

# The Exclusionary Rule and Causation: *Hudson v. Michigan* and Its Ancestors

Albert W. Alschuler\*

*ABSTRACT:* In *Hudson v. Michigan*, the Supreme Court held that evidence need not be excluded despite the fact that the police had violated the Fourth Amendment by failing to knock and announce their presence before conducting a search. The Court said that the constitutional violation was not a but-for cause of the seizure; the police would have obtained the evidence even if they had knocked. *Hudson's* analysis threatens to withdraw the exclusionary remedy whenever the police have conducted a search in an unconstitutional manner—most notably, when they have failed to obtain a warrant before searching. The Court's decision is likely to withdraw the remedy in the cases in which it is most likely to work and to leave the police with little incentive to conduct searches properly.

Even scholars critical of *Hudson* have seen the Supreme Court's statement of the need for but-for causation as "unassailable." In the administration of the exclusionary rule, however, the Supreme Court generally has not required a but-for causal relationship between a police wrong and discovery of the challenged evidence. Instead it has treated officers who entered without knocking or without obtaining warrants as trespassers and has excluded all evidence that their wrongful presence enabled them to obtain.

This approach begged the question of which constitutional violations made the police trespassers and which did not. This Article maintains that the appropriate question in exclusionary rule cases is neither the one traditionally posed by trespass law nor the one posed by *Hudson's* requirement of but-for causation. It is instead one of "contributory" causation. Courts should ask, not whether a constitutional violation enabled the police to obtain evidence they would not have obtained without it, but whether a constitutional violation facilitated the discovery of evidence either by improving the likelihood of its discovery or by reducing the work required to obtain it.

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\* Professor of Law, Northwestern University; Julius Kreeger Professor of Law and Criminology Emeritus, The University of Chicago. I have profited from the comments of Marshall Shapo, John Stinneford, and Ronald Allen, from conversations with Andrew Koppelman and Steven Art, and from the research assistance of Julia Rickert.

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## INTRODUCTION

What does the Fourth Amendment exclusionary rule exclude? *Mapp v. Ohio* says it bars “all evidence obtained by searches and seizures in violation of the Constitution.”<sup>1</sup> *Nardone v. United States* says it excludes “fruit of the poisonous tree.”<sup>2</sup> *Wong Sun v. United States* says it “extends as well to the indirect as the direct products” of Fourth Amendment violations.<sup>3</sup> *United States v. Peltier* says it suppresses evidence “gained as a result of” Fourth Amendment violations.<sup>4</sup>

All of these formulations pose a question of causation. Did a violation of the Fourth Amendment *cause* the government’s receipt of evidence that a defendant now seeks to suppress?

When criminal procedure students consider what the exclusionary rule excludes, they return to a subject they are likely to have examined at length in classes on torts and substantive criminal law. For no apparent reason, however, the vocabulary is different. The opinions speak of “derivative evidence” and “fruit of the poisonous tree” rather than “proximate cause.” They ask whether the “taint of the primary illegality has dissipated” rather than whether an “independent intervening cause” has broken the causal chain.

Students, like their teachers and like Supreme Court Justices, may assume that the governing principles are the same. As in the law of torts and crimes, there appear to be two requirements. The first is that the Fourth Amendment violation must be a *sine qua non*, “but-for cause,” or “cause in fact” of the discovery of the challenged evidence. The second is that the violation must also be a proximate cause of this discovery. The first issue is seen as one of fact, and the second is seen as one of policy. The task at the second or proximate-cause stage is to choose from all the conditions without which the discovery of evidence would not have occurred those causes that the courts will treat as causes.<sup>5</sup>

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1. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The *Mapp* Court intended this statement as a pithy, one-sentence declaration of its holding. The Court in *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006), described it as one of *Mapp*’s “expansive dicta.”

2. *Nardone v. United States*, 308 U.S. 338, 341 (1939).

3. *Wong Sung v. United States*, 371 U.S. 471, 484 (1962).

4. *United States v. Peltier*, 422 U.S. 531, 539 (1975).

5. The term “proximate cause” has fallen out of favor among legal scholars because it does not advance the analysis of causal issues. No substitute has emerged, however, to describe the second stage of causal analysis. Concepts like duty, foreseeability, relational negligence, and result within the risk may or may not help. See Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333 (2002) (maintaining that risk analysis is conceptually incoherent, normatively undesirable, and descriptively inaccurate); see also ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 117–22 (2000) (maintaining that foreseeability analysis is conceptually incoherent, normatively undesirable, and descriptively inaccurate).

In *Hudson v. Michigan*, the Supreme Court spoke in conventional causal language and declared that “but-for causality is only a necessary, not a sufficient, condition for suppression.”<sup>6</sup> *Hudson* was not the first Supreme Court decision to declare but-for causation essential,<sup>7</sup> and Wayne LaFave, America’s preeminent authority on the law of the Fourth Amendment, calls the Court’s statement of the need for but-for causality “unassailable.”<sup>8</sup>

LaFave, however, excoriates *Hudson*’s application of this doctrine. The Court assumed in *Hudson* that the police had violated the Fourth Amendment by conducting a search without appropriately knocking and announcing their presence. It then declared that their “illegal manner of entry was not a but-for cause of obtaining the evidence.”<sup>9</sup> LaFave calls this statement “dead wrong.”<sup>10</sup> He writes that *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.”<sup>11</sup>

I concur with LaFave that *Hudson* was wrongly decided, but this Article travels a very different route from his to this conclusion. Endorsing the statement that he calls “dead wrong,” it contends that the failure to knock and announce in *Hudson* was not a but-for cause of the police seizure.

Questions of but-for causation must be resolved by asking whether, if the hypothesized cause were absent, the result would still have occurred. An

Many exclusionary-rule decisions could be described in conventional causal language. For example, *Wong Sun v. United States* holds that “but-for” causation is insufficient and that a suspect’s voluntary decision to confess after an unlawful arrest sometimes qualifies as an independent intervening cause. *Wong Sun*, 371 U.S. at 487–88. *Brown v. Illinois* holds that, just as tort and criminal decisions follow the consequences of deliberate wrongdoing farther than the consequences of negligent error, courts must consider “the purpose and flagrancy of the official misconduct” in determining how far the causal chain from a Fourth Amendment violation extends. *Brown v. Illinois*, 422 U.S. 590, 603 (1975).

6. *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006).

7. See *Segura v. United States*, 468 U.S. 796, 815 (1984) (“[O]ur cases make it clear that evidence will not be excluded as ‘fruit’ unless the illegality is at least the ‘but-for’ cause of the discovery of the evidence.”); see also *Nix v. Williams*, 467 U.S. 431, 443 (1984) (declaring that exclusion should place the prosecution in neither a better nor a worse position than if no Fourth Amendment violation had occurred).

Compare the causal statements of *Segura* and *Nix* with those of *United States v. Ramirez*, 523 U.S. 65, 72 n.3 (1998), which noted that a finding of illegality would have required it to consider whether there was a “sufficient causal relationship” between the illegality and the discovery of evidence, *Powell v. Nevada*, 511 U.S. 79, 90–91 (1994), which declared that “causation is a necessary . . . condition for suppression,” and *United States v. Crews*, 445 U.S. 463, 468 (1980), which said that the challenged evidence must be “in some sense the product of illegal governmental activity.” This Article questions the *Hudson* and *Segura* formulations but not those of *Ramirez*, *Powell*, and *Crews*.

8. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a), at 27 (4th ed. Supp. 2007).

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

10. 6 LAFAVE, *supra* note 8, at 24.

11. *Id.* at 27.

appropriate analysis of this question requires envisioning a world as much like the existing world as possible apart from the absence of the supposed causal event. In a case like *Hudson*, the question is whether the police would have obtained the challenged evidence even if they had obeyed the Fourth Amendment. The police, however, might have complied with the Fourth Amendment in more than one way. For one thing, they might have complied by abandoning their search, but that scenario does not seem likely. A more plausible scenario—a “counterfactual” more closely resembling the actual world—is one in which they have complied with the Constitution by knocking as the Fourth Amendment requires. Because the police undoubtedly would have obtained the challenged evidence if they had knocked, *Hudson* was correct that their failure to knock was not a but-for cause of their seizure.

While this Article defends the statement that LaFare considers dead wrong, it assails the proposition he calls unassailable. The Supreme Court generally has not required a but-for causal relationship between a constitutional violation and the discovery of challenged evidence. Instead, the Court has followed the approach that common law courts took in civil actions at the time of the framing of the Fourth Amendment. When government officers failed to obtain a search warrant or to knock and announce their presence, these courts did not ask whether the officers would have inflicted the same harm if they had obtained the required warrant or knocked. Instead, they treated the officers as trespassers and held them strictly liable for any harm they produced. The courts asked only whether the officers’ wrongful *presence* was a cause of their seizure, and it always was. The causal principles followed in search-and-seizure and other trespass cases differed from those followed in most tort and substantive criminal law decisions.

The approach of the common law begged a large question: Which violations of legal requirements turned officers into trespassers, and which did not? This Article argues in favor of a less ad-hoc standard—one that for the most part produces the same results as the common law and early exclusionary-rule cases but that is substantially more protective of Fourth Amendment rights than the requirement of but-for causation articulated in *Hudson*.

The appropriate standard in exclusionary rule cases is one of “contributory” rather than “but-for” causation. Courts should ask, not whether a constitutional violation enabled the police to obtain evidence they would not have obtained without it, but whether the constitutional violation *facilitated* the discovery of this evidence. A violation can facilitate the discovery of evidence either by increasing the likelihood of this discovery or by reducing the work required to make it.

This Article shows that the standard it proposes is in accord with nearly all of the results the Supreme Court has reached in exclusionary-rule cases

and that *Hudson's* standard of but-for causation is not.<sup>12</sup> It also contends that the proposed standard better accommodates the dual rationales of the exclusionary rule—a rule that seeks both to vindicate the rights of defendants who have been unlawfully searched and to inhibit future illegality. It contends that, although *Hudson's* requirement of but-for causation accomplishes the former goal (protecting the rights of defendants), it fails to achieve the latter (providing appropriate incentives for law observance by the police). It seems odd that the Court has disavowed the goal that *Hudson* achieves while endorsing the one it does not.

The development of this Article's thesis will require an analysis of the rule's objectives and of the ability of the two competing causal standards to achieve them. This analysis will require examining not only *Hudson's* ruling on causation but also two alternative rationales that the Court advanced for its decision. The Court maintained that the interests protected by the knock-and-announce requirement “would not be served by suppression of the evidence obtained”<sup>13</sup> and that the social cost of excluding this evidence would outweigh the deterrent gain.<sup>14</sup>

Part I of this Article reviews the two sorts of justifications asserted for the exclusionary rule—“rights” justifications and “instrumental” justifications—and considers their differing causal implications. A “rights” theory of the rule seeks (within limits) to restore the victim of a constitutional wrong to the position he would have occupied had the wrong not occurred. This theory implies a standard of but-for causation. Excluding evidence the government would have obtained even in the absence of its wrong would afford the victim of the constitutional wrong a windfall rather than vindicate his rights. A fully “instrumental” concept of the rule, however, might untie the rule from any requirement of causation and bestow exclusionary benefits whenever they would provide appropriate incentives for law observance by the police.

Part II examines the twists, turns, and limitations of the concept of but-for causation. It begins by distinguishing two sorts of Fourth Amendment requirements—rules governing when a search may occur and rules governing how a search must be conducted. This Part maintains that a fairly applied requirement of but-for causation ordinarily would lead to the suppression of evidence only when the police had made a search they should not have made or had searched in a place they should not have searched.

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12. This Article is in part an exercise in Langdellian “legal science.” It seeks to articulate a principle that may have guided judicial decisions without being fully recognized. See ALSCHULER, *supra* note 5, at 86–90 (describing the jurisprudence of C. C. Langdell and other legal scholars of the late nineteenth and early twentieth centuries).

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

14. *Id.* at 2165.

When the police have conducted an otherwise constitutional search in an improper manner, their violation of the Fourth Amendment usually does not lead to the discovery of evidence they would not have found if they had conducted the search properly. Moreover, a scenario in which the police have conducted their search properly is the appropriate “counterfactual conditional” in judging but-for causality.

Parts III and IV examine the two alternative holdings that, according to the *Hudson* majority, also justified its restriction of the exclusionary rule. Part III considers the claim that, “even given a direct causal connection,” the interests protected by the knock-and-announce requirement “would not be served by suppression of the evidence obtained.”<sup>15</sup> It shows how the Court’s requirement that exclusion must directly serve an interest protected by a Fourth Amendment rule differs from the similar principle followed in tort cases and how this principle departs from the instrumental rationale for the rule favored by the Court for forty years. It also shows how one can characterize the interests served by Fourth Amendment rules so as to eliminate as much or as little of the exclusionary rule as one likes.

Part IV addresses the Supreme Court’s conclusion in *Hudson* that the social cost of excluding evidence obtained after a knock-and-announce violation outweighs the deterrent benefit. Both the Court’s claim that the costs of exclusion would be high and its claim that non-exclusionary remedies now can do the job were woefully unconvincing. *Hudson* allows the police to violate some Fourth Amendment commands with impunity. Indeed, the principal beneficiaries of *Hudson*’s restriction of the exclusionary rule will be officers who violate the Fourth Amendment in bad faith. Although “rights” theories of the exclusionary rule support *Hudson*’s limitation of the rule, this limitation frustrates the rule’s “instrumental” objectives. Withdrawing the exclusionary remedy when the police have conducted a search in an improper manner leaves them with little incentive to conduct searches properly.

Part V maintains that a contributory-cause standard, one that asks only whether a Fourth Amendment violation *facilitated* the seizure of evidence, would better accommodate the dual rationales of the exclusionary rule. Part VI then contends that, with only a few exceptions, the Supreme Court’s decisions on the scope of the exclusionary rule have not required a but-for causal relationship between the police wrong and discovery of the challenged evidence.

The most significant of these decisions are those excluding evidence obtained when the police have searched without a warrant. They include such landmark rulings as *Weeks v. United States*<sup>16</sup> and *Mapp v. Ohio*.<sup>17</sup> In cases in which the police would have been entitled to a warrant had they sought

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15. *Id.* at 2164.

16. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

17. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

one, the Court has excluded evidence to enforce a rule about how a search must be conducted rather than whether it should occur. When the issue is but-for causation, omitting the constitutionally mandated step of obtaining a warrant does not differ from omitting the constitutionally mandated step of knocking and announcing. Neither violation usually leads to the discovery of evidence the police would not have found if they had conducted the search properly. The Supreme Court's longstanding exclusion of evidence simply because the police searched without warrants cannot be reconciled with the requirement of but-for causation developed by the *Hudson* majority.

Several recent decisions reveal the Supreme Court's reluctance to use the exclusionary remedy to enforce rules concerning how a search must be conducted, but most of these decisions are consistent with a contributory-cause standard. They include *United States v. Ramirez*,<sup>18</sup> *Segura v. United States*,<sup>19</sup> *Murray v. United States*,<sup>20</sup> and *Wilson v. Layne*.<sup>21</sup> One decision prior to *Hudson*, however, was clearly incompatible with the contributory-causation standard proposed by this Article—*Nix v. Williams*, in which the Court admitted unlawfully seized evidence that the government “inevitably” would have discovered in a lawful manner.<sup>22</sup> Courts could modify a contributory-cause standard, however, to accommodate a limited “inevitable discovery” exception.<sup>23</sup>

## I. TWO JUSTIFICATIONS FOR THE EXCLUSIONARY RULE AND WHERE THEY LEAD

### A. “RIGHTS” JUSTIFICATIONS

At its inception, and for many decades thereafter, the exclusionary rule rested at least in part on what Yale Kamisar called a “principled basis” rather than “an empirical proposition.”<sup>24</sup> In *Boyd v. United States*, the Court maintained that unlawfully seizing a person's papers was akin to forcing him to supply evidence in violation of his privilege against self-incrimination.<sup>25</sup> In *Elkins v. United States*, the Court spoke of the “imperative of judicial

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

19. *Segura v. United States*, 468 U.S. 796 (1984).

20. *Murray v. United States*, 487 U.S. 533 (1988).

21. *Wilson v. Layne*, 526 U.S. 603 (1999).

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

23. Part VI also discusses *New York v. Harris*, 495 U.S. 14 (1990), in which an unlawfully arrested suspect made two statements to the police. The Supreme Court held the second of these statements admissible but approved exclusion of the first. This Article maintains that, although admitting the second statement was incompatible with the proposed standard of contributory causation, exclusion of the first was incompatible with the standard of but-for causation approved in *Hudson*.

24. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 565 (1983).

25. *Boyd v. United States*, 116 U.S. 616, 630, 633 (1886).

integrity.”<sup>26</sup> And in *Mapp v. Ohio*, the Court declared that the exclusion of improperly obtained evidence was the Fourth Amendment’s “most important constitutional privilege.”<sup>27</sup>

More basically, the exclusionary rule deprives the government of part of the profit it otherwise might derive from a constitutional wrong. It also implements in an incomplete fashion a basic remedial principle—that courts should place the victim of a wrong in the position he would have occupied had the wrong not occurred.<sup>28</sup> Although most discussions of the exclusionary rule are devoted to analyzing its forward-looking behavioral effects, how firmly one believes that the government should not profit from its wrong seems more likely to determine what he thinks of the rule.<sup>29</sup>

Ordinary remedial principles often yield when the victim of a wrong is a wrongdoer himself. Hardly anyone would place the victim of an unlawful search in the position he would have occupied had the search not occurred by returning to him property he had stolen or contraband he possessed. The same sentiments that lead even the most enthusiastic proponents of the exclusionary rule to oppose the return of heroin to an accused drug dealer lead others to resist exclusion of the heroin at the alleged dealer’s trial. When either the government or an accused criminal must receive an undeserved benefit, it becomes necessary to weigh incongruities, which is

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26. *Elkins v. United States*, 364 U.S. 206, 222 (1960); see also *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (emphasizing the need to “preserve the judicial process from contamination”).

27. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). One non-instrumental justification for the rule emphasizes that the Supreme Court has come to view privacy rather than property as the principal value protected by the Fourth Amendment. See generally *Katz v. United States*, 389 U.S. 347 (1967). A return of property is the most obvious remedy for an improper deprivation of property, but a return of property cannot remedy a wrongful invasion of privacy. Courts have sought to limit the effects of improper intrusions on privacy by forbidding the use of wrongfully obtained information. When a police officer reveals unlawfully obtained information in court, not only does he know things he is not entitled to know, but others—the judge, jurors, and spectators—know these things as well. Every use of improperly obtained information may aggravate a wrongful invasion of privacy. Cf. *Dodge v. United States*, 272 U.S. 530, 532 (1926) (“If the search and seizure are unlawful as invading personal rights secured by the Constitution those rights would be infringed yet further if the evidence was allowed to be used.”).

28. See Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 266 (1998); William A. Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensating Device*, 51 GEO. WASH. L. REV. 633, 637 (1983).

29. This Article lumps together three somewhat different ideas—that exclusion vindicates the rights of the defendant before the court, that it prevents unjust governmental enrichment, and that it protects judicial integrity. What it calls “rights” justifications might more precisely be called non-instrumental justifications. People who endorse one of the three ideas usually endorse the others, and the causal implications of all three ideas are similar. When governmental wrongdoing is not a but-for cause of the receipt of evidence—when the government would have presented the same evidence anyway—excluding this evidence is not necessary to protect the rights of the defendant, to prevent unjust enrichment, or to preserve the integrity of the forum.

what Justice Holmes did when he endorsed the rule: “I think it a less evil that some criminals should escape than that the Government should play an ignoble part.”<sup>30</sup> Both the arguments supporting and those opposing “rights” justifications for the exclusionary rule are sufficiently plausible that each side should respect the other’s position.

A rights-based conception of the exclusionary rule entails a concept of but-for causation. The object of the rule is to restore the *status quo ante* within limits. If the government would have obtained the challenged evidence even in the absence of its wrong, the Fourth Amendment does not require exclusion.

### B. “INSTRUMENTAL” JUSTIFICATIONS

In *Linkletter v. Walker* in 1965, the Supreme Court declared that “the purpose [of *Mapp v. Ohio*, an earlier decision requiring state courts to exclude unlawfully obtained evidence,] was to deter the lawless action of the police.”<sup>31</sup> Since *Linkletter*, the Court has repeatedly called deterrence the primary justification for exclusion,<sup>32</sup> once suggesting that it may be “the sole one”<sup>33</sup> and proclaiming on another occasion that it is the rule’s “single and distinct purpose.”<sup>34</sup> The Court has demoted what *Elkins v. United States* called “the imperative of judicial integrity,” declaring that a concern for integrity “has limited force as a justification for the exclusion of highly probative evidence.”<sup>35</sup> The Court repeatedly has endorsed other language that appeared in the *Elkins* opinion: “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”<sup>36</sup>

All of these statements misconceive the principal instrumental justification for the exclusionary rule. Although the rule may influence police conduct, it does not deter. In ordinary usage, the word deterrence refers to discouraging behavior through fear of punishment. It does not encompass all means of influencing behavior.<sup>37</sup> And a rule that simply restores the *status quo ante* does not punish. Even when the rule limits or

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30. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

31. *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (citing *Mapp v. Ohio*, 367 U.S. 643 (1961)). The Court also wrote, “[A]ll of the [recent] cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action.” *Id.* at 636–37.

32. *E.g.*, *Nix v. Williams*, 467 U.S. 431, 442–44 (1984); *Stone v. Powell*, 428 U.S. 465, 486 (1976).

33. *United States v. Janis*, 428 U.S. 433, 446 (1976).

34. *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 413 (1966).

35. *Stone*, 428 U.S. at 484–85.

36. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

37. See THE RANDOM HOUSE COLLEGE DICTIONARY 362 (rev. ed. 1975) (defining “deter” as “to restrain from acting or proceeding, as through fear or doubt”).

eliminates an officer's improper gain, it ordinarily leaves him with nothing to lose by violating the Fourth Amendment.<sup>38</sup>

A case described by a former Assistant U.S. Attorney in Chicago indicates how little the exclusionary rule deters. The members of a federal-state task force had searched an automobile, seized drugs, and arrested the vehicle's occupants. This search gave them grounds to search the arrestees' apartment, which they proceeded to do without a warrant. Recognizing that the drugs seized in the apartment would be suppressed, the Assistant U.S. Attorney asked the officers why they had not obtained a warrant. They explained that another officer was retiring from the Chicago Police Department that day and that seeking a warrant might have made them late for his party.<sup>39</sup>

The exclusionary rule may indeed influence conduct in the way *Elkins* mistakenly called deterrence—by removing one incentive to violate the Fourth Amendment. In the case just described, this influence was weak because the automobile search had given the officers ample evidence to ensure the suspects' convictions, and this influence is weaker still when the police search primarily to gain intelligence, recover contraband, improve their arrest records, harass people they don't like, or accomplish any goal other than prosecuting and convicting a suspect. In addition and more importantly, the exclusionary rule influences police conduct in a more positive way.

Forty years ago, when Dallin Oaks was thinking about writing his classic article *Studying the Exclusionary Rule in Search and Seizure*,<sup>40</sup> he remarked in conversation that he hoped to determine whether Fourth Amendment violations had declined in frequency following the decision in *Mapp v. Ohio*. I asked Oaks how he would ascertain the incidence of unlawful searches in non-exclusionary-rule states before *Mapp* in view of the fact that the legality or illegality of police searches almost never came before the courts. For a moment, Oaks appeared startled. It is startling that, until 1961, judges in nearly half the states had almost no occasion to give legal guidance to the police.<sup>41</sup>

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38. But see *infra* Part IIA (discussing the distinction between rules governing when a search may occur and rules governing how a search must be conducted).

39. Interview with a former Assistant U.S. Attorney, in Chicago, Illinois (Dec. 28, 2007).

40. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

41. See *Elkins*, 364 U.S. at 225 (appendix reviewing the law in each state). Oaks ultimately focused on laws prohibiting gambling and the sale and possession of weapons and narcotics. He demonstrated that the enforcement of these laws is highly dependent on police searches and seizures and hypothesized that if unlawful searches were occurring in non-exclusionary-rule jurisdictions prior to *Mapp* and if *Mapp* had reduced their incidence, the total number of arrests and convictions for these offenses should have declined. Oaks found little evidence of any decline in Cincinnati, but a later study of other jurisdictions by Bradley Canon presented a more complicated picture. Compare Oaks, *supra* note 40, at 690–91, with Bradley C. Canon, *Is the*

The repeated articulation of Fourth Amendment norms—not only in Supreme Court decisions but also in everyday interaction between the courts and local police departments—can influence police conduct. LaFave notes that one sees the exclusionary rule's effects “in the use of search warrants where virtually none had been used before, stepped-up efforts to educate the police on the law of search and seizure where such training had been virtually nonexistent, and the creation and development of working relationships between police and prosecutors . . . .”<sup>42</sup> The Supreme Court's view of how the exclusionary rule works seems essentially backwards. The rule does not operate primarily by altering a short-term pleasure-pain calculus or by frustrating a police officer's distinctive blood lust.<sup>43</sup> It works over the long term by allowing judges to give guidance to police officers who ultimately prove willing to receive it.<sup>44</sup>

An instrumental view of the exclusionary rule would untie it from any requirement of a causal relationship between a governmental wrong and the challenged evidence. Critics of the rule note that when an unlawful search uncovers no evidence, the rule affords no remedy.<sup>45</sup> If the exclusionary rule is inadequate to protect the innocent, however, it could be revised. As reformulated by a committee of welfare economists, the rule might provide that whenever an unlawful search has produced no evidence, all evidence seized by the police in their next lawful search (or their next six lawful searches) must be suppressed. A defendant who benefited from this suppression would receive an undeserved boon, but if one discounts “rights” justifications for the rule, so does a defendant who persuades a judge to suppress evidence today. This defendant too receives a windfall for the sake

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*Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 704–05 (1973).

42. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2(b), at 33 (4th ed. 2004) (footnotes and citations omitted).

43. *United States v. Leon*, 468 U.S. 897 (1984), and its progeny declare the exclusionary rule inapplicable to violations of the Fourth Amendment by officials other than police officers. *Leon* explains that “no evidence suggest[s] that [these officials] are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion.” *Id.* at 916. For criticism of the Court's efforts to generalize about occupational groups, see Albert W. Alschuler, “Close Enough for Government Work”: *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 351–57.

44. I have noted:

Critics of the exclusionary rule may have followed too closely Justice Holmes's advice to view the law from the perspective of a “bad man” who wishes only to evade it. From a “bad cop” perspective, it is easy to ridicule the exclusionary rule's supposed deterrent effects. . . . [A]lthough the “bad cop” deserves attention, the “good cop” merits notice as well.

Albert W. Alschuler, *Fourth Amendment Remedies: The Current Understanding*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 197, 203–04 (Eugene W. Hickok, Jr. ed., 1991).

45. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994).

of giving appropriate incentives to the police.<sup>46</sup> William Landes and Richard Posner write that “the idea of causation can largely be dispensed with in an economic analysis of torts,”<sup>47</sup> and the concept of causation also can evaporate in a consequentialist analysis of the exclusionary rule.<sup>48</sup>

No one can know what level of “deterrence” through exclusion is optimal, especially when exclusion achieves its instrumental goals primarily through long-term guidance and habit formation rather than push-pull deterrence. Ignorance may be bliss, however, for it enables judges and scholars to assert that almost any rule they like produces “sufficient” deterrence. Perhaps excluding the fruits of every other unlawful search would yield sufficient deterrence, or perhaps excluding the fruits of every search conducted within one week of an unlawful search would be better. Or perhaps rules based on traditional causal principles are, like Baby Bear’s bed, just right.<sup>49</sup> Like most “positive” economic analysis of law, the pronouncements are simply *deus ex machina*. They rest entirely on assertion.

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46. See, e.g., *People v. Young*, 449 N.Y.S.2d 701, 704 (N.Y. 1982) (declaring that the “purpose of the exclusionary rule is not to redress the injury to the accused’s privacy . . . [but] to deter future unlawful police conduct”).

47. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 229 (1987).

48. Economists, to be sure, tell “just so” stories in which conventional rules of causation promote efficient behavior. In analyzing the law of torts and crimes, however, they defend incompatible causal principles. In criminal cases, they suggest that a sentencing judge can promote efficiency by assessing the harm a criminal has caused and multiplying this harm by a number reflecting the *ex ante* chance the crime would go undetected. See, e.g., Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1213–27 (1985). This sort of sentence can ensure that crime will not pay. Were it not for the fact that many criminals are insolvent, however, economists maintain that criminal law could be abandoned altogether. Like the criminal law, the law of torts determines the optimal price for the harm a wrongdoer has caused, and if all criminals could pay the full social costs of their behavior, the deterrence of antisocial conduct could be left to tort law. See *id.* at 1203–04.

Tort law, however, sets a very different price from the law of crimes. Both prices cannot be optimal. Unlike the law of crimes, the law of torts does not sanction attempted wrongdoing—conduct that causes no harm. In addition, tort law usually omits any multiplier to account for the possibility of non-detection. See Keith N. Hylton & Thomas J. Miceli, *Should Tort Damages Be Multiplied?*, 21 J.L. ECON. & ORG. 388, 390–92 (2005). It also omits damages incurred by people not before the court—for example, the costs of the societal fear generated by wrongful conduct and the costs of maintaining police departments and courthouses. Indeed, rules of “proximate causation” limit a wrongdoer’s obligation to internalize even costs he has caused to the plaintiff before the court. Economists speculate, however, that “proximate causation” requirements can promote efficiency by saving the cost of calculating improbable harms and by saving the legal system the cost of remedying them. See, e.g., LANDES & POSNER, *supra* note 47, at 243–55. Some of these stories might be plausible in isolation, but not all of them together. Economists strain to produce consequentialist rationalizations for causal requirements that unmistakably were designed to serve the nonconsequentialist goals of corrective justice and retribution.

49. See, e.g., *Nix v. Williams*, 467 U.S. 431, 443 (1984). The Court stated:

The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all

In view of the weakness of the exclusionary rule as a deterrent, the rule might indeed provide more appropriate incentives if it excluded all evidence seized by the police in their next lawful search following an unlawful search that yielded no evidence.<sup>50</sup> Suppressing evidence whose discovery bore no causal relationship to the government's wrong, however, would seem bizarre. Its strangeness would not flow from a judgment that the instrumental calculus supporting it was less plausible than that supporting the current rule. Divorcing the exclusionary rule from causal requirements would be odd because almost no one—perhaps not even Richard Posner—truly discounts “rights” theories and ideas of corrective justice entirely. As a later section of this Article will explain more fully, an appropriate vision of the rule must accommodate both of its dual rationales.

C. *THE SUPREME COURT'S ENDORSEMENT OF "RIGHTS" THEORIES IN SOME CASES AND "INSTRUMENTAL" THEORIES IN OTHERS*

*Hudson's* tilt toward “rights” theories of the exclusionary rule in judging questions of causation departs sharply from the Supreme Court's general insistence that the primary or exclusive purpose of the rule is deterrence. The Court, however, has made a similar shift in another area of Fourth Amendment adjudication. In deciding whether a defendant has standing to invoke the rule,<sup>51</sup> the Court has insisted that, whatever the instrumental

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probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.”

*Id.*; see also *United States v. Johnson*, 380 F.3d 1013, 1014 (7th Cir. 2004) (Posner, J.). Judge Posner wrote:

The independent-source and inevitable-discovery doctrines are easily collapsed into the familiar rule of tort law that a person can't complain about a violation of his rights if the same injury would have occurred even if they had not been violated. To punish a person for an act that does no harm is not required in order to deter harmful acts.

*Id.*

50. Perhaps, because the police could easily manipulate this rule, it would be better to suppress all evidence the police had seized in the lawful search immediately *preceding* an unlawful search that yielded no evidence.

51. The Supreme Court does not like the word “standing,” but I refuse to give it up. The Court wrote in *Rakas v. Illinois*, 439 U.S. 128, 139 (1978), “[W]e think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.” Uttering the forbidden word in an argument before the Court causes a duck to drop from the ceiling and Justice Kennedy to lecture the offender that the Court has “abandoned the idea of ‘standing’ in the Fourth Amendment context.” 64 *Crim. L. Rep.* (BNA) 2033, 2037 (Oct. 14, 1998). The Supreme Court gives similar lectures to lower courts: “The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of ‘standing’ doctrine, an analysis which this Court rejected 20 years ago in *Rakas*.” *Minnesota v. Carter*, 525 U.S. 83, 87 (1998). Although some lawyers and commentators have argued for extending standing to parties whose rights have not been violated, the concept recognized by

benefits of exclusion, this defendant must show that exclusion would remedy a violation of his rights.

A notable example is *United States v. Payner*, in which the Internal Revenue Service used a woman to lure a visiting Bahamian bank officer from his Miami apartment.<sup>52</sup> An IRS operative then entered the apartment with a key supplied by the woman, took the officer's briefcase, and photographed approximately four hundred documents that he found inside. This violation of the Fourth Amendment was deliberate, and a federal district court found that the IRS had "affirmatively counsel[ed] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties."<sup>53</sup> Few cases could present stronger "deterrent" reasons for excluding evidence than *Payner*, but because the improperly seized evidence was offered against a bank customer rather than the bank officer whose rights were violated, the Supreme Court held that the district court lacked authority to exclude it.<sup>54</sup> The Court wrote that "unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."<sup>55</sup>

A basic difference between decisions like *Hudson* and *Payner*, which emphasize "rights" justifications for the exclusionary rule, and the more numerous decisions insisting that the rule is all about deterrence seems clear. The Court has invoked the "deterrence rationale" as a reason for refusing to apply the rule when, despite a violation of the rights of the defendant before the Court, the likelihood of deterrence appeared to be low—for example, in cases initially decided prior to *Mapp*,<sup>56</sup> cases in which officers relied on the erroneous legal conclusions of judges and legislators,<sup>57</sup> and cases in which the question was whether to exclude evidence in

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the Court before *Rakas* was never "theoretically separate" from the extent of a particular defendant's rights. The word "standing" was simply a convenient shorthand way of referring to the doctrine that a litigant may assert only his own rights, not the rights of other people. Scholars like Wayne LaFare have refused to yield to the Court's linguistic tyranny, and the Court has continued to quote them with approval. *See* *Brendlin v. California*, 127 S. Ct. 2400, 2408 (2007) (quoting Professor LaFare for the proposition that a passenger has "standing" to challenge the unlawful stop of an automobile).

52. *United States v. Payner*, 447 U.S. 727 (1980).

53. *Id.* at 730 (internal citation omitted).

54. *Id.* at 735–36.

55. *Id.* at 734.

56. *See* *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (refusing to "make the rule of *Mapp* retrospective").

57. *See, e.g.,* *United States v. Leon*, 468 U.S. 897, 918–25 (1984) (refusing to apply the exclusionary rule when police officers executed a search warrant erroneously issued by a magistrate judge); *see also* *Illinois v. Krull*, 480 U.S. 340, 349–55 (1987) (refusing to apply the exclusionary rule when police officers made a warrantless search in reasonable reliance on an unconstitutional statute).

proceedings that the Supreme Court said were outside an offending officer's "zone of primary interest."<sup>58</sup> In standing and causation cases, however, "rights" theories supply reasons for restricting the rule, while "instrumental" theories argue against restriction. The Court shifts to whichever reason for exclusion gives it a reason not to exclude.

