independent source, and attenuation doctrines ultimately may allow some evidence discovered by bad-faith behavior to be admitted at trial, the police still have to assume at the time they choose to violate the Constitution that if their actions yield incriminating evidence, it will be excluded. Although there is a chance that subsequent good-faith police behavior or external events beyond their control⁴²² will vitiate their conduct, they cannot rely on this possibility. Thus, with the pre-*Hudson* derivative evidence exceptions, the deterrent effect of the exclusionary rule remained at least tenuously in place. Under *Hudson*, the potential loss of evidence is no longer a deterrent.

E. *The End of the Suppression Hearing*

Hudson not only creates a new exception to the exclusionary rule, but also fundamentally alters Fourth Amendment criminal practice. Under pre-*Hudson* law, when a defendant believed his Fourth Amendment rights had been violated by a failure to knock and announce, his counsel would file a motion to suppress evidence result-

421. Although all the hypotheticals deal with situations where the police had authority to conduct a search (reasonable suspicion for a *Terry* stop or a warrant to search a home), but acted in bad faith, the parallel-universe exception could also potentially be extended to cover situations where the police acted in good faith, thinking that they had authority to search when they did not. Under this theory, even a warrantless search of a home might not be a basis for exclusion of the evidence found during the search, so long as the police had probable cause for the search. Because the police had probable cause for the search, had they gone to a magistrate, he or she would have issued a search warrant. In the parallel universe, had the police done what they should have done—sought the warrant—they would have been able to conduct the same search lawfully and would have found the same evidence. Evidence that could have been found constitutionally by hypothetical good cops should not be suppressed. Professor Amar believes this is the logical next step in building on *Hudson* to dismantle the exclusionary rule. See Amar, *supra* note 7.

422. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471 (1963) (independent voluntary confession of the defendant).

ing from that violation. The trial court would then hold a suppression hearing at which the defense could attempt to establish that the Constitutional violation had occurred. The prosecution could put on evidence to rebut the claim that a violation had occurred or concede the violation and argue that an exception to the exclusionary rule applied (or argue in the alternative that a violation did not occur, but if it did, then an exception should apply).

Suppression hearings are procedural tools that serve important purposes beyond simply determining whether evidence shall be suppressed. Suppression hearings bring police misconduct to light in a public forum. The hearings may alert the prosecutor's office, the leadership of the police department, citizen review boards, and other groups to the conduct of officers who should be disciplined. Additionally, it can highlight the need for additional training, either for individuals or for the entire department. Suppression hearings also establish a record that may be useful for the defendant and other victims of the constitutional violation in attempting to seek compensation or other redress for the harm they suffered. Even if evidence is not ultimately suppressed, motions to suppress serve to reinforce the need to comply with the Constitution in the minds of police officers by subjecting officers' actions to scrutiny and reminding them of the possibility of suppression if they do not respect suspects' rights.

The *Hudson* majority, on the other hand, seems to view suppression hearings as largely a waste of valuable judicial resources, referring to the extensive litigation occasioned by the exclusionary rule.⁴²³ *Hudson* goes a long way toward solving that problem by eliminating the need for suppression hearings in knock-and-announce cases⁴²⁴ and by providing a basis for eliminating suppression hearings for a variety of other types of constitutional violations in the future. By removing the possibility that police abuses will come to light through suppression hearings, Justice Scalia's claim that knock-and-announce violations are not a major problem in need of deterrence⁴²⁵

423. *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006).

424. See, for example, *United States v. Gaver*, 452 F.3d 1007, 1008 (8th Cir. 2006), where in response to a motion to suppress filed prior to *Hudson*, the Eighth Circuit stated (citing *Hudson*), "We need not consider whether the officers acted reasonably by entering without knocking and announcing, because even if there were a violation of the Fourth Amendment, the exclusionary rule would be inapplicable." *Id.*; see also *United States v. Robinson*, 441 F. Supp. 2d 1029, 1033 (D. Minn. 2006) (summarily denying motion to suppress based on alleged knock-and-announce violation); *In re Frank S.*, 142 Cal. App. 4th 145, 148 (Cal. Ct. App. 2006) ("Defendant Frank S. contends that his counsel was ineffective for failing to move to suppress evidence discovered incident to his arrest. He argues that the arresting officer's violation of the knock-and-announce rule requires exclusion of the evidence. The claim fails because the United [States] Supreme Court recently held in *Hudson v. Michigan* that violation of the knock-and-announce rule does not justify application of the exclusionary rule.").

425. *Hudson*, 126 S. Ct. at 2167-68.

can become a self-fulfilling prophecy. Police violations may appear to be on the decline simply because there will be few reported cases of such violations.

One potentially hopeful note for those who believe *Hudson* was wrongly decided is Justice Kennedy's apparent willingness to reconsider his position if the decision results in increased police abuses as the dissenting Justices fear:

Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20.⁴²⁶

Yet, however sincere Justice Kennedy may be, the likelihood of being able to demonstrate such a widespread pattern without criminal defense counsel bringing violations to the notice of the courts and the public through suppression motions is remote.

F. *The Fruitless Poisonous Tree Doctrine*

Just as *Terry v. Ohio* revolutionized Fourth Amendment analysis by creating a new intermediate class of Fourth Amendment searches and seizures subject to a lower standard than traditional "full-blown searches," *Hudson* effectively creates a new category of Fourth Amendment violations subject to a similar lower standard. This category, starting with knock-and-announce violations, includes those Fourth Amendment violations that, by their nature, do not merit the exclusionary rule because they do not, by definition, yield poisonous fruit. Filing a motion to suppress would be pointless in such cases because even if a constitutional violation could be established, there would be no evidence subject to suppression.⁴²⁷ This category of constitutional violations may be labeled *fruitless poisonous trees*: there is a poisonous tree—a constitutional violation—but it is barren.

426. *Id.* at 2171 (Kennedy, J., concurring).

427. Indeed, after *Hudson*, it could be argued that filing a suppression motion for a knock-and-announce violation would be unethical, since there is no "good faith basis in law or fact" for such a motion. *See, e.g.*, FED. R. CIV. P. 11(b); MODEL RULES OF PROF'L CONDUCT R. 3.1 (2006) (Meritorious Claim and Contentions).

Terry v. Ohio created an intermediate class of Fourth Amendment searches and seizures: those requiring reasonable suspicion instead of probable cause.⁴²⁸ *Terry* stop-and-frisks were just the first category of searches and seizures to be placed in this classification. Later, additional categories of searches were added: limited weapon searches of cars,⁴²⁹ protective sweeps for confederates in homes,⁴³⁰ immigration stops,⁴³¹ vehicle stops to check license and registration,⁴³² temporary seizures of property,⁴³³ and searches of probationers and their homes.⁴³⁴ As discussed below, *Richards v. Wisconsin* incorporated the reasonable suspicion standard into the knock-and-announce arena, allowing the police to dispense with the requirement if they have reasonable suspicion of certain dangers.⁴³⁵ The justification for the less stringent standard adopted in *Terry* is the minimally intrusive nature of the searches and seizures involved relative to full-scale searches and seizures of persons and protected places.⁴³⁶ Thus, the minimally intrusive nature of a *Terry* stop was balanced against the need for police protection, public safety, and effective law enforcement and was found to be reasonable.⁴³⁷

G. *Criteria for Fruitless Poisonous Trees*

What is the basis for establishing a second tier of Fourth Amendment violations? What type of violations will fall into the fruitless poisonous tree category in addition to knock-and-announce violations? *Hudson* provides several clues for the criteria to be applied. One possibility is that placement in the class will require a balancing of social costs versus deterrence value such as that conducted by Justice Scalia in *Hudson*.⁴³⁸ Thus, any type of Fourth Amendment violation that a majority of the Court found unlikely to be deterred by the exclusionary rule or which they determined there was little incentive to commit could be considered a fruitless poisonous tree. The problem with this criterion is that the social costs of the exclusionary rule will always be high and the (theoretical) potential deterrence of internal discipline or a civil suit will always be present. The social costs bal-

428. 392 U.S. 1, 27 (1968).

429. *Michigan v. Long*, 463 U.S. 1032 (1983).

430. *Maryland v. Buie*, 494 U.S. 325 (1990).

431. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

432. *Delaware v. Prouse*, 440 U.S. 648 (1979).

433. *United States v. Place*, 462 U.S. 696 (1983).

434. *United States v. Knights*, 534 U.S. 112 (2001) (searching of probationers and their homes is appropriate when supported by reasonable suspicion and authorized as a condition of probation).

435. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

436. *Terry v. Ohio*, 392 U.S. 1, 26 (1968).

437. *Id.* at 27.

438. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165-68 (2006)

ancing analysis is really illusory. In truth, it is an argument to abandon the exclusionary rule altogether.