## II. THE MEANING AND LIMITATIONS OF BUT-FOR CAUSATION

### A. TWO TYPES OF FOURTH AMENDMENT RULES

When the police lack probable cause to search a dwelling, the Fourth Amendment generally requires them to stay out; and when the police have probable cause, the Fourth Amendment supplies rules about how the search must be conducted. Most of these rules are subject to exceptions, but ordinarily the police must obtain a warrant, knock and announce their presence, seize only items named in the warrant, and use only reasonable force.<sup>59</sup>

The Constitution's rules about when a search may occur differ from its rules about how a search must be conducted in at least two respects. First, the rules about *when* the police may search are the Fourth Amendment's primary safeguards of property and privacy. People care more about whether the police will come in than about whether they will come in with a piece of paper or without one. Although knocking and announcing can reduce the terror of a police entry, even the requirement of notice is secondary to the requirement of evidentiary justification for the search. The Fourth Amendment's central mission is to keep the police out when they don't belong in.

Second, the exclusionary rule is more likely to induce compliance with rules about how a search must be conducted than to induce compliance with rules about when a search may occur. When the police lack probable cause for a search and cannot easily get it, they may nevertheless search and recover incriminating evidence. The evidence they seize may be suppressed, and a criminal may escape punishment. If the police had not conducted their illegal search, however, the criminal would have escaped punishment.

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58. See, e.g., *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998) (refusing to apply the exclusionary rule in parole revocation proceedings); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (refusing to apply the exclusionary rule in deportation proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (refusing to apply the exclusionary rule in federal civil tax proceedings in which the evidence was seized by state law enforcement officers); *United States v. Calandra*, 414 U.S. 338 (1974) (refusing to apply the exclusionary rule in grand jury proceedings).

59. Fourth Amendment rules also limit the places within a dwelling where the police may search. For purposes of this Article, these rules should be regarded as rules requiring the police to stay out (that is, to stay out of particular places) rather than as rules about how they must conduct a search.

James Madison and the Fourth Amendment, not the exclusionary rule, would have set him free.

In cases in which the issue is simply whether to search or not, the police ordinarily have nothing to lose by searching in violation of the Fourth Amendment. Moreover, they often have something to gain. Their search may allow them to recover contraband, harass the suspect, arrest the suspect, press the suspect to become an informant, or even seize evidence that later can be used against someone who lacks standing to challenge the search or against anyone in a civil tax proceeding, deportation proceeding, grand jury proceeding, plea negotiation session, and more.

When the question is whether to obtain a warrant or knock, however, the police do have something to lose.<sup>60</sup> In this situation, the suspected criminal will not go free either way. He will avoid punishment only if the police break the rules. A nearly costless step is likely to make all the difference.<sup>61</sup>

The exclusionary rule can better enforce the rules that make less difference in people's lives.<sup>62</sup> With "inevitable discovery" and "independent source" cases set aside,<sup>63</sup> making a search the police should not have made is always a but-for cause of their seizure of whatever they find. If the police had stayed out as the Constitution required, they would not have obtained this evidence. But rules about how a search must be conducted make less difference in people's lives partly because such rules do not block the discovery of evidence. *Hudson's* requirement of but-for causation appears largely to withdraw the exclusionary remedy when the police have violated one of these rules. As conceived by *Hudson*, the requirement of but-for causation abandons the exclusionary remedy in the cases in which it is most likely to achieve its goals.

On rare occasions, conducting a search in an improper manner can reveal evidence the police would not have found if they had conducted the search properly. When police officers with a warrant to search for a stolen elephant break into a house without knocking, they may find an occupant

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60. More precisely, the police are unlikely to gain a benefit they otherwise could easily have obtained.

61. See *Murray v. United States*, 487 U.S. 533, 540 (1988) ("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.").

62. Studies by Bradley Canon and others showed a substantial increase in the use of search warrants following the decision in *Mapp v. Ohio*. See Canon, *supra* note 41, at 714 (reporting an increase in the use of search warrants following *Mapp*); Neil A. Milner, *Supreme Court Effectiveness and the Police Organization*, 36 LAW & CONTEMP. PROBS. 467, 475 (1971) (reporting the same increase in New York City); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 124 (1992) (reporting the same increase in Chicago); Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 700 (1998) ("[F]ew would dispute . . . that there has been a large increase in the use of search warrants since *Mapp*.").

63. See *infra* Part VI.F.

placing a bag of cocaine in a drawer. Because the police could not lawfully have opened this drawer while searching for the elephant, they would not have found the cocaine if they had delayed their entry briefly by knocking. Ordinarily, however, conducting a search in an improper manner yields no evidence the police would not have found if they had conducted the search properly. With a warrant to search for drugs rather than an elephant, the police would have discovered the cocaine in the drawer. Justice Scalia's majority opinion in *Hudson* accordingly declared that the "illegal *manner* of entry was *not* a but-for cause of obtaining the evidence."<sup>64</sup>

B. *BUT-FOR CAUSATION: NOT AS EASY AS IT LOOKS*

Justice Breyer's dissenting opinion for himself and three other Justices responded to Justice Scalia's statement:

[T]aking 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 was a necessary condition of their finding and seizing the evidence.<sup>65</sup>

By speaking of an unlawful *entry* rather than an unlawful *manner* of entry, Justice Breyer made the question of but-for causation appear to be a word game. By characterizing the wrong broadly rather than narrowly, he produced an outcome he liked.<sup>66</sup> Rumor has it that Justice Breyer recently attended a wedding at which the bride broke the rules of etiquette by wearing scarlet rather than white. Justice Breyer remarked, "But for her improper dress, she would have been naked."

A unanimous Supreme Court (including Justice Breyer) declared in *United States v. Ramirez* that, although unnecessarily destroying property during a search violates the Fourth Amendment, this violation does not require the suppression of evidence seized during the search.<sup>67</sup> Smashing the front door in a case like *Hudson* can, I think, be distinguished from smashing a vase (or even a person) once inside,<sup>68</sup> but Justice Breyer's word game provides no distinction. When the police have smashed a vase needlessly, one could say that although the police might have searched lawfully, they did not; that their unlawful behavior inseparably characterized

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64. *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006).

65. *Id.* at 2177 (Breyer, J., dissenting).

66. Justice Breyer calls himself a pragmatist. See Linda Greenhouse, *Portrait of a Pragmatist; Confirmation Hearing for Breyer Elicits His Emphasis on Rulings' Lasting Impacts*, N.Y. TIMES, July 14, 1994, at A1 (calling Breyer "a self-described pragmatist"); see also Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

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

68. See *infra* Part VI.B.

the entire search; and that, if they had not searched, they would not have found the challenged evidence.<sup>69</sup>

In philosophers' language, a "counterfactual conditional" asks what the world would be like if one aspect of the world were changed. Questions of but-for causation are answered by envisioning counterfactual conditionals. Specifically, when the standard for determining what evidence will be excluded includes a requirement of but-for causation, one must ask what the world would be like if the police had obeyed the Fourth Amendment. Would they still have obtained this evidence?

Behind the word game in *Hudson* was an apparent duel of counterfactuals. Justice Scalia envisioned a world in which the police complied with the Fourth Amendment by knocking and announcing their presence. In this world, the police would have obtained the challenged evidence. Justice Breyer envisioned a world in which the police complied with the Fourth Amendment by never entering Hudson's premises at all. In his counterfactual world, the police would not have seized this evidence. The number of imaginary worlds in which the police have obeyed the Fourth Amendment is infinite.

A pragmatist might view the choice between the majority's and the dissent's counterfactuals as one of policy. He would not see the question of but-for cause or "cause-in-fact" as a question of fact at all. The selection of counterfactuals, however, should not be made on such a result-oriented basis.

The pragmatist's error would become apparent if a super-pragmatist trumped Justice Breyer's counterfactual. This opponent of exclusion might grant that, if the police had not entered Hudson's premises improperly, they would not have entered at all. Then he might claim that the police still would have obtained the challenged evidence, for shortly after the police abandoned their search, Hudson would have attended a religious meeting, repented of his sins, and delivered the evidence to the police. Justice Breyer's response to the suggestion of this counterfactual probably would not be, "I disagree with your policy." It would be, "My goodness, that doesn't seem likely."

Justice Breyer's counterfactual also does not seem likely. If blocked from entering without knocking, it seems doubtful that the officers who conducted the search in *Hudson* would have said, "Let's go home." More

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69. Similarly, Justice Breyer joined the opinion of the Court in *Wilson v. Layne*, 526 U.S. 603 (1999). Without deciding the question, the Court indicated that evidence would not be suppressed simply because the police violated the Fourth Amendment by allowing journalists to accompany them as they entered a home. *See id.* at 614 n.2 ("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."). Again, it would have been easy to say that although the police could have entered lawfully, they did not; that their unlawful behavior in bringing along the journalists inseparably characterized their entry; and that, if they had not entered, they would not have found what they found.

probably, they would have knocked (especially because knocking posed little risk to them—it would not have been required if it did). The appropriate counterfactual in judging but-for causation varies the existing world as little as possible while still altering the circumstance whose effect is at issue—in this case, the officers’ violation of the Fourth Amendment.<sup>70</sup> The appropriate counterfactual in *Hudson* is not a world in which the South won the war or professional police forces never existed. When one asks which counterfactual is “maximally consistent” with the actual world, the majority in *Hudson* was correct. The Fourth Amendment violation was not a but-for cause of the police seizure.<sup>71</sup>

On occasion, officers blocked from violating rules concerning how they must conduct a search might abandon the search in the way Justice Breyer implied the officers would have in *Hudson*. For example, in *United States v. Alvarez-Tejeda*, federal agents had probable cause to search an automobile for drugs, but because their undercover investigation was continuing, they did not want the owner of the vehicle to know that they had seized it.<sup>72</sup> They therefore created a minor traffic accident involving the automobile and then staged its theft as the owner was filling out paperwork pertaining to the accident. A federal district court held this method of seizure unreasonable and suppressed drugs found in the vehicle.<sup>73</sup> In this case, if the police had

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70. See Peter Menzies, *Counterfactual Theories of Causation*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2008 ed.), available at <http://plato.stanford.edu/archives/spr2008/entries/causation-counterfactual> (describing the work of David Lewis):

The central notion of a possible world semantics for counterfactuals is a relation of comparative similarity between worlds. One world is said to be closer to actuality than another if the first resembles the actual world more than the second does. . . . [T]he relation of similarity produces a weak ordering of worlds so that any two worlds can be ordered with respect to their closeness to the actual world, with allowance being made for ties in closeness.

*Id.* (citation and emphasis omitted). For elegant criticism of David Lewis’s view of causation and the view offered here, see Michael Moore, *For What Must We Pay? Causation and Counterfactual Baselines*, 40 SAN DIEGO L. REV. 1181 (2003). This Article is not the place to examine Moore’s view that the law should ask about counterfactual baselines without pretending that they describe or define causal relationships.

71. Such precision in statements of but-for causation is often unnecessary. When Mrs. Peacock shoots Colonel Mustard and Colonel Mustard falls dead, one is likely to say that Mrs. Peacock’s act of shooting was a but-for cause of Colonel Mustard’s death. The evidence might show, however, that if Mrs. Peacock had not killed Colonel Mustard with the gun in the parlor, she would have dispatched him with the poison in the kitchen. This possibility is unimportant when the issue is Mrs. Peacock’s responsibility for Colonel Mustard’s death. A researcher interested in how many lives effective gun control might save, however, could not appropriately say that Mrs. Peacock’s act of *shooting* was a but-for cause of Colonel Mustard’s death.

Perhaps the researcher could say that the act of shooting was a but-for cause of death if the poisoning would have happened later. See the discussion of whether accelerating a result should be regarded as causing the result in *infra* Part VI.E.

72. *United States v. Alvarez-Tejeda*, 491 F.3d 1013, 1015–16 (9th Cir. 2007).

73. *Id.* at 1016.

been unable to seize the automobile clandestinely, they might not have seized it at all.<sup>74</sup> On appeal, the Ninth Circuit made the question of but-for causation academic by approving the unusual mode of seizure.<sup>75</sup> Conducting a search in an improper manner can be a but-for cause of the seizure of evidence both when it enables the police to find evidence that they otherwise could not have found and when the police would not have searched at all if they could not have searched improperly. Except when taking law school examinations, however, one is unlikely to encounter either situation.

LaFave repeats a phrase initially used by Judge Sam Ervin III that summarizes the majority's causal analysis in *Hudson*: "[I]f we hadn't done it wrong, we would have done it right."<sup>76</sup> This paraphrase captures something troublesome about the *Hudson* decision, but when "doing it right" is the counterfactual maximally consistent with the actual world—when the police would indeed have done it right if they had not done it wrong—their violation of the Fourth Amendment is not a but-for cause of their discovery. The arresting paraphrase suggests a good reason for relaxing or abandoning the requirement of but-for causation but not for distorting it.

### III. HUDSON'S SECOND GROUND OF DECISION: THE INTERESTS SERVED BY THE KNOCK-AND-ANNOUNCE REQUIREMENT WOULD NOT BE ADVANCED BY SUPPRESSION

If officers with a warrant to search for an elephant broke into a dwelling unlawfully and discovered someone putting cocaine in a drawer, their violation of the Fourth Amendment would be a but-for cause of their seizure of the cocaine. Nevertheless, the *Hudson* majority apparently would not order the cocaine suppressed. The Court declared suppression inappropriate "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."<sup>77</sup>

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74. When the police have violated the Fourth Amendment, the government should bear the burden of showing that it would have obtained the challenged evidence had the violation not occurred. A tie—that is, a case of equally plausible counterfactuals—should go to the defendant, just as it does when the government claims that it would inevitably have discovered unlawfully obtained evidence through lawful means. See *Nix v. Williams*, 467 U.S. 431, 444 (1984) (the government must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means").

75. *Alvarez-Tejeda*, 491 F.3d at 1018.

76. See 6 LAFAVE, *supra* note 8, at 272 (internal quotation marks omitted). Judge Ervin used this language in *United States v. Thomas*, 955 F.2d 207, 210 (4th Cir. 1992).

77. *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006). To support this proposition, the Court invoked cases declaring that causation can be too "attenuated" to justify exclusion. It said that attenuation can occur not only when causation is remote, but also when the interests served by a Fourth Amendment requirement do not include protecting material from the government's scrutiny. *Id.* at 2165. The Court, however, had never previously used the word attenuation to refer to anything other than the remoteness of the causal connection. It is not

The Court wrote that the knock-and-announce requirement differed from the requirement of a search warrant because the former was not designed to “shield[] . . . potential evidence from the government’s eyes.”<sup>78</sup> The knock-and-announce requirement instead served three other interests:

One . . . is the protection of human life and limb, because an unannounced entry may provoke violence in self-defense by the surprised resident. Another interest is the protection of property. . . . The knock-and-announce rule gives individuals “the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.” 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.” In other words, it assures the opportunity to collect oneself before answering the door.<sup>79</sup>

Although the Court’s analysis of the interests served by specific Fourth Amendment rules brought something new to Fourth Amendment jurisprudence,<sup>80</sup> it seemed to echo a doctrine that often has blocked recovery in tort cases. The *Restatement (Second) of Torts* declares:

A statute or ordinance may be construed as intended to give protection against a particular form of harm to a particular interest. If so, the violation of the enactment will not be negligence unless the harm which the violation causes is that from which it was the purpose of the enactment to protect the other.<sup>81</sup>

The Supreme Court’s decision in *Kernan v. American Dredging Co.* illustrates this principle, although the Court ultimately declined to apply the tort-law principle to actions brought under the Jones Act by injured seamen.<sup>82</sup> A navigation regulation required a scow to carry a white light at least eight feet above the water. No one doubted that the purpose of the regulation was to ensure the scow’s visibility to other vessels. A scow violated the regulation by carrying its only light no more than three feet above the water. This open-flame light ignited vapors above the water that had been generated by an unforeseeable spill of petroleum products, and a seaman

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apparent what *Hudson’s* requirement that suppression must advance a specific Fourth Amendment interest has to do with causal remoteness.

78. *Id.*

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

80. *But see infra* Part VI.C (discussing *New York v. Harris*, 495 U.S. 14 (1990)).

81. RESTATEMENT (SECOND) OF TORTS § 286 cmt. i (1965).

82. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 432 (1958).

lost his life. A trial judge found that the fire would not have occurred if the scow's light had been at the height required by the regulation.<sup>83</sup>

All members of the Court agreed that "general tort doctrine" would have barred recovery in a wrongful-death action brought by the seaman's survivors. "The tort doctrine . . . imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent."<sup>84</sup> By a vote of five to four, however, the Court held this doctrine inapplicable to Jones Act cases. It noted that in construing a similar statute it had "rejected many of the refined distinctions necessary in common-law tort doctrine for the purposes of allocating risks between person who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved."<sup>85</sup>

*Hudson* differs from cases like *Kernan v. American Dredging Co.* The decedent in *Kernan* had not suffered the kind of injury the navigation regulation was designed to prevent, but the defendant in *Hudson* was injured in precisely the way the Fourth Amendment sought to foreclose. To be sure, he had suffered no loss of life or limb; in his case, the police entry provoked no shoot-out. Moreover, he had suffered no property damage; he had left his door unlocked, and the police gained entry just by turning the knob.<sup>86</sup> He also had no need to get out of bed, pull on clothes, or collect himself. Nevertheless, he lost what the Supreme Court called "those elements of privacy and dignity that can be destroyed by a sudden entrance."<sup>87</sup> To put the matter less delicately, he was terrorized when a team of police officers burst into his home without appropriately knocking and announcing their presence.