Another possibility implied by *Hudson* is that certain *de minimis* violations should be considered fruitless poisonous trees because the exclusionary remedy would be disproportionate. This argument was specifically advanced by the government⁴³⁹ and was one of the arguments relied upon by a divided panel of the Seventh Circuit in refusing to apply the exclusionary rule to a knock-and-announce violation in *United States v. Espinoza*.⁴⁴⁰ Justice Scalia did not explicitly endorse this argument, but used language which implies that the logic appeals to him. For example, he repeatedly refers to the exclusionary rule as the “massive remedy”⁴⁴¹ and also called it the “incongruent remedy.”⁴⁴² Incongruent is simply a synonym for disproportionate. Justice Scalia further highlighted his view of the disproportionality between violation and remedy by minimizing the significance of the violation, calling it a “misstep,”⁴⁴³ and exaggerating the severity of Hudson’s offense, dubiously claiming that “[l]arge quantities of drugs were found.”⁴⁴⁴ A major potential problem with exempting certain *de minimis* violations is that as soon as a court has determined that a constitutional violation is sufficiently minor as to be exempt from the exclusionary rule, the police will immediately feel no need to comply with that minor aspect of the Constitution.

H. Fruitless Poisonous Trees and Causation

Fourth Amendment violations that do not give the officers an evidentiary advantage or cause them to find evidence could also be considered fruitless poisonous trees. The dicta in *Ramirez* regarding a sufficient causal relationship⁴⁴⁵ has apparently been elevated to a constitutional causation requirement, with five members of the Court endorsing Justice Scalia’s view of “the requirement of unattenuated causation.”⁴⁴⁶ Justice Kennedy specifically relied on the *Ramirez* footnote in his concurrence:

439. *Id.* at 2181 (Breyer, J., dissenting) (“The United States, in its brief and at oral argument, has argued that suppression is ‘an especially harsh remedy given the nature of the violation in this case.’”) (citation omitted).

440. 256 F.3d 718, 725 (7th Cir. 2001) (“The [e]xclusion of [e]vidence is a [d]isproportionately [s]evere [s]anction in [c]ases [w]here the [p]olice [c]onduct [d]oes [n]ot [a]ctually [h]arm [p]rotected [i]nterests.”). The Seventh Circuit’s approach was criticized in a vigorous dissent by Judge Wood and by the editors of the *Harvard Law Review*. *Id.* at 729 (Wood, J., dissenting); Recent Cases, *supra* note 87.

441. *Hudson*, 126 S. Ct. at 2168.

442. *Id.* at 2166.

443. *Id.* at 2164.

444. *Id.* at 2162.

445. 523 U.S. 65, 72 n.3 (1998).

446. *Hudson*, 126 S. Ct. at 2165.

Under our precedents the causal link between a violation of the knock-and-announce requirement and a later search is too attenuated to allow suppression. Cf. *United States v. Ramirez* (application of the exclusionary rule depends on the existence of a “sufficient causal relationship” between the unlawful conduct and the discovery of evidence). When, for example, a violation results from want of a 20-second pause but an ensuing, lawful search lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence.

....

In this case the relevant evidence was discovered not because of a failure to knock-and-announce, but because of a subsequent search pursuant to a lawful warrant.⁴⁴⁷

Indeed, according to Justice Kennedy, “extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule.”⁴⁴⁸

Although the Court has required some logical nexus between a constitutional violation and the evidence sought to be suppressed, the imposition of a rigid requirement that the constitutional violation cause the police to acquire the evidence in order for the defendant to qualify for the exclusionary rule is new, troubling, and inconsistent with the way the Court has applied exclusionary rules in other contexts. For example, if the police fail to provide *Miranda*⁴⁴⁹ warnings to a suspect, incriminating statements made by the suspect are inadmissible. In *Dickerson v. United States*, the Court rejected a voluntariness test which would have admitted unwarned statements if they were voluntarily made and therefore, at least arguably, not caused by the lack of rights advisement.⁴⁵⁰ The prosecution is not offered the opportunity to attempt to prove that the suspect would have made the statements even if he had been given *Miranda* warnings.