The *Restatement (Second) of Torts* declares that a defendant who has violated a statute is not "negligent" unless the harm his violation causes is one the statute was designed to prevent. The police, however, were negligent or worse toward the defendant in *Hudson*. *Hudson's* discussion of "the interest protected by the constitutional guarantee" concerned not the issue of right addressed in the tort cases, but an issue of remedy. The Court's view was apparently that any remedy for the violation of an interest protected by

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83. One might question whether the scow's violation of the regulation was even a but-for cause of the seaman's death. As Justice Harlan observed in dissent, the regulation did not forbid placing a light (or a dozen lights) three feet above the water. *Kernan*, 355 U.S. at 442 n.1 (Harlan, J., dissenting). It merely required placing one light eight feet above the water. If the owners of the scow had complied with the regulation, however, there probably would have been no light three feet above the water. The issue of but-for causation turns on what would have happened in the appropriate counterfactual world, not on what might lawfully have happened. That the regulation was never intended to prevent the placement of lights three feet above the water bears strongly on whether a violation of the regulation should, without more, lead to liability for the fatal fire, but it does not bear on the issue of but-for causation.

84. *Id.* at 432.

85. *Id.* at 438.

86. *Hudson v. Michigan*, 126 S. Ct. 2159, 2161 (2006).

87. *Id.* at 2165.

the Fourth Amendment must be limited to the restoration of that interest or to compensation for its loss.

The view the *Hudson* Court took of the exclusionary rule was, in words Abraham Lincoln used concerning a more objectionable Supreme Court decision, “a new wonder of the world.”<sup>88</sup> For more than forty years, the Court has denigrated “rights” theories of the rule and contended that exclusion never vindicates the interests of the defendant before the court.<sup>89</sup> The Court has insisted that exclusion is always what the *Hudson* Court said it never can be—a windfall awarded to a defendant for the sake of protecting the rights of others. If, as the Court has said repeatedly, exclusion cannot restore the defendant’s violated interests and is not designed to do so, *Hudson*’s declaration that exclusion is inappropriate *unless* it restores the defendant’s violated interests is simply a formula for abolishing the rule.

What “interests” does the Fourth Amendment protect? One view might be that the Amendment was never intended to protect the property and privacy of guilty people, for it expressly allows intrusions upon property and privacy when there is even probable cause to believe that a search will uncover incriminating evidence. Certainly the Amendment was not intended to safeguard the interest in possessing contraband. And although *Hudson* declared that the search warrant requirement “shield[s] . . . potential evidence from the government’s eyes,”<sup>90</sup> that statement is not usually true. The warrant requirement shields evidence from the government’s eyes only when the police cannot establish probable cause for a search. When the police have probable cause but do not obtain a warrant, perhaps “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”<sup>91</sup>

The requirement of but-for causation as conceived by *Hudson* largely withdraws the exclusionary remedy when the police have violated a rule concerning how a search must be conducted. There appear to be only a few exceptions, and *Hudson*’s additional requirement that exclusion must serve an interest protected by the rule appears to obliterate the exceptions.<sup>92</sup> This

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88. CREATED EQUAL?: THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 at 37 (Paul M. Angle ed., 1958). Lincoln’s remark concerned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

89. See, e.g., *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (“[T]he ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.”).

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

91. *Id.* at 2164; see also *infra* text accompanying notes 194–200.

92. Perhaps one exception remains. Suppression might still be appropriate if the police entered without knocking and discovered an adult engaging in sex with someone below the age of consent. The failure to knock and announce could have been a but-for cause of this discovery, and the evidence would have been gathered by invading the adult’s interest in “collecting [him]self,” “get[ting] out of bed,” and “pull[ing] on clothes.” See *Hudson*, 126 S. Ct. at 2165.

requirement could conceivably bar exclusion even when the police have searched in violation of a rule telling them to stay out. The Court might conclude that people with cocaine in their dwellings are not among the people the probable-cause requirement was designed to protect. *Hudson's* insistence that exclusion must further an interest protected by a Fourth Amendment rule could mean almost anything.

#### IV. THE FOURTH AMENDMENT: ONLY A FORM OF WORDS?<sup>93</sup>

By requiring both but-for causation and a close fit between the interest protected by a Fourth Amendment rule and the exclusionary remedy, *Hudson* appeared largely to preclude exclusion when the police have violated rules concerning how a search must be conducted. A rights-focused analysis of the rule supports this restriction, for the violation of a rule concerning how a search must be conducted rarely gives the government evidence it would not have had if it had obeyed the rule. *Hudson's* requirements, however, fit far less well with instrumental justifications for the rule. Withdrawing the exclusionary remedy when the police have conducted a search in an improper manner leaves them with little incentive to conduct searches in the manner the Constitution requires.

The *Hudson* majority, however, denied that it had left broad categories of Fourth Amendment violations unsanctioned. Indeed, it claimed that an instrumental analysis independently justified its ruling. As a third alternative ground of decision, it declared, "Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except 'where its deterrence benefits outweigh its "substantial social costs."'"<sup>94</sup>

The Court averred costs that it said went even beyond "the grave adverse consequence that exclusion of relevant incriminating evidence always entails."<sup>95</sup> For one thing, it said, the threat of exclusion would cause officers "to wait longer than the law requires [before entering]—producing preventable violence against officers in some cases, and the destruction of evidence in many others."<sup>96</sup>

Although the Supreme Court had previously restricted the scope of the exclusionary rule by questioning its deterrent efficacy in many contexts,<sup>97</sup>

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93. Justice Holmes's opinion in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), declared that failing to exclude evidence derived from an unlawful search would "reduce[] the Fourth Amendment to a form of words."

94. *Hudson*, 126 S. Ct. at 2165 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984))).

95. *Id.*

96. *Id.* at 2166.

97. *E.g.*, *Scott*, 524 U.S. 357; *Arizona v. Evans*, 514 U.S. 1 (1995); *Illinois v. Krull*, 480 U.S. 340 (1987); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *Leon*, 468 U.S. 897; *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). Chief Justice Burger once called the "deterrence rationale" for the exclusionary rule "hardly more than a wistful

the *Hudson* majority apparently was convinced of the rule's power. The rule's transformation was so remarkable that it now *overdeterred*, inhibiting even lawful and valuable police conduct. Presumably the Court thought civil remedies less able to influence police behavior, for it did not suggest that they might have the same unfortunate effect.<sup>98</sup> As the Court recognized, it had held that the Fourth Amendment allows officers to enter without knocking whenever they have even a reasonable suspicion that giving notice might lead to the destruction of evidence or to violence.<sup>99</sup> Having given the police the benefit of every reasonable doubt, the *Hudson* majority decided that they needed more.<sup>100</sup>

Asserting (unconvincingly<sup>101</sup>) that the legal standards in knock-and-announce cases are less certain than those governing other areas of Fourth Amendment adjudication, the Court also warned of a "flood" of litigation.<sup>102</sup> "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.'"<sup>103</sup> Since 1917, however, a federal statute has required officers to knock and announce their presence before searching,<sup>104</sup> and twice—in 1958 and 1968—the Supreme Court has ordered evidence obtained in searches that violated this statute suppressed.<sup>105</sup> Although the Seventh Circuit in an opinion by Judge Posner anticipated the three *Hudson* holdings and refused to suppress evidence gathered in an unlawful no-knock search,<sup>106</sup> every other federal court of appeals either rejected this position<sup>107</sup> or suppressed evidence in no-knock cases without addressing the question.<sup>108</sup> Like the Seventh Circuit, one state—Michigan—anticipated

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dream." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

98. As explained in text accompanying notes 142–51 *infra*, the Court had it backwards. Civil remedies are far more likely to inhibit appropriate police conduct than the exclusionary rule.

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

100. See *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 125, 180 (2006) ("The Court double-counted . . . by first narrowing the scope of the rule and then narrowing the scope of the remedy.").

101. See James J. Tomkovicz, *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1822–32 (2008).

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

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

104. 18 U.S.C. § 3109 (2000) (original version at ch. 30, Title XI §§ 8–9, 40 Stat. 229 (1917)).

105. *Sabbath v. United States*, 391 U.S. 585, 586 (1968); *Miller v. United States*, 357 U.S. 301, 313–14 (1958).

106. *United States v. Langford*, 314 F.3d 892, 894–95 (7th Cir. 2002).

107. See *United States v. Dice*, 200 F.3d 978, 984–86 (6th Cir. 2000); *United States v. Martz*, 986 F.2d 1216, 1220 (8th Cir. 1993).

108. See David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2005–2006 CATO SUP. CT. REV. 283, 284 n.3.

*Hudson*,<sup>109</sup> but nine states rejected the *Hudson* position while many others suppressed evidence found in unlawful no-knock searches without specifically addressing the issue.<sup>110</sup> When lawyers throughout the United States had been making no-knock challenges for a half century or more, the Supreme Court's statement that a contrary ruling in *Hudson* would generate suppression hearings "as never before" revealed a Court that had lost perspective.<sup>111</sup>

This Article maintains that the exclusionary rule works primarily by giving courts the opportunity to articulate Fourth Amendment standards in decisions with enough bite to be taken seriously. If this perception of the rule's operation is accurate, *Hudson*'s virtual elimination of litigation concerning the validity of no-knock searches is a cost rather than a benefit. Knock-and-announce questions arise so rarely in civil litigation that, after *Hudson*, courts will almost never have occasion to address them. *Hudson* will bring judicial development of the law of no-knock searches to a halt.

The Supreme Court announced that suppression might not be justified even if the only alternative were "no deterrence of knock-and-announce violations at all."<sup>112</sup> It noted that the exclusionary remedy would be unavailable if the police beat a suspect *after* obtaining incriminating evidence from him and that this suspect would have only the civil remedy that proponents of the exclusionary rule generally consider ineffective.<sup>113</sup>

Unlawfully breaking bones, however, would be more likely to produce a civil recovery than unlawfully breaking a door.<sup>114</sup> The Court might better have cited the situations in which its decisions clearly leave Fourth Amendment violations without any redress at all. For example, judges and prosecutors enjoy absolute immunity from civil lawsuits,<sup>115</sup> yet the Court has held that violations of the Fourth Amendment by these officials do not trigger the exclusion of evidence.<sup>116</sup> "Qualified" immunity blocks recovery for many violations of the Fourth Amendment by the police,<sup>117</sup> and when the exclusionary remedy is unavailable for these violations (for example, because the police failed to recover any incriminating evidence), the violations go unsanctioned. The Framers of the Fourth Amendment would not have applauded this state of affairs. They presumably agreed with

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109. *People v. Stevens*, 597 N.W.2d 53, 55–56 (Mich. 1999).

110. *See Moran*, *supra* note 108, at 283 n.2 (citing the petitioner's brief in *Hudson*).

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

112. *Id.*

113. *Id.* at 2166–67.

114. *See infra* text accompanying notes 133–37.

115. *See Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (judicial immunity); *Imbler v. Pachtman*, 424 U.S. 409, 422–23 (1976) (prosecutorial immunity).

116. *See United States v. Leon*, 468 U.S. 897, 916–17 (1984) (explaining why the Court would not exclude evidence when officials other than police officers violate the Fourth Amendment).

117. *See infra* text accompanying notes 127, 169.

Blackstone and Chief Justice Marshall that “where there is a legal right, there is also a legal remedy.”<sup>118</sup>

Although the Supreme Court said that suppression might not be justified even if the result were no deterrence of knock-and-announce violations at all, it did not acknowledge that its decision would eliminate nearly all legal sanctions for these violations. It wrote, “As far as we know, civil liability is an effective deterrent here,”<sup>119</sup> and it added,

We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.<sup>120</sup>

More than the Court’s other pronouncements, these statements have prompted academic concern that the Court may scrap the exclusionary rule altogether.<sup>121</sup> The Court’s statements certainly argue no more for eliminating the exclusionary remedy in knock-and-announce cases than for eliminating it in all others. Nevertheless, Justice Kennedy, who endorsed the majority’s language and who supplied the fifth vote in favor of the *Hudson* ruling, declared in a concurring opinion, “[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.”<sup>122</sup> While joining an opinion for the Court that appears to contain at least one additional holding, Kennedy declared, “Today’s decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”<sup>123</sup>

The *Hudson* majority noted four developments that it said had made civil remedies more effective than they were when the Supreme Court decided *Mapp v. Ohio* in 1961.<sup>124</sup> First, during the same Term that it decided *Mapp*, the Court held that a federal civil rights statute, 42 U.S.C. § 1983, authorized civil actions against state officers who violate the Constitution.<sup>125</sup> Second, the Court held a decade later that another statute, 28 U.S.C. §

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118. 3 WILLIAM BLACKSTONE, COMMENTARIES \*23; see *Marbury v. Madison*, 5 (1 Cranch) U.S. 137, 163 (1803) (quoting 3 BLACKSTONE, *supra*).

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

120. *Id.*

121. *E.g.*, Moran, *supra* note 108, at 296 (noting that *Hudson* could “put the entire exclusionary rule at risk”); *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 100, at 183 (“*Hudson* is a strong signal that the exclusionary rule is in trouble.”).

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

123. *Id.*

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

125. *Monroe v. Pape*, 365 U.S. 167, 187 (1961).

1331(a), authorized similar actions against federal officers.<sup>126</sup> Both of these statutes, however, leave many Fourth Amendment violations without a remedy. The Court has held that unless the police “violate clearly established . . . constitutional rights of which a reasonable person would have known,” they are immune from suit.<sup>127</sup> Third, the Court declared that a 1978 decision had “extended [the § 1983 remedy] to reach the deep pockets of municipalities.”<sup>128</sup> This decision, however, allowed recovery from municipalities only when an officer’s unlawful actions could “fairly be said to represent official policy.”<sup>129</sup> A later ruling held that only violations by officials expressly given final policymaking authority by law could meet this standard.<sup>130</sup> Under the Court’s decisions, governmental entities other than municipalities remain immune from suit.<sup>131</sup> Fourth, the Court noted, a federal statute now allows civil rights plaintiffs to recover reasonable attorney fees.<sup>132</sup>

If the measures described by the Court truly had made civil remedies for knock-and-announce violations effective, one would expect the reports to reveal at least a few cases in which plaintiffs had recovered more than nominal damages for knock-and-announce violations. The defendant’s lawyer in *Hudson*, however, could not find any; Michigan’s lawyer could not find any; the dissenting justices could not find any; and the majority could not find any. At the same time, as the dissenting justices noted, the knock-and-announce violations reported in the exclusionary-rule cases were “legion.”<sup>133</sup>

The lack of any reported recovery in civil lawsuits for knock-and-announce violations apparently gave the majority no pause. It wrote, “[W]e do not know how many claims have been settled, or indeed how many

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126. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

127. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson v. Creighton*, 483 U.S. 635 (1987).

128. *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978)).

129. *Monell*, 436 U.S. at 694.

130. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 114 (1988).

131. A 1974 amendment to the Federal Torts Claims Act, however, makes the federal government liable for some Fourth Amendment violations by its officers. See 28 U.S.C. § 2680(h) (2000).

132. 42 U.S.C. § 1988(b) (2000). Another statute, 42 U.S.C. § 1997e(d) (2000), limits attorney fees to 150 percent of the plaintiff’s monetary recovery when the plaintiff is a prison inmate. Wayne LaFave notes a case in which an officer unlawfully broke an automobile window and in which a federal district court awarded nominal damages of one dollar. The Tenth Circuit held that, because the plaintiff was incarcerated at the time of his lawsuit, the award of attorney fees could not exceed \$1.50. 1 LAFAVE, *supra* note 8, § 1.2, at 4–5 (describing *Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006)).

133. *Hudson*, 126 S. Ct. at 2175 (2006) (Breyer, J., dissenting).

violations occurred that produced anything more than nominal injury.”<sup>134</sup> Justices who can assert the effectiveness of an invisible remedy do not lack *chutzpa*.<sup>135</sup>

As the majority speculated, few knock-and-announce violations are likely to produce large enough recoveries under the applicable rules of damages to be worth the bother.<sup>136</sup> A plaintiff typically stands to recover no more than the cost of repairing a broken door and perhaps some compensation for short-term emotional distress.<sup>137</sup>

Although it does not seem to have happened yet, knock-and-announce violations could occasionally lead to large damage awards. David Moran, Hudson’s counsel in the Supreme Court, found one alleged violation that did, although the award survived only briefly. In *Doran v. Eckold*, police officers received an anonymous tip that Doran was manufacturing methamphetamine in his home.<sup>138</sup> The officers did not attempt to corroborate most of the readily checked information the unknown tipster provided—notably, that Doran’s twenty-six-year-old son, who lived with him, had recently been arrested for possessing a sawed-off shotgun. The tipster’s report of the son’s arrest was false, as was his report that Doran was manufacturing speed.

After receiving the tip, the officers searched some trash bags they found outside Doran’s home. Inside the bags, they discovered fifty plastic sandwich bags with their corners cut out; methamphetamine residue in two of the bags, three of the corners, and one pill bottle; and an empty Dristan box. The officers knew that Dristan contains an ingredient useful not only in combating nasal congestion but also in manufacturing speed. On the basis of the anonymous tip and the evidence found in the trash bags, the officers obtained a warrant to search Doran’s home, which they entered by breaking down the door without knocking.<sup>139</sup>

Doran testified that he was awakened by the break-in, grabbed a pistol from beneath his pillow, and ran to the kitchen. Realizing that the intruders

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

135. *Cf. Oaks, supra* note 40, at 676 (“Informed observers other than the United States Supreme Court have uniformly agreed that presently available alternatives [to the exclusionary rule] for deterring police misconduct are ineffective.”).

136. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986) (holding that courts may not invite juries to place a value on the loss of intangible constitutional rights and that “when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts”). In appropriate cases, however, juries may award punitive damages in § 1983 actions. *See Smith v. Wade*, 461 U.S. 30 (1983).

137. *See Chatman v. Slagle*, 107 F.3d 380 (6th Cir. 1997) (holding that a plaintiff may recover damages for the emotional distress inflicted by an unlawful search even when this distress is not “severe”). In *Hudson*, the defendant had left his door unlocked, and the police entered without damaging his property.

138. *Doran v. Eckold*, 409 F.3d 958, 960 (8th Cir. 2005).

139. *Id.* at 960–61.

were police officers, he bent to place his pistol on the floor, but as he was doing so, an officer shot him. The officer testified, however, that he shouted, "Police, search warrant, get down," and fired only when Doran failed to lower his weapon in response to this warning. Doran was hit twice and sustained serious injuries.

Although the jury found that the force used by the officer who shot Doran was reasonable, it awarded more than two million dollars in damages for the allegedly unlawful no-knock entry.<sup>140</sup> A three-judge panel of the Eighth Circuit upheld this verdict two-to-one, but the en banc court of appeals set it aside. The en banc court concluded eight-to-four that the no-knock entry was justified.<sup>141</sup>

The effectiveness of civil remedies is hampered by more than a limited measure of damages and the doctrine of qualified immunity. Most victims of police abuse are not well advised. They lack easy access to lawyers. They may fear reprisals. They are likely to seem unattractive to jurors. Juries prepared to support their local police may nullify these victims' constitutional rights.<sup>142</sup>

If the current limitations of civil remedies could be corrected, the champions of effective law enforcement would not like the result. Critics of the exclusionary remedy observe that this remedy was unknown to the Framers of the Constitution.<sup>143</sup> The remedy the Framers knew was a civil trespass action against the offending officers—one in which the officers had no qualified immunity and no prospect of indemnification from their employers.<sup>144</sup> Restoring this sort of damage action in the name of constitutional originalism or in the belief that sanctions are most effective when applied directly to the individuals responsible for a violation<sup>145</sup> would bring much valuable law enforcement to a halt.

Although law enforcement benefits the public, damage actions of the kind that existed in 1791 inflict the burdens of excess and mistake on

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140. *Id.* at 960.

141. *Id.* at 967.

142. See Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 499–500 (1955). Successful lawsuits for civil rights violations have become far more common than they were at the time of Foote's article, and some of the impediments Foote noted appear to be less substantial now than they were then. Nevertheless, none of these impediments have evaporated.

143. See Amar, *supra* note 45, at 786–87. Similarly unknown to the Framers were cocaine, heroin, marijuana, helicopters, magnetometers, drug-detecting dogs, and professional police forces.

144. See *id.*; Bradford P. Wilson, *The Fourth Amendment as More Than a Form of Words: The View from the Founding*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 151, 153–58 (Eugene W. Hickok, Jr. ed., 1991).

145. See Oaks, *supra* note 40, at 725 ("A prime defect of the exclusionary rule is that police who have been guilty of improper behavior are not affected in their person or their pocketbook by the application of the rule."); see also *Irvine v. California*, 347 U.S. 128, 136 (1954) (Jackson, J.) ("Rejection of the evidence does nothing to punish the wrongdoing official . . .").

individual officers. This mismatch easily could lead officers to play it safer than they should. As long as an action conceivably might be held illegal, an officer faced with the prospect of damage liability would have little to gain and much to lose by making it.<sup>146</sup>

Myron Orfield once asked twenty-two Chicago narcotics officers whether they thought a “system in which victims of improper searches could sue police officers directly would be better than the exclusionary rule.”<sup>147</sup> All of the officers answered no.<sup>148</sup> Orfield then asked, “What would be the effect of civil suits for damages on police work?” Twenty-one of the twenty-two officers answered that the police would be afraid to conduct searches they should make.<sup>149</sup> One high-ranking officer referred to a proposal for increasing the effectiveness of civil remedies that Chief Justice Burger had advanced in a dissenting opinion<sup>150</sup> and said, “If they ever try that one, we’re going to stop doing anything.”<sup>151</sup>

The *Hudson* majority declared that, like civil remedies, better police training and “a new emphasis on internal police discipline” deters civil-rights violations.<sup>152</sup> Citing a work by Samuel Walker, it added that there had been “wide-ranging reforms in the education, training, and supervision of police officers.”<sup>153</sup> Walker, however, promptly protested that the Court had missed his point. The exclusionary rule had played a “pivotal role” in producing the reforms he described.<sup>154</sup> Until *Mapp*, “police departments had failed to curb misuse of authority by officers on the street while the courts took a hands-off attitude.”<sup>155</sup> Moreover, whatever improvements might have occurred in

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146. See *The Supreme Court, 2005 Term—Leading Cases*, *supra* note 100, at 181. Governments today commonly indemnify officers against financial liability incurred in the course of their employment, but when an officer’s unlawful action could lead to substantial governmental liability, he might fear that this action would lead to dismissal, transfer, or other unpleasant personal consequences. Reformers who would substitute civil remedies for the exclusionary rule usually intend this effect. *But see* Oaks, *supra* note 40, at 717–18 n.145 (reporting unpublished research by William A. Briggs that found that although eighteen of thirty-five damage actions filed against Chicago police officers in a federal district court between 1960 and 1967 resulted in indemnification payments by the city, no officer responsible for these payments was disciplined even by reprimand).

147. Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1053 (1987).

148. *Id.*

149. *Id.*

150. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 422–23 (1971) (Burger, C.J., dissenting).

151. See Alschuler, *supra* note 44, at 205.

152. *Hudson v. Michigan*, 126 S. Ct. 2159, 2168 (2006).

153. *Id.* (citing SAMUEL E. WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 51 (1993)).

154. Samuel Walker, *Thanks for Nothing, Nino*, L.A. TIMES, June 25, 2006, at 5.

155. *Id.*

police discipline, knock-and-announce violations seem *never* to have led to police discipline of the officers responsible for the violations.<sup>156</sup>

The Court maintained that the deterrence of knock-and-announce violations was not of great importance because the police have little incentive to commit them:

[I]gnoring 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 a ‘reasonable suspicion’ of their existence, *suspend the knock-and-announce requirement . . .*”<sup>157</sup>

That the police might violate people’s rights just for the fun of it seems not to have occurred to the Court. Moreover, just as the Court has created “bright line rules” that allow searches it would hold unreasonable if it considered the facts of particular cases,<sup>158</sup> police officers may not pause to consider the facts of particular cases unless judges give them a reason to do so.

In particular, *Hudson* invites the police to create de facto the bright line rule that the Supreme Court refused to give them in *Richards v. Wisconsin*.<sup>159</sup> The State maintained in *Richards* that, because a search for drugs nearly always poses some risk of violence and of destruction of evidence, police officers executing a warrant to search for illegal drugs should never be required to knock and announce their presence.<sup>160</sup> In *Richards*, a unanimous Court rejected this categorical rule<sup>161</sup> while in *Hudson* the Court declared that the police have no interest in creating it.

I recently conducted a survey on the subject of when police officers consider it useful to break in. Although my sample was small (one officer), it

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156. See Moran, *supra* note 108, at 320–30. Dallin Oaks observed, “[I]t is a notorious fact that police are rarely, if ever, disciplined by their superiors merely because they have been guilty of illegal behavior that caused evidence to be suppressed.” Oaks, *supra* note 40, at 725–26. But see Orfield, *supra* note 147, at 1046 (“[A]s a general rule in the Narcotics Section, two suppressions in other than minor cases cause an officer’s transfer or demotion.”). When, under rulings like *Hudson*, illegal behavior does not cause evidence to be suppressed, police discipline becomes even less likely.

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

158. See, e.g., Thornton v. United States, 541 U.S. 615 (2004); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); New York v. Belton, 453 U.S. 454 (1981); Michigan v. Summers, 452 U.S. 692 (1981); Robinson v. United States, 414 U.S. 218 (1973). Compare Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. PITT. L. REV. 307 (1982), and Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, with Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

159. *Richards v. Wisconsin*, 520 U.S. 385, 396 (1997).

160. *Id.* at 388–91.

161. *Id.* at 391–95.

was larger than the sample examined by the Supreme Court.<sup>162</sup> Detective Walter Smith of the Chicago Police Department, who has participated in the execution of more than two hundred search warrants, reported that Chicago narcotics officers rarely seek warrants authorizing no-knock entry.<sup>163</sup> With few exceptions, they knock and announce their presence even when they believe that people inside the premises have guns and drugs.<sup>164</sup> Smith suggested, moreover, that the police would knock and announce in some cases even if no law required them to do so—for example, a case in which a drug dealer had left a suitcase containing drugs at the home of his unsuspecting eighty-year-old grandmother.

If freed of any legal obligation to knock, however, Smith reported that the police would not knock often: “From the police perspective, it is almost always safer not to.”<sup>165</sup> I questioned this answer, suggesting that a knock often might reduce the likelihood of violence, but Smith rejected the idea. It was better for the police to give notice at the same time they broke in. “As soon as the ram hits the door, we are shouting ‘POLICE, POLICE, POLICE!’ We may shout it one hundred times.”<sup>166</sup>

The principal beneficiaries of *Hudson’s* limitation of the exclusionary rule will be officers who violate the Constitution deliberately. Officers with plausible reasons for making no-knock entry need no restriction of the rule, for they do not violate the Fourth Amendment. As the *Hudson* majority explained,

[A knock] is not necessary when “circumstances presen[t] a threat of physical violence,” or if there is “reason to believe that evidence would likely be destroyed if advance notice were given,” or if knocking and announcing would be “futile” . . . . We require only that police “have a reasonable suspicion . . . under the particular

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162. Only the *Hudson* dissenters offered any evidence on the empirical question the majority addressed. They cited a work by Kemal Mericli for the proposition that “some ‘[d]rug enforcement authorities believe that safety for the police lies in a swift, surprising entry with overwhelming force—not in announcing their official authority.’” *Hudson*, 126 S. Ct. at 2174 (Breyer, J., dissenting) (quoting Kemal A. Mericli, *The Apprehension of Peril Exception to the Knock and Announce Rule*, 16 SEARCH & SEIZURE L. REP. 129, 130 (1989)).

163. Telephone Interview with Walter Smith, Detective, Chi. Police Dep’t (Feb. 26, 2008).

164. The police also may attempt to gain entry by subterfuge—for example, by knocking and pretending to be a neighbor and then exhibiting their warrant to whoever answers the door. Just how much notice the police actually provide is open to question. When I asked another Chicago narcotics officer whether he knocked before entering, he said, “Yes, with a wet sponge.” A high-ranking police official told Dallin Oaks that his officers “almost invariably lie about [their conformity with] the no-knock rule . . . because it affects their personal safety.” Oaks, *supra* note 40, at 741 n.226.

165. Telephone Interview with Walter Smith, *supra* note 163.

166. *Id.*

circumstances” that one of these grounds . . . exists, and we have acknowledged that “this showing is not high.”<sup>167</sup>

When Fourth Amendment law gives the police the benefit of every doubt, only officers acting in bad faith are likely to violate the law. The *Hudson* majority underscored this fact when it noted that lower courts had allowed “colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity.”<sup>168</sup> As the Court had explained in an earlier case, qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”<sup>169</sup> If, as the Supreme Court maintained, qualified immunity poses no obstacle to suit, the reason is that police officers are not always the nice people the Supreme Court imagines they are.<sup>170</sup> In *United States v. Leon*, the Supreme Court created an exception to the exclusionary rule for officers who obtain and execute search warrants in objectively reasonable good faith.<sup>171</sup> *Hudson* adds what might be called a subjectively unreasonable bad faith exception to the rule.

#### V. CONTRIBUTORY CAUSATION

This Article’s analysis of the goals of the exclusionary rule and of the concept of but-for causation may appear to pose a dilemma. On the one hand, limiting exclusion to cases in which a Fourth Amendment violation was a but-for cause of the government’s discovery of evidence would allow the police to violate many Fourth Amendment commands with impunity. The disobedience of a rule concerning how a search must be conducted rarely leads to the discovery of evidence that the police would not have found if they had conducted the search properly. On the other hand, excluding evidence whose discovery did not result from a Fourth Amendment violation would be strange. In the absence of a causal relationship between a Fourth Amendment violation and the challenged

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167. *Hudson*, 126 S. Ct. at 2162–63 (citations omitted). One readily understands why the police need not risk violence or the destruction of evidence, but excusing a knock simply because the police have a “reasonable suspicion” that knocking would be futile is mystifying. When the police merely suspect that no one may be at home, they surely ought to knock.

168. *Id.* at 2167.

169. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

170. The *Hudson* majority cited four decisions in support of its claim that the doctrine of qualified immunity did not block “colorable” lawsuits. *Hudson*, 126 S. Ct. at 2167. In all of these cases, plaintiffs had alleged flagrant violations of the Fourth Amendment. *See generally* *Green v. Butler*, 420 F.3d 689 (7th Cir. 2005); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179 (10th Cir. 2001); *Mena v. City of Simi Valley*, 226 F.3d 1031 (9th Cir. 2000); *Gould v. Davis*, 165 F.3d 265 (4th Cir. 1998). The facts of these cases are in tension with the Court’s view that the police have no interest in entering without notice unless they risk violence or the destruction of evidence.

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

evidence, arguments about the ineffectiveness of civil remedies and the need to sanction police misconduct would simply raise eyebrows.<sup>172</sup>

This apparent dilemma arises only because lawyers tend to think of “but for” causation as the least demanding kind of causation the law can require. It isn’t.<sup>173</sup> Rather than ask whether the government’s wrong was a *sine qua non* of the discovery of challenged evidence, courts might ask whether the government’s illegal conduct *facilitated* the discovery of evidence either by reducing the labor required to make this discovery or by improving the odds of its occurrence. The concept of “contributory” cause would limit exclusion to cases in which exclusion remedies a past violation, but unlike a requirement of but-for cause, it would not withdraw the most important forward-looking incentive for compliance with a broad range of Fourth Amendment requirements. “Contributory” cause best accommodates the dual rationales of the exclusionary rule.

Because the primary goal of the law of torts is corrective justice,<sup>174</sup> tort law usually demands at least a but-for relationship between wrongdoing and harm. But even the law of torts makes exceptions. A classic example is the case in which two wrongdoers acting independently set fires, either of which would be sufficient to destroy the property of a third party. When the two fires join and destroy the property, neither wrongdoer’s act is a but-for cause of the damage, but both wrongdoers are liable for it.<sup>175</sup> Moreover, in a mass torts case in which the plaintiffs established a significant but smaller than fifty percent chance that each defendant’s wrong caused their injuries, the California Supreme Court required each defendant to pay a proportionate share of the plaintiffs’ damages.<sup>176</sup> Indeed, as this Article will explain,<sup>177</sup>

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172. Although courts and commentators may disavow “rights” justifications for the exclusionary rule, these justifications and the limiting principles they imply seem ineradicable—part of the law’s collective unconscious perhaps. Excluding evidence that bears no causal relationship to a wrong simply to achieve instrumental goals seems almost unthinkable.

173. The position of this Article is that any antecedent that contributes the production of a result is a cause of the result. A specification of the way in which this antecedent must contribute to the result is a specification of the *kind* of causation required.

174. *Contra* LANDES & POSNER, *supra* note 47. Sadly, the Landes and Posner view now appears to dominate the academy.

175. See *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 49 (Minn. 1920); RESTATEMENT (SECOND) OF TORTS § 432(2) (1965). Cases like this one are called cases of “overdetermined” causation. I do not suggest that these cases and the others discussed in this paragraph are comparable to *Hudson* and to the other exclusionary-rule cases discussed in this Article. These cases reveal, however, that “but for” causation is not the irreducible minimum of causal standards even in tort law.

176. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 936–38 (Cal. 1980). *But see* *Skipworth v. Lead Indus. Ass’n*, 690 A.2d 169, 172–73 (Pa. 1997). At least one torts scholar has maintained that negligently causing a significant risk of harm should itself be actionable. See Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779, 782–83 (1985). *But see* *Bd. of Educ. v. A. C & S, Inc.*, 546 N.E.2d 580, 587 (Ill. 1989).

177. See *infra* Part VI.

courts have not required *Hudson*-style but-for causation in civil damage actions for unlawful searches. Recognizing that a requirement of but-for cause can be too demanding, both Dean Green and Dean Prosser favored instructions defining “cause in fact” as any “substantial factor” in the production of an injury.<sup>178</sup> Prosser declared that this term was “sufficiently intelligible to the layman to furnish an adequate guide in instructions to the jury, and . . . it is neither possible nor desirable to reduce it to any lower terms.”<sup>179</sup>

Canada’s exclusionary rule is generally less expansive than ours. It allows trial courts to weigh the benefits of exclusion against its costs, taking into consideration the importance of the unlawfully obtained evidence to the prosecution, the seriousness of the offense charged, and the gravity of the violation of the Canadian Charter of Rights and Freedoms by the law enforcement officers.<sup>180</sup> Nevertheless, the Supreme Court of Canada has rejected any requirement of a but-for causal relationship between a violation of the Charter and discovery of the evidence to be suppressed. Rather than focus “narrowly on the actions most directly responsible for the discovery of evidence,” the Canadian court considers “the entire course of events leading to its discovery.”<sup>181</sup> A “temporal and tactical connection” between the violation and the challenged evidence is sufficient.<sup>182</sup> For example, the denial of a suspect’s right to counsel during a search may lead to the exclusion of evidence seized during the search despite the absence of any

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178. See LEON GREEN, JUDGE AND JURY 192 (1930); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 248 (4th ed. 1971); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 553–55 (1962).

179. PROSSER, *supra* note 178, at 240. California jury instructions employ the “substantial factor” formulation. Moreover, they define a substantial factor as any factor “contributing” to the harm. At the same time, however, these instructions include a bracketed instruction requiring but-for causation which judges may give in appropriate cases:

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a trivial or remote factor. It does not have to be the only cause of harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

Judicial Council of California, California Civil Jury Instructions No. 430 (2007).

180. See generally *R. v. Burlingham*, [1995] 2 S.C.R. 206 (Can.); *R. v. Kokesch*, [1990] 3 S.C.R. 3 (Can.); *R. v. Strachan*, [1988] 2 S.C.R. 980 (Can.); *R. v. Collins*, [1987] 1 S.C.R. 265 (Can.); Kent Roach & M.L. Friedland, *Borderline Justice: Policing in the Two Niagaras*, 23 AM. J. CRIM. L. 241 (1996).