Similarly, under the Sixth Amendment, an indicted defendant has the constitutional right to counsel during lineups and other corporeal identification procedures.⁴⁵¹ If counsel is not present at such a lineup, evidence of the out-of-court identification is inadmissible at trial.⁴⁵² Did this constitutional violation cause the eyewitness to identify the suspect? Would the eyewitness have identified the defendant anyway if counsel had been there? It does not matter, because there is no

447. *Id.* at 2170-71 (Kennedy, J., concurring) (citing *Ramirez*, 523 U.S. at 72 n.3).

448. *Id.* at 2171.

449. 384 U.S. 436 (1966).

450. 530 U.S. 428 (2000).

451. *Kirby v. Illinois*, 406 U.S. 682 (1972); *United States v. Wade*, 388 U.S. 218, 237 (1967).

452. *Gilbert v. California*, 388 U.S. 263, 273 (1967).

causation requirement. Even if the prosecutor could prove that the lineup was conducted in a perfectly nonsuggestive manner and the eyewitness undoubtedly would have made the identification even with counsel present, the identification will be excluded.

The Court has specifically rejected causation analysis where it could potentially benefit defendants. In *Oregon v. Elstad*, the suspect was questioned while in police custody without *Miranda* warnings and made an incriminating statement.⁴⁵³ Later, at the police station, he was given *Miranda* warnings.⁴⁵⁴ He then gave a second, more damaging statement.⁴⁵⁵ The first statement was clearly inadmissible.⁴⁵⁶ Elstad argued that this second statement should also be inadmissible because the initial constitutional violation was the fruit of the earlier statement.⁴⁵⁷ He argued that he had already let the “cat out of the bag” and therefore, not realizing that the first statement would be suppressed, saw no point in remaining silent.⁴⁵⁸ In this sense, the constitutional violation (the initial failure to warn) caused the police to obtain the second confession. According to Elstad, but for the police’s initial failure to advise him of his rights, he would not have confessed either time.⁴⁵⁹ The Court rejected this argument.⁴⁶⁰

Requiring proof of direct causation before evidence will be excluded could potentially lead to serious abuses by police. Property destruction and physical abuse of suspects are examples of Fourth Amendment violations that typically do not *cause* evidence to be found. As discussed earlier, “[e]xcessive or unnecessary destruction of property in the course of a search”⁴⁶¹ could encompass a wide range of activities. The destruction could take place prior to or as part of the entry or once inside during the search. For example, the police could break an expensive stained glass window, rather than simply lifting up an open window or knocking out a less expensive plate glass window, or they could destroy a heavy and expensive front door and frame, when they could just as easily break through an inexpensive side door. This unnecessary destruction would not be a knock-and-announce violation, assuming the police announced their presence and waited an appropriate time before entering. It would be unreasonable, though, and thus violate the Fourth Amendment, if there were no good reason to cause such extensive or expensive damage. The police could also cause unnecessary damage after a lawful entry

453. 470 U.S. 298, 301 (1985).

454. *Id.*

455. *Id.* at 301-02.

456. *Id.* at 302.

457. *Id.* at 305.

458. *Id.* at 302.

459. *Id.*

460. *Id.* at 300.

461. *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

by ransacking the interior (breaking furniture, slashing mattresses, ripping up carpet, tossing clothes and papers around, and leaving piles of debris with no thought for the potential clean up and reorganization problems) while ostensibly searching through the home. The property destruction would not be causally related to the finding of evidence, because the police would have found the incriminating evidence if they had conducted the search carefully minimizing property damage. Similarly, the police could rough up the occupants of a home during a search. Although clearly unreasonable, such behavior would not likely lead the police to additional evidence that they would not find by diligently searching. Thus, the poisonous tree—the constitutional violation—would not bear fruit.

I. Media Presence During a Search: The First Fruitless Poisonous Tree?

There is another type of Fourth Amendment violation that the Court has previously suggested fits in the fruitless poisonous tree category, albeit one likely to be rare. In *Wilson v. Layne*, the Court held that “it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant.”⁴⁶² Because *Wilson* was a civil damages suit,⁴⁶³ the Court did not need to consider whether the exclusionary rule should apply.⁴⁶⁴ Nevertheless, Chief Justice Rehnquist added, in an accompanying footnote:

Even though such actions might violate the Fourth Amendment, if the police are lawfully present, the violation of the Fourth Amendment is the presence of the media and not the presence of the police in the home. We have no occasion here to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives.⁴⁶⁵

It is surprising that Justice Scalia did not discuss *Wilson* in *Hudson*, because it was cited in the briefs and arguably offers the strongest support of any precedent for his decision. *Wilson* debatably stands for the proposition that even when the police act unreasonably in some aspect of the manner of their execution of the search (in this case, by allowing a media representative to accompany them, an unnecessary invasion of the occupant’s privacy comparable to a knock-and-announce violation) and thereby violate the Fourth Amendment, exclusion does not necessarily follow. *Wilson* also lends

462. 526 U.S. 603, 614 (1999).