181. *R. v. Strachan*, [1988] 2 S.C.R. 980, 1002 (Can.); see also *R. v. Grant*, [1993] 3 S.C.R. 223, 255 (Can.) (declaring it unrealistic to sever an illegal search that might not have been “causally linked to the evidence tendered” from “the total investigatory process which culminated in the discovery of the impugned evidence”).

182. *R. v. Grant*, [1993] 3 S.C.R. 223, 255 (Can.).

causal relationship between the violation and discovery of the evidence.<sup>183</sup> The fact that unlawfully obtained evidence inevitably would have been discovered in a lawful manner does not prevent exclusion, for a failure of the police “to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of evidence.”<sup>184</sup> As Kent Roach and M.L. Friedland observe, “A conclusion that the police could have obtained the evidence through constitutional means, far from precluding exclusion . . . actually makes exclusion more likely.”<sup>185</sup>

As the next section of this Article will show, the position of the Supreme Court of Canada is not as distinctive as it seems. Like the Canadian court, the U.S. Supreme Court generally has not required a but-for causal relationship between a constitutional violation and the evidence to be excluded.

## VI. CONTRIBUTORY CAUSE AND BUT-FOR CAUSE IN THE SUPREME COURT

### A. SEARCHES WITHOUT WARRANTS—WEEKS, MAPP, AND AGNELLO

The Supreme Court’s 1914 decision in *Weeks v. United States* established the exclusionary rule in the federal courts.<sup>186</sup> The violation that prompted the exclusion of evidence in *Weeks* was the failure of a U.S. Marshal to secure a warrant before searching the defendant’s house and seizing his papers. The Court’s 1961 decision in *Mapp v. Ohio* extended the exclusionary rule to the states.<sup>187</sup> In *Mapp*, “no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for.”<sup>188</sup> An appendix to Justice Breyer’s dissenting opinion in *Hudson* listed forty-one cases in which the Supreme Court had either ordered the suppression of evidence seized inside a home or remanded for proceedings that could lead to the suppression of this evidence.<sup>189</sup> In at least twenty-five of these cases, the alleged constitutional violation consisted simply of the failure of the police to obtain a warrant. Although not included in Justice Breyer’s list, the Court also has suppressed evidence in cases in which the police seized evidence outside a home but failed to obtain a required warrant.<sup>190</sup>

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183. See *R. v. Strachan*, [1988] 2 S.C.R. 980, 1000 (Can.). The Canadian Supreme Court has ordered the exclusion of an incriminating statement made to a witness the day after a right-to-counsel violation “despite the fact that the statement was but remotely connected to the unconstitutional conduct.” *R. v. Burlingham*, [1995] 2 S.C.R. 206, 239 (Can.).

184. *R. v. Collins*, [1987] 1 S.C.R. 265, 285 (Can.).

185. Roach & Friedland, *supra* note 180, at 346.

186. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

187. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

188. *Id.* at 645.

189. *Hudson v. Michigan*, 126 S. Ct. 2159, 2186–88 (2006) (Breyer, J., dissenting).

190. See, e.g., *Katz v. United States*, 389 U.S. 347, 359 (1967) (“The government agents here ignored ‘the procedure of antecedent justification . . . that is central to the Fourth Amendment

In many of these cases, probable cause for the search was clear. The police could have secured a warrant had they sought one. Nevertheless, as the Supreme Court observed in *Agnello v. United States*,

The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. . . . Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.<sup>191</sup>

*Hudson's* ruling on but-for causation would require a different result in all of the cases in which the police searched without a warrant they could have obtained. If the police had complied with the Constitution by securing this warrant, they would have discovered the challenged evidence, and if blocked from searching without a warrant, they probably would have taken the low-cost step of obtaining one. To echo the words of Judge Sam Ervin III, if they hadn't done it wrong, they would have done it right.<sup>192</sup>

In both *Hudson* and the no-warrant cases, the police omitted a step that the Constitution required them to take. In both, they would have obtained the challenged evidence lawfully if they had taken this step. And in both, they probably would have taken this step if blocked from taking the shortcut they took. On the issue of but-for causation, the no-knock and no-warrant cases are indistinguishable.

In both sorts of cases, however, contributory causation is clear. Omitting a constitutionally required step (knocking or obtaining a warrant) made it easier for the police to discover the challenged evidence. A contributory-cause standard requires the exclusion of evidence whenever the police have taken an illegal shortcut to its discovery. For more than ninety years, the Supreme Court has implicitly employed this standard (or one even less demanding<sup>193</sup>) when the police have searched without the warrants the Constitution required them to have.

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. . . ,’ a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.”) (citation omitted); *see also* *United States v. Chadwick*, 433 U.S. 1, 15–16 (1977) (search of luggage); *Walter v. United States*, 447 U.S. 649, 655–56 (1980) (search of film canisters); *Coolidge v. New Hampshire*, 403 U.S. 443, 472–73 (1971) (seizure of an automobile).

191. *Agnello v. United States*, 269 U.S. 20, 32–33 (1925); *see also* *Vale v. Louisiana*, 399 U.S. 30, 35 (1970) (stating that unless circumstances justify a warrantless search, it is “constitutional error [to] admit[ ] into evidence the fruits of the illegal search,” even though the authorities had probable cause).

192. *See supra* text accompanying note 76. To put the point somewhat differently, of the imaginable counterfactual worlds in which the police have complied with the Constitution, the world “maximally consistent” with the real world is one in which they have sought a warrant before searching.

193. *See infra* text accompanying notes 201–08.

The *Hudson* Court purported to distinguish no-warrant cases from no-knock cases when it advanced a second ground of decision. Its effort to distinguish these cases may signal its reluctance to overrule them. Should the Court ultimately reaffirm *Weeks*, *Mapp*, and the other decisions suppressing evidence for failure to obtain a warrant, it may note that it expressly distinguished these cases in *Hudson*. If the Court adheres to *Hudson*'s causal analysis, however, *Weeks*, *Mapp*, and the other no-warrant rulings are doomed. The fact that the Court regarded a second ground of decision as inapplicable does not affect the controlling character of the first ground.

As its second ground of decision, the Court held that the interests served by the knock-and-announce requirement would not be advanced by suppression. It indicated that the warrant requirement was different. Unlike the knock-and-announce requirement, the warrant requirement was designed to “shield[] potential evidence from the government’s eyes.”<sup>194</sup>

The Court’s purported distinction seems strained. The primary interest served by the warrant requirement is keeping the police out when they don’t belong in, and this interest cannot be advanced when the police do belong in. When the police have probable cause to search, moreover, they belong in. A magistrate would have said so and would have given the police a paper to prove it if only they had asked. As this Article has noted, the Court’s statement that the warrant requirement shields potential evidence from the government’s eyes is not usually true. This requirement shields evidence from the government’s eyes only when the police cannot establish probable cause for a search.

The requirement of a warrant also serves a second interest. A warrant gives the occupants of the premises to be searched notice “of the lawful authority of the executing officer, his need to search, and the limits of his power to search.”<sup>195</sup> The purpose of the knock-and-announce requirement, however, is also to give notice, and *Hudson* holds that this interest would not be advanced by suppression. The requirement of notice is not designed to “shield potential evidence from the government’s eyes.”

When the police search without a warrant, they bypass a constitutionally required procedure for determining *in advance* whether the search they propose is justified. Perhaps the warrant requirement serves a third interest as well—that of property owners and their guests<sup>196</sup> in having the

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

195. *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

196. *Some* guests, that is. See *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998) (holding that guests did not have standing to challenge an illegal search of a house). In a concurring opinion in *Carter*, Justice Scalia wrote, “We went to the absolute limit of what text and tradition permit . . . when we protected a mere overnight guest against an unreasonable search of his host’s apartment.” *Id.* at 96 (Scalia, J., concurring).

If the police were illegally to raid one of Justice Scalia’s poker parties and seize all the money, cards, and chips on the table, apparently only Justice Scalia would have standing to

government adhere to constitutionally required procedures even when adherence to these procedures would not affect the outcome.<sup>197</sup>

In no-knock cases, however, the police also fail to follow constitutionally required procedures, and unlike a failure to secure a warrant, a failure to knock and announce usually defeats the interests this procedure was intended to protect. People are terrified when the police invade their homes without notice. A failure to secure a warrant when the police have probable cause to search, however, does not defeat the primary interest the warrant requirement was designed to protect. This failure could be regarded as harmless error for the same reason that many trial court errors are treated as harmless when they are reviewed on appeal. The violation can be seen in retrospect not to have affected substantial rights of the defendant.<sup>198</sup> Whether or not the police have a piece of paper when they search ordinarily makes little difference in a suspect's life—less difference than whether they knock and announce their presence.

Searching homes and seizing property are threatening activities for which the Constitution usually requires a license. The Constitution calls this license a warrant. Statutes require people to obtain licenses before engaging in other threatening activities as well—such activities as driving, practicing medicine, and practicing law. Courts have considered whether engaging in one of these activities without a license should lead to tort liability when an unlicensed actor who appears to have done nothing else wrong has produced an injury. The decisions are not uniform, but courts generally have answered no, calling the lack of a license merely an attendant circumstance rather than an effective contributing cause.<sup>199</sup>

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object. *See* Joan Biskupic, *No Shades of Gray for Scalia*, USA TODAY, Sept. 17, 2002, at 1A (“Scalia has a reputation as the life of the party. He plays poker . . . , sings and is a duck hunter.”). Nevertheless, one of Justice Scalia’s guests (a fellow duck hunter perhaps) might have standing to challenge the seizure if he had drunk too much beer and was sleeping it off in a bedroom. Then the issue would be how long he was expected to sleep and whether Justice Scalia would have allowed him to drive home before morning. Of course neither Justice Scalia nor his guest would be able to secure suppression of the money, cards, and chips if the police had merely broken in without giving notice.

197. In at least one area of constitutional adjudication, the Supreme Court has held that a failure to adhere to required procedures entitles a litigant to relief despite the fact that adhering to these procedures would not have benefitted him. The Court has held it immaterial that a plaintiff challenging an affirmative action program for allocating government contracts would not have obtained a government contract in any event. This person’s “inability to compete on an equal footing” is enough to entitle him to relief. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The rule is different, however, when a plaintiff challenging an affirmative action program seeks damages rather than injunctive relief. *Texas v. Lesage*, 528 U.S. 18, 22 (1999).

198. *See* FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”); *cf.* *Nix v. Williams*, 467 U.S. 431, 443 n.4 (1984) (“The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule . . .”).

199. *See, e.g., Wysock v. Borchers Bros.*, 232 P.2d 531, 540 (Cal. Ct. App. 1951); *see also Rentschler v. Lewis*, 33 S.W.3d 518, 519 (Ky. 2000) (ruling evidence of defendant’s suspended

In most of these cases, the courts have assumed that the failure to obtain a license was a but-for cause of the plaintiff's injuries. They have imagined a counterfactual world in which, if the defendant had complied with the law, he would not have engaged in the activity at all, rather than a world in which he would have obtained a license before undertaking the activity. When obtaining a license is difficult and costly, this assumption seems sound, and in that respect, the no-warrant cases are different. When the police have probable cause to search, obtaining a search warrant is often irksome but usually easy.

Despite their assumption of but-for causality, courts have ruled that the interest served by the licensing requirement would not be advanced by imposing tort liability. They have characterized the relevant interest as one of preventing negligent driving or unskilled treatment and then have concluded that the failure to obtain a license was harmless because no negligent driving or unskilled treatment occurred. Courts might similarly hold that the primary purpose of the warrant requirement is to prevent searches without probable cause and that the failure to obtain a warrant is harmless when no search without probable cause has occurred.<sup>200</sup>

When, in retrospect, it is clear that the police officers who searched without a warrant had probable cause for their search, courts have excluded evidence primarily for instrumental reasons and not to vindicate the rights

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license irrelevant in a negligence action); *Falvey v. Hamelburg*, 198 N.E.2d 400, 403 (Mass. 1964); *Dean v. Leonard*, 83 N.E.2d 443, 444 (Mass. 1949); *Mandell v. Dodge-Freedman Poultry Co.*, 45 A.2d 577, 579 (N.H. 1946) (declaring that an unlicensed driver's actions in an emergency should be judged as though she were licensed); *Brown v. Shyne*, 151 N.E. 197, 199 (N.Y. 1926) (holding that a chiropractor's failure to obtain a license was not connected to a patient's injury); *The Empire Jamaica*, [1957] A.C. 386, 396 (H.L.) (ruling that a ship's owners were not liable for a boat collision although the ship's pilot was unlicensed); R.P. Davis, Annotation, *Lack of Proper Automobile Registration or Operator's License as Evidence of Operator's Negligence*, 29 A.L.R. 2d 963 (1953) ("It is generally held that the mere fact that a motor vehicle involved in an accident on the highway is not licensed or registered has no causal relation to the injury and is therefore immaterial, irrelevant, and incompetent to the issue of original or contributory negligence of the operator.").

200. Indeed, in two respects, the case for finding a violation harmless seems stronger when the police have searched without a warrant than when an unlicensed but otherwise non-negligent medical practitioner or driver has injured someone. First, the injury produced by an unlicensed practitioner or driver would have been regrettable even if he had been licensed. The result produced by an unlicensed police search, however, would have been laudable if only the police had complied with the warrant requirement. The impulse to provide a remedy even in the absence of a clear causal relationship might therefore be less when the police have searched without a warrant.

Second, a license provides some assurance of knowledge and skill, and its absence provides a reason to suspect a lack of these things. When an unlicensed medical practitioner or driver has injured someone, he might have been negligent in ways that the person injured by his conduct cannot prove. Some state statutes create a presumption that anyone driving without a license was driving without due care. *See, e.g.*, KY. REV. STAT. ANN. § 186.640 (West 2008). The warrant requirement, however, is designed to ensure, not knowledge and skill, but the existence of probable cause—something that often can be established with clarity after the fact.

or interests of the defendants before them. As Justice Stevens once noted, “[I]f probable cause dispensed with the necessity of a warrant, one would never be needed.”<sup>201</sup> The police could omit the constitutionally required step of submitting their evidence to a magistrate and could rely on the courts to sort things out later. Refusing to exclude evidence because the failure to obtain a warrant did not change the outcome would leave the police with no incentive to seek warrants in cases in which this action *would* change the outcome.

The no-warrant cases reveal why consistently applying *Hudson’s* requirement of but-for causation would allow the police to violate constitutional rules concerning how a search must be conducted without significant adverse consequences. They also reveal that many of the Supreme Court’s exclusionary-rule decisions have avoided this result by not requiring but-for causation.

Courts in fact failed to require but-for causation in civil lawsuits against offending officers at the time of the enactment of the Fourth Amendment. Rather than ask about the causal relationship between these officers’ failure to obtain a warrant and the injury inflicted by their search, common law courts declared that the officers’ failure to obtain a warrant made them trespassers within the searched premises. The courts then asked whether the officers’ wrongful presence was the cause of the injury, and of course it always was. In other words, common law courts made the same move that Justice Breyer’s dissenting opinion later made in *Hudson*. Justice Breyer broadly characterized the officers’ violation of the Fourth Amendment as an unlawful entry rather than simply a failure to knock,<sup>202</sup> and an officer’s entry is always a but-for cause of his seizure of evidence inside.

*Wilkes v. Wood*, whose condemnation of general warrants inspired the Framers of the Fourth Amendment, illustrates how common law courts elided the causal issue the Supreme Court addressed in *Hudson*.<sup>203</sup> The British Secretary of State, Lord Halifax, had issued a warrant to search for an allegedly seditious publication, *The North Briton*, No. 45. As described by Lord Chief Justice Pratt, this warrant specified “no offenders names” and allowed “messengers to search wherever their suspicions may chance to fall.”<sup>204</sup> Declaring the warrant “totally subversive of the liberty of the suspect,” the Lord Chief Justice encouraged a jury to take account of both compensatory and instrumental goals and to award sizeable damages:

I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages

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201. *Walter v. United States*, 447 U.S. 649, 657 n.10 (1980) (plurality opinion).

202. *See supra* text accompanying note 65.

203. *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489, 498–99 (K.B.).

204. *Id.* at 498.

are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.<sup>205</sup>

The jury that heard this charge withdrew for less than half an hour. Then it found for the plaintiff, awarding damages of one thousand pounds.<sup>206</sup> The equivalent sum today would be \$244,000.<sup>207</sup>

Note that if a court were to characterize the wrong only as failing to obtain a warrant and then award only compensatory damages, the inability of civil remedies to provide appropriate incentives for compliance with the warrant requirement would be clear. The damages recoverable for a knock-and-announce violation rarely exceed the cost of repairing a broken door and compensation for brief emotional distress. If an officer with probable cause to search had merely failed to obtain a warrant, however, the provable compensatory damages would be zero.

Officers who entered without warrants were not the only ones the common law regarded as trespassers. Officers who entered without knocking were trespassers too.<sup>208</sup> Both were strictly liable for any harm they produced. In no-knock cases, the courts apparently did not care that the same harm would have occurred even if the officers had knocked. They described the wrong not as failing to knock, but as trespass. They asked not whether the failure to knock caused the plaintiff's injuries, but whether the trespass caused these injuries. The trespass cases failed to require even the contributory causal relationship between wrong and injury that this Article has argued should determine the scope of the exclusionary rule.

Like Justice Breyer's dissent, the common law approach begged a central question. If entering without a warrant or without knocking made an officer a trespasser, what other violations of law would have the same effect? Would failing to exhibit the warrant to the people inside? Would seizing an item not named in the warrant? Would destroying property once inside?<sup>209</sup> Would bringing an unauthorized party along on the search? Would using unnecessary force to enter after a knock had gone unanswered? The courts

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205. *Id.* at 498–99.

206. *Id.* at 499.

207. Two online calculators supplied this figure. *See* CoinMill.com-The Currency Converter, <http://coinmill.com> (last visited May 13, 2008); MeasuringWorth, <http://measuringworth.com> (last visited May 13, 2008).