463. *Id.* at 608.

464. *Id.* at 614 n.2.

465. *Id.*

support to the theory that a violation in the manner in which a search is conducted can be separated from the lawfulness of the search itself. Although the police violated the Constitution, *Wilson* suggests that any evidence the police found would still be admissible. Indeed, this is exactly how lower courts have interpreted *Wilson*. For example, in *Artis v. United States*, the appellant claimed ineffective assistance of counsel because his defense counsel failed to file a motion to suppress on the basis that the police had allowed a television news crew to accompany them during the execution of the search warrant.⁴⁶⁶ Citing *Wilson*, the court rejected this argument, stating that the exclusionary rule would not have applied anyway, so there was no justification for defense counsel to file a suppression motion.⁴⁶⁷ Similarly, in *United States v. Hendrixson*, the Eleventh Circuit held that evidence would not be subject to exclusion where unlawful media presence did not expand the scope of a police search beyond that allowed by the terms of the warrant or otherwise facilitate the search, again citing the footnote in *Wilson*.⁴⁶⁸

J. Multiple Fourth Amendment Violations

One issue not addressed in *Hudson* is what happens when there are multiple Fourth Amendment violations during the same search. Suppose the police learn of a possible child pornography collector. The individual has no prior criminal record and lives alone, and there is no basis to believe he owns a weapon. His collection is alleged to include magazines and numerous files on his computer's hard drive, with backup copies on CDs. The collector is also alleged to have tried to lure some young children into his home to be photographed. The police apply for and receive a warrant to search the suspect's home for child pornography. There is no basis for either a nighttime or a no-knock warrant. The police do not expect any danger to themselves, nor do they anticipate efforts to destroy evidence. But the officers involved despise pedophiles and decide to teach the suspect a lesson. Rather than wait for daylight, they execute the warrant in the middle of the night. They break down the front door

466. 802 A.2d 959, 964 (D.C. 2002).

467. *Id.* at 967-68.

468. 234 F.3d 494, 496-97 (11th Cir. 2000). An interesting twist in *Wilson* is the suggestion that evidence found by the media representative during the search might be subject to the exclusionary rule. See *Wilson*, 526 U.S. at 614, n.2. Thus if the police actually allowed the media to assist in the search, as opposed to merely observe the search, then the evidence unearthed by the media might be suppressed. It seems to me, especially in light of *Hudson*, that if actually confronted with this situation, the Court would decline to suppress the evidence, citing the inevitable discovery exception. That is, if the police were already in the home executing an otherwise valid search warrant, and they had not allowed the media representative to participate in the search, they eventually would have found whatever the media representative found on his/her own.

with a battering ram, rough up the suspect, and trash his entire house, trampling on his belongings with muddy feet, crumpling up his magazines and papers, and knocking over lamps and other breakable objects. During this search, they find incriminating evidence. The police have violated the Constitution in several ways: unreasonably destroying property, both upon entry and during the search; unreasonably executing the warrant at night; blatantly disregarding knock-and-announce; and physically abusing a suspect. Clearly, this is an “unreasonable search and seizure.”⁴⁶⁹ But should the evidence be suppressed? Under the logic of *Hudson*, there is a strong possibility that it would not be. Both individually and collectively, none of these violations can be said to have “caused” the police to find the evidence or given them an evidentiary advantage. Had the police simply executed the search warrant in a reasonable, good-faith manner, they would have found exactly the same evidence.

Lest the hypothetical be considered too far-fetched, consider *United States v. Larabee*.⁴⁷⁰ In *Larabee*, the Sheriff’s Department received a warrant to search an apartment at approximately 5:00 p.m.⁴⁷¹ The search warrant was executed at approximately 11:10 p.m. by four deputy sheriffs, although they had no good reason to execute the search at night.⁴⁷² When the officers executed the search warrant, they banged on the door and the side of the apartment with their fists while simultaneously shouting “Sheriff’s Office—search warrant” three times.⁴⁷³ Although they had no specific reason to fear for their safety or that evidence would be destroyed, they did not pause and wait for a reply.⁴⁷⁴ They immediately pried open the storm door of the apartment and kicked open the front door, damaging the storm door and the door jamb in the process.⁴⁷⁵ A motion to suppress was filed and granted.⁴⁷⁶ The district court’s conclusion:

The search warrant was executed in contravention of the Fourth Amendment because there was an inadequate justification for executing the warrant at night and because the officers did not wait a reasonable time to determine whether their request to enter the apartment was refused before forcibly opening the doors. In addition, the officers damaged the entry to the apartment when they exe-

469. U.S. CONST. amend. IV.

470. No. 05-40070-01-RDR, 2006 WL 839451 (D. Kan. Mar. 28, 2006); *see also* *United States v. Nielson*, No. 04-40068-01-RDR, 2004 WL 3186011 (D. Kan. Oct. 6, 2004), *aff’d*, 415 F.3d 1195 (10th Cir. 2005).

471. *Larabee*, 2006 WL 839451, at *1.

472. *Id.* at *1, *4.

473. *Id.* at *2.

474. *Id.* at *4.

475. *Id.* at *2.

476. *Id.* at *5.

cuted the warrant. All of these factors lead the court to conclude that this was an unreasonable search under the Fourth Amendment.⁴⁷⁷

Larabee was announced three months prior to *Hudson*.⁴⁷⁸ After *Hudson*, it is unlikely that the three factors that rendered the search unreasonable would be sufficient to warrant suppression.⁴⁷⁹ But can it be that the police can repeatedly and deliberately violate a defendant's rights without triggering the exclusionary rule? One possible argument in favor of suppression in cases like *Larabee* is that the multiple violations would take this case out of the *de minimis* violation category so that suppression would no longer be "incongruent."⁴⁸⁰ Whether or not the cumulative unreasonableness of multiple violations of the Fourth Amendment should be enough to warrant suppression remains an open question that the Supreme Court will ultimately have to address. One could argue that two or more Fourth Amendment violations, which individually fall into the fruitless poisonous tree category, should bear poisonous fruit when they are combined. This approach would afford one potential way to limit the scope of *Hudson*, but such an approach could lead to anomalous and unfair results. Why should suppression be unavailable for a single but egregious knock-and-announce violation, yet available for two less serious Fourth Amendment violations? The basic problem with *Hudson* is that it has begun the process of ranking Fourth Amendment violations in the first place, thereby weakening the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁴⁸¹ Going further down this road will not undo the damage to the Fourth Amendment wrought by *Hudson*.

VI. CONCLUSION

By creating a new exception to the exclusionary rule as well as a second-class category of Fourth Amendment violations that are automatically excluded from the coverage of the exclusionary rule, the Court has not only failed to deter violations and encourage compliance with the Fourth Amendment by the police, but has affirmatively encouraged lawless behavior by officers and departments who will no longer be restrained by fear of losing criminal prosecutions. The sad reality of *Hudson* is that police can now intentionally choose to violate the Constitution, knowing that it may have no effect on any subsequent prosecution. Despite Justice Kennedy's assurances that

477. *Id.*

478. *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (decided June 15, 2006); *Larabee*, 2006 WL 839451, at *1 (decided Mar. 28, 2006);

479. *Larabee*, 2006 WL 839451, at *5.

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

481. U.S. CONST. amend. IV.

the decision is narrowly confined to “the specific context of the knock-and-announce requirement,”⁴⁸² it is unlikely that the current Court majority will limit *Hudson* to its facts and not follow it to its logical conclusion, especially considering the recent trend of the Court minimizing the risk of police abuses while narrowing the reach of the exclusionary rule.⁴⁸³

The real danger of *Hudson* is not merely that it “destroys the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement” and that “it weakens, perhaps destroys, much of the practical value of the Constitution’s knock-and-announce protection,”⁴⁸⁴ but that, by severely undermining the exclusionary rule, it may weaken—and perhaps destroy—the protection of the Fourth Amendment. *Hudson* has given a green light to a potentially wide range of intentional unreasonable police conduct. It is unfortunate that such a momentous and troubling decision is built on such a shaky logical foundation. Perhaps in Justice Scalia’s parallel universe, where all the police departments are models of professionalism and restraint, the exclusionary rule would not be needed to deter official misconduct. But in the real world of twenty-first-century America, the full protection of the exclusionary rule is still needed if the Fourth Amendment is to be more than an empty promise.

482. *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring).

483. *See, e.g.*, Part IV.A.

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