208. *See, e.g.*, *Burton v. Wilkinson*, 18 Vt. 186, 189 (1846); *The Case of Richard Curtis*, (1757) 168 Eng. Rep. 67, 68 (K.B.); *Semayne's Case*, (1603) 77 Eng. Rep. 194, 195 (K.B.); G. Robert Blakey, *The Rule of Announcement and Unlawful Entry*, 112 U. PA. L. REV. 499, 500–08 (1964).

209. *See* *The Six Carpenters' Case*, (1610) 77 Eng. Rep. 695, 696 (K.B.) (misconduct by one who has entered the premises of another under authority of law can taint his entry from the beginning); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 25 (5th ed. 1984) (describing the “curious and unique fiction” of trespass ab initio).

did address questions like these, and not just in civil cases. These issues were prominent in early decisions on the scope of the exclusionary rule.

For example, in *McGuire v. United States* in 1927, officers with a valid warrant to search for and seize bootleg liquor destroyed “all the seized liquor except one quart of whiskey and one quart of alcohol, which they retained as evidence.”<sup>210</sup> The Court held that the two quarts the officers retained were admissible, and it said:

It is contended that the officers by destroying the seized liquor became trespassers *ab initio*; that they thus lost the protection and authority conferred upon them by the search warrant; that therefore the seizure of the liquor, both that destroyed and that retained as evidence, was illegal and prohibited by the Fourth Amendment and that the reception of the liquor in evidence violated the Fourth and Fifth Amendments to the Constitution. This conclusion has received some support in judicial decisions. But the weight of authority is against it. That the destruction of the liquor by the officers was in itself an illegal and oppressive act is conceded. But it does not follow that the seizure of the liquor which was retained violated constitutional immunities of the defendant or that the evidence was improperly received.<sup>211</sup>

Justice Breyer’s discussion of causation in *Hudson* placed him in distinguished company. Judges had played the same word game for two-and-one-half centuries.

*B. SMASHING VASES—THE DICTUM IN UNITED STATES V. RAMIREZ*

A final section of Justice Scalia’s opinion in *Hudson* declared that “a trio of cases” supported the Supreme Court’s refusal to exclude evidence seized after an unlawful no-knock entry.<sup>212</sup> Justice Kennedy, who had joined the other parts of Justice Scalia’s opinion, did not join this one, so this last section of Justice Scalia’s opinion was not an opinion of the Court. Justice Kennedy declared without elaboration that he was “not convinced that [two of the three cases cited by Justice Scalia<sup>213</sup>] have as much relevance here as Justice Scalia appears to conclude.”<sup>214</sup>

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210. *McGuire v. United States*, 273 U.S. 95, 97 (1927).

211. *Id.* at 97–98 (internal citations omitted); see also *On Lee v. United States*, 343 U.S. 747, 752 (1952) (“[T]he claim that [an undercover agent’s] entrance was a trespass because consent to his entry was obtained by fraud must be rejected.”); *Zap v. United States*, 328 U.S. 624, 629 (1946) (“The agents did not become trespassers *ab initio* when they took the check.”).

212. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2168 (2006).

213. *New York v. Harris*, 495 U.S. 14 (1990) and *Segura v. United States*, 468 U.S. 796 (1984).

214. *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring).

Justice Kennedy's concurring opinion, however, relied on a third case cited by Justice Scalia, *United States v. Ramirez*.<sup>215</sup> In *Ramirez*, the Court found no Fourth Amendment violation but said in dictum, "Excessive or unnecessary destruction 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 not subject to suppression."<sup>216</sup>

Justice Breyer apparently agreed with Justice Kennedy that this dictum offered the most plausible precedent for the result in *Hudson*. In dissent, he called *Ramirez* the majority's "best hope."<sup>217</sup> Although Justice Breyer and the other *Hudson* dissenters had joined the unanimous *Ramirez* opinion, he indicated that this part of the opinion might have slipped past him and might not have his approval. "[E]ven if I accept this dictum," he said, "the entry here is unlawful, not lawful."<sup>218</sup> In this statement, Justice Breyer relied once more on his characterization of the Fourth Amendment violation in *Hudson*. This violation did not consist simply of failing to knock or of entering in an unlawful manner. The failure of the police to knock made the entry itself unlawful. This entry was unlawful because Justice Breyer said so, and he offered no other basis for distinguishing *Ramirez*.

Although *Ramirez* did not cite *McGuire v. United States*,<sup>219</sup> the smash-the-mash liquor case described above,<sup>220</sup> what was merely dictum in *Ramirez* appeared to be holding in *McGuire*. Although destroying property unnecessarily during a search violates the Fourth Amendment, this violation does not require the exclusion of evidence seized during the search. The *Hudson* majority appeared to ask why, if unnecessarily breaking property during a search does not trigger exclusion, unnecessarily breaking the front door to get in should be different.<sup>221</sup>

The concept of contributory causation supplies an answer. Consider more fully a case of the sort discussed in *Ramirez*. As a group of police officers are lawfully searching a house for cocaine, one of them notices a vase in the living room and smashes it. He has no good reason for destroying

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

216. *Id.* at 66. The Court also said that if it had found that breaking a window to enter a garage violated the Fourth Amendment, it would have considered whether there was a "sufficient causal relationship" between this violation and the discovery of evidence to warrant suppression. *Id.* at 72 n.3. Both Justice Kennedy and Justice Scalia treated this reservation of the issue as though it had resolved the issue at least in part. Justice Kennedy described *Ramirez* as holding that "application of the exclusionary rule depends on the existence of a 'sufficient causal relationship' between the unlawful conduct and the discovery of evidence." *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring). Justice Scalia asked, "What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?" *Id.* at 2170 (Scalia, J.).

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

218. *Id.*

219. *McGuire v. United States*, 273 U.S. 95 (1927).

220. *See supra* notes 210–11 and accompanying text.

221. *See Hudson*, 126 S. Ct. at 2170.

this property. The officer does not find cocaine in the vase, but he and the other officers later find cocaine in the bedroom. The *Ramirez* dictum and the *McGuire* holding indicate that the cocaine found in the bedroom will not be suppressed.

This conclusion seems sound—and not because a court whose judges skipped breakfast has decided that it would rather not call the vase-smashing officer a trespasser ab initio. It is sound because there was no causal relationship between smashing the vase in the living room and seizing the drugs in the bedroom. If the police were to search a house illegally one day and another house legally the next, a court would not suppress drugs found in the second house. The lack of a causal relationship would be decisive, and the lack of a causal relationship similarly justifies the dictum in *Ramirez*.

The case would be different if the officer had found cocaine inside the vase itself. Even in that case, destroying the vase might not have been a but-for cause of the seizure. If the officer had not smashed the vase, he might have turned it over and found the drugs lawfully. Breaking the vase was, however, a contributory cause of the discovery. It made finding the drugs easier. The officer took an illegal shortcut to the discovery of this evidence.

*Hudson* is much the same. Unlike breaking a vase in the living room, breaking the front door made discovering drugs in the bedroom easier, or at least the police believed that it did. Illegally smashing a vase in the living room before finding drugs in a bedroom resembles illegally searching one house before finding drugs in another, but illegally smashing a door before finding drugs inside a house has more in common with smashing a vase and finding drugs inside the vase.

As the “vase case” illustrates, a requirement of contributory causation would leave some Fourth Amendment violations without a remedy. Omitting a mandatory step—taking a shortcut—would require the suppression of evidence, but taking an unlawful extra step might not. Even smashing a person in the living room would not require suppression of the cocaine found in the bedroom unless the unlawfully beaten person was standing in the officer’s way (like the door in *Hudson*) or unless he responded by revealing the location of the drugs.<sup>222</sup>

As this Article has noted, it may not make sense from an instrumental perspective to require a causal relationship between wrongdoing and harm. Discouraging the police from smashing a person in the living room is surely as worthwhile a goal as inhibiting them from breaking in.

Moreover, some judicial approaches to causal issues would allow the suppression of the cocaine seized in the “vase case.” A common law judge

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222. Note that a standard of but-for causation would not require the suppression of the drugs found in the bedroom even if the suspect beaten in the living room had told the police where they were. Because a lawful search for the drugs was underway, the drugs “inevitably” would have been discovered. A standard of contributory causation, however, would require suppression of the drugs.

might announce that, by smashing the vase, the offending officer became a trespasser ab initio. Or, respecting the ruling in *McGuire*, this judge might declare that although smashing a vase does not make someone a trespasser ab initio, smashing a person does because it is very, very bad. Justice Breyer might declare that, although the officers who smashed the vase could have searched lawfully, they did not, and if the officers had not searched at all, they would not have discovered the cocaine. The Supreme Court of Canada might find a sufficient “temporal and tactical connection” between smashing the vase and the later discovery of cocaine to warrant suppression. The Canadian court, however, might use its generally discretionary approach to suppression to distinguish on other grounds a smashed-vase case from a smashed-person case.

Unlike some of these other approaches, a contributory-causation standard requires at least a minimal “rights” justification for suppression in every case. The police must have wronged the person seeking suppression, and their wrong must either have made the seizure from this person more likely or reduced the work required to make it. Moreover, this standard supplies a principle of decision and depends less on gestalt responses to particular circumstances. A contributory-cause standard also rationalizes most of the Supreme Court’s decisions in exclusionary-rule cases. For example, it distinguishes the *Ramirez* dictum from the Court’s many no-warrant cases and its no-knock rulings prior to *Hudson*.<sup>223</sup>

### C. ARRESTS WITHOUT WARRANTS—NEW YORK V. HARRIS

In *United States v. Watson*, the Supreme Court held that a police officer need not obtain an arrest warrant before arresting a suspected felon in a public place.<sup>224</sup> In *Payton v. New York*, the Court held that an officer ordinarily must obtain an arrest warrant before entering a dwelling to make a felony arrest.<sup>225</sup> The defendant in *New York v. Harris*, another of the trio of cases on which Justice Scalia relied in *Hudson*,<sup>226</sup> was arrested in his home without a warrant in violation of *Payton*.<sup>227</sup> After his arrest, he made an

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223. Recall that, prior to *Hudson*, the Supreme Court had twice suppressed evidence because officers failed to knock and announce before entering. See *Sabbath v. United States*, 391 U.S. 585, 591 (1968); *Miller v. United States*, 357 U.S. 301, 314 (1958). These cases had relied, not on the Constitution, but on a federal statute imposing a knock-and-announce requirement identical to the one the Court later discovered in the Constitution. See *Sabbath*, 391 U.S. at 388; *Miller*, 357 U.S. at 313. There is no apparent reason why the same right should lead to different remedies simply because it appears in one form of law rather than another. None of the *Hudson* Court’s arguments against exclusion rested on its reluctance to impose a federally crafted remedy on the states. *Miller* and *Sabbath* appear to have been overruled *sub silentio* by *Hudson*.

224. *United States v. Watson*, 423 U.S. 411, 423–24 (1976).

225. *Payton v. New York*, 445 U.S. 573, 590 (1980).

226. See *Hudson*, 126 S. Ct. at 2168.

227. *New York v. Harris*, 495 U.S. 14, 15 (1990).

incriminating statement inside his home and then another incriminating statement at the station house. The defendant contended that both of these statements should be suppressed as the product of his unlawful arrest.

In *Harris*, the State did not challenge the trial judge's ruling that the defendant's first statement—the one made inside his home—should be excluded. Early in its opinion, the Supreme Court declared, "The sole issue in this case is whether Harris' second statement—the written statement made at the station house—should have been suppressed . . . ."228 As it neared the end of its opinion, however, the Supreme Court went beyond the "sole" issue that the case presented and approved suppression of the initial statement: "[A]nything incriminating the police gathered from arresting Harris in his home . . . has been excluded, *as it should have been*."229 Holding the defendant's second statement admissible, the Court explained, "Even though we decline to suppress statements made outside the home following a *Payton* violation, the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home."230

The Court sought to justify admission of the second statement by speaking of counterfactual conditionals. When the police violate *Payton* by making a warrantless arrest inside a home, one can envision three counterfactual scenarios in which they could have complied with the Constitution. First, they might not have arrested the defendant at all; second, they might have obtained a warrant prior to his arrest; and third, they might have arrested the defendant without a warrant in a public place.

For no apparent reason, the Court chose the third counterfactual. It wrote that "Harris' statement taken at the police station was not . . . the fruit of having been arrested in the home rather than someplace else."231 And again: "[T]he 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."232

The Court's analysis failed to distinguish the defendant's two statements from one another. If the police had arrested the defendant in a public place without a warrant, they probably would have obtained both of these statements. Although the dissenting Justices in *Harris* declared that someone arrested unlawfully inside the home "is likely to be so frightened and rattled that he will say something incriminating,"233 the dissent's attribution of extremely different psychological effects to an arrest in a home and an arrest elsewhere seemed strained. Though one can never be sure in a

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228. *Id.* at 16.

229. *Id.* at 20 (emphasis added).

230. *Id.*

231. *Id.* at 19.

232. *Harris*, 495 U.S. at 20.

233. *Id.* at 28 (Marshall, J., dissenting).

counterfactual world, the best judgment is that, if the police had arrested the defendant in a public place, they would have obtained both of his statements.

Neither of the other counterfactuals would have made the Court's distinction between the defendant's first statement and his second more plausible. If the police had complied with the Constitution by not arresting the defendant, they would have obtained neither of his statements, and if they had complied by obtaining a warrant prior to his arrest, they would have obtained both.<sup>234</sup> Although the Court purported to ask whether each of the defendant's statements was the "product" or "fruit" of his unlawful arrest, it did not engage in a bona fide causal analysis. Instead, it supplied a pragmatic split-the-difference resolution of the case—admitting one piece of evidence and excluding the other in the belief that a fifty-percent solution would provide "sufficient" deterrence.

The Court's instrumental analysis was dubious. It maintained that "the principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, inside the home."<sup>235</sup> When a person under arrest has made a statement inside his home, however, persuading him to repeat this statement someplace else is rarely difficult. In Justice Jackson's often quoted words, "[A]fter an accused has once let the cat out of the bag by confessing, . . . he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good."<sup>236</sup> And once someone has confirmed outside his home what he said inside, the admissibility of what he said inside barely matters.<sup>237</sup>

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234. For this reason, it is immaterial whether, if blocked from making an unlawful warrantless arrest inside the suspect's home, the police would have secured an arrest warrant or instead would have arrested the defendant in a public place without one. If they had taken either course, they probably would have obtained both of the defendant's statements lawfully, and a *Hudson*-style analysis would therefore admit both statements. A requirement of but-for causation would require exclusion only if the officers blocked from making an unlawful arrest would have given up and gone home.

235. *Harris*, 495 U.S. at 20.

236. *United States v. Bayer*, 331 U.S. 532, 540 (1947) (Jackson, J.).

237. The Court's fifty-percent solution has created odd incentives and required artificial line-drawing. *Harris* turns the admissibility not only of statements but also of tangible evidence seized following a *Payton* violation on whether the evidence is seized inside or outside the home. It thereby provides an incentive for officers to delay a search of the suspect's person until they have removed him from his dwelling. Of course, officers must balance the evidentiary advantage of such a delayed search incident to arrest against the risk it would pose to their safety. They are unlikely to use this gambit often.

Like *Payton*, *Harris* requires courts to determine whether the police made arrests and obtained evidence inside or outside a home. Post-*Harris* litigation therefore has focused on determining the home's boundary. Pre-*Harris* law declared that although officers could lawfully trespass on "open fields" without probable cause or a search warrant, their entry into the "curtilage" of a dwelling house required both. See *United States v. Dunn*, 480 U.S. 294, 301

The Supreme Court's refusal to exclude the second statement of the suspect in *Harris*—his stationhouse statement—cannot be squared with the standard of contributory causation advocated by this Article. In *Harris*, the Constitution required the police either to obtain a warrant for the suspect's arrest or to wait until he left his dwelling before arresting him. By doing neither, the police made their acquisition of the second statement easier than it should have been. Moreover, no intervening cause other than the officers' delivery of the *Miranda* warnings and the suspect's own decision to confess "dissipated the taint" of the unlawful warrantless arrest, and the Supreme Court earlier had held those events insufficient to break the causal chain.<sup>238</sup>

Although half of *Harris* cannot be squared with a contributory-causation standard, the other half cannot be squared with *Hudson*. Unlike *Hudson*, *Harris* did not withdraw the exclusionary remedy altogether from a broad class of Fourth Amendment violations. Even after *Harris*, a *Payton* violation could have evidentiary consequences. Courts still had occasion to develop the law of the Fourth Amendment and give guidance to the police.

Moreover, the *Harris* and *Hudson* standards of causation are irreconcilable. If the police in *Harris* had been blocked from arresting the

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(1987) (requiring courts to consider the proximity of an area to the dwelling, whether the area is enclosed, how the area is used, and what steps have been taken to preserve the area's privacy); *Oliver v. United States*, 466 U.S. 170, 177–78 (1984); *Hester v. United States*, 265 U.S. 57, 59 (1924). Some courts have concluded that the *Payton-Harris* line is the same and that a statement made outside a dwelling but within its curtilage must be suppressed. *See, e.g.*, *State v. Santiago*, 602 A.2d 40, 44 (Conn. App. Ct. 1992) (suppressing statements made on a porch); *State v. Smith*, 767 So. 2d 1, 1–2 (La. 2000) (suppressing statements made in a backyard). Most courts, however, have drawn the line at the "threshold" of a dwelling. *See, e.g.*, *Stevens v. State*, 691 N.E.2d 412, 23–24 (Ind. 1997) (refusing to suppress statements made on a driveway). Their approach raises nice questions about garages. *See, e.g.*, *United States v. Oaxaca*, 233 F.3d 1154, 1156–58 (9th Cir. 2000) (holding an arrest in garage invalid because the police lacked a warrant).

Drawing the line at the "threshold" has generated frequent litigation about arrests and statements made near the front door and about police stratagems to draw suspects to or beyond their doorsteps. In the absence of an arrest warrant, reaching inside a door to pull a suspect onto the porch violates *Payton*. No part of an officer's body may intrude into a home without a warrant. *McClish v. Nugent*, 483 F.3d 1231, 1241–48 (11th Cir. 2007). *Contra* 1 LAFAVE, *supra* note 42, § 6.1(e), at 303 ("[A] de minimus breaking of the vertical plane above the threshold should not itself make the warrantless arrest unlawful; otherwise the legality of doorway arrests would have to be determined by resort to plumb bob and quaint distinctions drawn from the 'entry' ingredient of common law burglary."). *Ordering* a suspect onto the porch, however, presents a close case. On the one hand, the order restrains the suspect's liberty and appears to affect an arrest while he is still inside. On the other, the officer does not *enter* without a warrant. *See id.* at 301–02 (describing a split of authority on whether the decisive location is that of the arresting officer or that of the arrestee). Luring a suspect onto the porch is permissible unless the methods used to do so render the suspect's presence on the porch involuntary. *People v. Fernandez*, 599 N.Y.S.2d 405, 408–10 (N.Y. Sup. Ct. 1993). Like other pragmatic, forward-looking, ethically incoherent decisions, *Harris* has spawned a mass of unpragmatic litigation.

238. *Brown v. Illinois*, 422 U.S. 590, 605 (1975); *Wong Sun v. United States*, 371 U.S. 471, 486–87 (1963).

defendant in his home without a warrant, they probably would not have abandoned the effort to arrest him. They would instead have obtained a warrant or else would have arrested him somewhere else. If they had done either, they would have obtained both of his statements lawfully. (If they hadn't done it wrong, they would have done it right.) *Hudson's* standard of but-for causation thus would have dictated admission of the statement whose exclusion *Harris* approved. The trio of decisions that Justice Scalia cited in support of *Hudson* included one decision flatly incompatible with *Hudson's* requirement of but-for causation.

D. *ENTERING TOO SOON, PART I*—SEGURA V. UNITED STATES

In *Segura v. United States*, the third case of Justice Scalia's trilogy, federal agents had probable cause to search an apartment for drugs and to arrest two people who lived there.<sup>239</sup> When they described their evidence to a federal prosecutor at 6:30 p.m., he told them that it was probably too late in the day to secure a search warrant. The prosecutor nevertheless authorized the agents to make their arrests and secure the apartment immediately.<sup>240</sup>

The agents staked out the apartment building of the suspects and arrested one of them as he entered the building. They then entered the suspects' apartment without consent and discovered four people inside. After a brief "sweep" of the premises, which revealed drug paraphernalia, the agents arrested these four people. One of them later proved to be the other resident of the apartment whom the agents sought.<sup>241</sup>

Two of the agents remained in the apartment while the others transported and booked the people under arrest and sought a search warrant. The two agents remained in the apartment for eighteen to twenty hours until a magistrate issued the warrant. Then they searched the apartment, discovering drugs and other incriminating evidence.<sup>242</sup> The magistrate who issued the warrant based his determination of probable cause on evidence gathered prior to the agents' entry of the apartment; he did not know what they had seen inside.<sup>243</sup>

In the Supreme Court, the government did not challenge lower court rulings that the evidence the agents had observed before the magistrate approved the search warrant must be suppressed. The question before the Court was whether the evidence discovered after the warrant issued should be excluded as well.<sup>244</sup> The Supreme Court held this evidence admissible by a vote of five to four.

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239. *Segura v. United States*, 468 U.S. 796 (1984).

240. *Id.* at 800.

241. *Id.* at 800-01.

242. *Id.* at 801.

243. *Id.* at 814.

244. *Segura*, 468 U.S. at 804.

Crucial to the majority's analysis was its determination that the agents could lawfully have "secured" the apartment without a warrant throughout the entire period it took to obtain a warrant.<sup>245</sup> Just what the agents could have done to guard against the destruction of evidence inside the apartment, however, was unclear. Only Chief Justice Burger spoke for the majority, and one lengthy section of what was otherwise his opinion for the Court was joined only by Justice O'Connor.

In this section—the heart of his opinion—the Chief Justice contended, first, that the agents had properly entered and swept the apartment and removed its occupants and, second, that the agents had lawfully deprived the apartment's occupants of their "possessory interest" in the premises.<sup>246</sup> If the agents had violated the Fourth Amendment at all, they had done so only by remaining inside the apartment after removing the occupants.<sup>247</sup> At that point, they could have secured the apartment from the outside by guarding the door. According to the Chief Justice, that course would have been "arguably wiser."<sup>248</sup> By remaining inside, the agents intruded upon a "privacy interest" of the occupants as well as their possessory interest.<sup>249</sup> Any improper intrusion upon the occupants' privacy interest, however, had been fully remedied by excluding what the agents saw prior to their search pursuant to the warrant.

The remaining Justices in the majority appeared reluctant to approve the agents' initial entry into the apartment. The portion of Chief Justice Burger's opinion that qualified as an opinion of the Court spoke only of guarding the apartment from the outside: "Had the police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here. The legality of the initial entry is, thus, wholly irrelevant . . . ."<sup>250</sup>

One can readily agree that securing the apartment in the way Chief Justice Burger and Justice O'Connor approved—sweeping the apartment, removing its occupants, and then guarding the door from the outside—would have been as effective as securing it in the way the agents did—sweeping the apartment, removing its occupants, and then guarding the premises from the inside.

It is more difficult to believe that the technique approved by the other three majority Justices would have been as effective as the technique the agents actually used—or that it would have been effective at all. The agents had lawfully arrested one resident of the apartment and would hold him

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245. *Id.*

246. *Id.* at 810.

247. *Id.* at 811.

248. *Id.*

249. *Segura*, 468 U.S. at 811.

250. *Id.* at 814.

overnight. If the second resident had suspected his arrest (or if she had noticed a law enforcement officer outside her door), she might well have cleared the apartment of its contraband. It is difficult to secure a dwelling while leaving an unarrested co-conspirator inside the dwelling free to flush.

If, in *Segura*, the agents' unlawful entry and occupation of the apartment prevented destruction of the evidence they later seized, their unlawful entry and occupation were a but-for cause of their seizure. *Hudson* presumably would require suppression of this evidence. *Hudson* asks whether the agents would have obtained the challenged evidence if they had obeyed the law; if obeying the law would have led to destruction of the evidence, this evidence could not have been seized.<sup>251</sup> All of the majority Justices in *Segura* assumed that some lawful police action would have prevented the destruction of evidence.

A contributory-causation standard, however, asks a question less forgiving of police misconduct. It asks whether a violation of the law facilitated seizure of the challenged evidence. In effect, this question changes the percentages. If the agents' unlawful act reduced the chance that evidence would be destroyed from forty percent to twenty percent, the causal relationship between the act and the seizure would be sufficient to require suppression. That the agents *probably* would have obtained the evidence even if they had obeyed the Constitution would not be decisive if they had unlawfully tilted the odds in their favor.

When an unlawful act has not facilitated a seizure—when it has not changed the odds in favor of the police or reduced their labor at all—even contributory causation is lacking. If one assumes in *Segura* that securing the apartment in a lawful manner would have been fully as effective as securing it in the way the agents did, the ruling in *Segura* seems sound. The entry and occupation of the apartment would then have been unlawful acts without causal significance (like smashing a vase just for the joy of it while conducting a search).<sup>252</sup> Although *Segura* anticipated *Hudson* by declaring a but-for causal relationship between a Fourth Amendment violation and

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251. If obeying the law in a case like *Segura* would have led to destruction of the evidence, something seems wrong with the law. Law enforcement officers with probable cause to search should be allowed to secure occupied premises effectively while they seek a search warrant, but that is a subject for another article.

252. One should hesitate to conclude that unlawful acts by the police were without causal significance. When the police have violated the Constitution, doubtful issues should be resolved against them. A court should begin with the assumption that law enforcement officers did what they did because they believed it would help to produce the results they produced. A court should also presume that this belief was accurate. *Cf. Segura*, 468 U.S. at 836 (Stevens, J., dissenting) (“The agents impounded this apartment precisely because they wished to avoid risking a loss of access to the evidence within it.”).

discovery of the challenged evidence essential,<sup>253</sup> even the decision in *Segura* is arguably consistent with a contributory-causation standard.

E. ENTERING TOO SOON, PART II—MURRAY V. UNITED STATES

In *Silverthorne Lumber Co. v. United States*, the Supreme Court held that the Constitution requires the exclusion not only of unlawfully seized “primary” evidence but also of evidence “derived” from this evidence<sup>254</sup>—what the Court later called “fruit of the poisonous tree.”<sup>255</sup> Justice Holmes’s opinion for the Court declared, “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.”<sup>256</sup> Holmes’s opinion then created what has come to be known as the independent source exception to the exclusionary rule: “Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . .”<sup>257</sup>

A standard of contributory causation would not disturb the independent source exception. When evidence has an independent source, there is no causal relationship of any kind between this evidence and an earlier constitutional violation.<sup>258</sup>

In *Silverthorne Lumber Co.*, for example, after unlawfully seized papers were returned to their owner, a prosecutor who had gained knowledge of the papers through their improper seizure issued a subpoena directing the owner to produce them before a grand jury.<sup>259</sup> The Supreme Court held this maneuver impermissible. It declared that the exclusionary rule does not “mean only that two steps are required instead of one.”<sup>260</sup>

The result evidently would have been different, however, if a prosecutor without unlawfully obtained knowledge had subpoenaed the papers in the course of an independent investigation. Then the earlier unlawful seizure would not have contributed to discovery of the papers in any way. Similarly, if unlawful wiretapping enabled the police to overhear a conversation and if one of the parties to this conversation then approached the police without prompting to describe this conversation, this participant’s testimony would

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253. *Segura*, 468 U.S. at 815 (majority opinion) (“[O]ur cases make clear that evidence will not be excluded as ‘fruit’ unless the illegality is at least the ‘but for’ cause of the discovery of the evidence.”); see *supra* note 19.

254. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 389 (1920).

255. See *Nardone v. United States*, 308 U.S. 338, 341 (1939).

256. *Silverthorne Lumber Co.*, 251 U.S. at 392.

257. *Id.*

258. The absence of a causal relationship between one source and another is what it means to call the second source independent.

259. *Silverthorne Lumber Co.*, 251 U.S. at 392.

260. *Id.*

be admissible. The unlawful wiretapping would have been neither a but-for nor a contributory cause of his testimony.

In *Segura v. United States*, the early-entry case discussed in the preceding section,<sup>261</sup> the Supreme Court assumed that all evidence the federal agents had observed between the time of their unlawful entry and the time they executed a valid warrant was properly suppressed.<sup>262</sup> In *Murray v. United States*, however, the Court held that this evidence should not have been suppressed. The Court relied on the independent source doctrine to justify this conclusion.<sup>263</sup>

In *Murray*, federal agents lawfully searched two vehicles and discovered marijuana. They previously had seen two suspects drive these vehicles into a warehouse and then, twenty minutes later, drive them out. As the suspects drove from the warehouse, the agents observed within it “two individuals and a tractor-trailer rig bearing a long, dark container.”<sup>264</sup> These and other circumstances established probable cause to search the warehouse, but after successfully searching the vehicles, the agents did not immediately seek a search warrant for the warehouse. Instead, they forced their way in. Although the agents did not find anyone inside, they observed “numerous burlap-wrapped bales that were later found to contain marijuana.”<sup>265</sup>

The agents then left the warehouse without disturbing the bales and sought a search warrant. “In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry.”<sup>266</sup> After the warrant issued, the agents searched the warehouse and seized 270 bales of marijuana.<sup>267</sup>

The Supreme Court assumed that the agents had violated the Fourth Amendment by entering the warehouse without a warrant. The Court recognized that if “information gained from the illegal entry [had] affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it,” the search pursuant to the warrant would have been unlawful.<sup>268</sup> The Court concluded, however, that the officers would have sought a warrant even if they had not entered unlawfully and that the magistrate would have granted it.<sup>269</sup> On these assumptions, the Court held that the search pursuant to the warrant had an independent source.<sup>270</sup> On the Court’s view of the facts, the agents’ initial entry of the

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261. *Supra* Part VI.D.

262. *Segura v. United States*, 468 U.S. 796, 796–97 (1984).

263. *Murray v. United States*, 487 U.S. 533 (1988).

264. *Id.* at 535.

265. *Id.*

266. *Id.* at 535–36.

267. *Id.* at 536.

268. *Murray*, 487 U.S. at 540.

269. *Id.* at 541.

270. *Id.* at 542.

warehouse was not a but-for cause of their seizure. The seizure would have occurred even if the agents had not entered too soon.<sup>271</sup>

Whether the initial entry was a contributory cause of the seizure is a more difficult issue. Immediately entering the warehouse without a warrant might appear to be an unlawful shortcut to the seizure of evidence. Yet if the agents had not broken in but instead had sought the warrant that they later did seek, they would have seized the marijuana sooner, not later, and they would have seized it with less work, not more. Entering the warehouse apparently broke the law, but perhaps, like smashing a vase in the living room, it did not help at all. As things turned out, it was merely a gratuitous extra step.

One might hesitate to reach this conclusion for two reasons. For one thing, although the break-in delayed the agents' seizure of the marijuana, it accelerated their discovery of this evidence. The law sometimes regards hastening a result as causing the result.<sup>272</sup>

Homicide law offers a clear illustration of the fact that acceleration can be everything. Proving that someone other than the defendant would have killed the victim a moment or two after he did (or that the victim was about to die of natural causes) does not save the defendant from conviction. Every homicide consists of hastening a death that was certain to occur anyway. It is sufficient that, but for the defendant's act, the result would not have occurred when it did. That the actor shortened life by a moment establishes that he caused a death.<sup>273</sup>

If the causal principles applicable to exclusionary-rule decisions were no different from those applied in homicide cases, the Court would have misapplied the concept of but-for causation in *Murray*. The agents would not have discovered the marijuana when they did but for their unlawful entry. *Hudson* also would have misapplied the concept of but-for causation. By failing adequately to knock and announce their presence, the officers hastened their seizure of the defendant's drugs by at least a few moments. And the Court would have misapplied the concept of but-for causation in *Nix v. Williams*, which this Article will discuss in its next section.<sup>274</sup> In *Nix*, an

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271. *Id.* at 543.

272. In *Murray*, although the break-in did not hasten the seizure, it did hasten the search.

273. In a memorable hypothetical case, Actor A pushes the victim from the top of the Empire State Building, and Actor B fatally shoots him as he passes the twenty-fifth floor. Actor B is guilty of murder, but Actor A is guilty only of attempted murder. See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 262 (1st ed. 1947) (presenting a similar hypothetical case); see also *State v. Matthews*, 38 La. Ann. 795, 796 (La. 1886) (When one actor mortally wounded a victim and another then struck him with a bottle, the second actor was "deemed guilty of the homicide, though the person beaten would have died of other causes . . ."); cf. *Dillon v. Twin State Gas & Elec. Co.*, 163 A. 111, 114–15 (N.H. 1932) (holding that when someone falling to his death grabs a live wire and is electrocuted, a defendant who negligently maintained the wire is liable to the victim's survivors, though the victim's short life expectancy due to the fall bears upon what damages the defendant must pay).

274. *Nix v. Williams*, 467 U.S. 431 (1984); *infra* Part VI.F.

unlawful interrogation in the absence of the defendant's counsel accelerated the discovery of a murder victim's body by three to five hours,<sup>275</sup> but the Court held that the interrogation was not a but-for cause of the discovery.<sup>276</sup>

In *Murray*, *Hudson*, and *Nix*, however, the precise moment when the officers discovered the incriminating evidence was, within limits, a matter of indifference. Although courts in homicide prosecutions treat every moment of life as valuable,<sup>277</sup> a comparable presumption would seem extravagant in search and seizure cases. The failure to give appropriate notice in *Hudson* was not wrongful because it enabled the police to seize evidence a few moments earlier than they otherwise would have. And just as an act that accelerates the discovery of evidence should not be regarded as a but-for cause of the discovery, it should not be regarded as a contributory cause of the discovery unless, for one reason or another, the timing of the discovery did matter.<sup>278</sup> A standard of contributory causation asks whether a Fourth Amendment violation facilitated a search or seizure. Acceleration without more does not meet this standard.

The dissenting Justices in *Murray* suggested a second reason why the agents' illegal entry might have had causal significance. Justice Marshall wrote that the relevant question was whether the agents would have sought a warrant if their initial warrantless search of the warehouse had failed to reveal incriminating evidence.<sup>279</sup> Marshall was concerned that law enforcement officers might conduct illegal searches to confirm their suspicions of criminal activity before seeking warrants. "[M]any 'confirmatory' searches," he wrote, "will result in the discovery that no evidence is present, thus saving the police the time and trouble of getting a warrant."<sup>280</sup> The Court's application of the independent source doctrine removed any disincentive to employing this two-search strategy. According to Justice Marshall, it empowered officers to search first, get a warrant second, and then seize.<sup>281</sup>

The majority responded that its ruling did effectively discourage use of the two-search strategy. Officers who searched unlawfully before seeking a warrant would be required to show that nothing they had observed during their search had influenced either their own decision to seek a warrant or

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275. *Nix*, 467 U.S. at 449.

276. *Id.* at 449–50.

277. *See* Commonwealth v. Bowen, 13 Mass. 356, 360 (1816) (declaring that there is "no period of life which is not precious as a season of repentance").

278. As it would have, for example, in *Segura* if the unlawful entry had prevented the destruction of the evidence and preserved it for seizure.

279. *Murray v. United States*, 487 U.S. 533, 547 n.2 (Marshall, J., dissenting).

280. *Id.* at 547.

281. *Id.*

the magistrate's decision to grant it.<sup>282</sup> The majority then offered two further responses to Justice Marshall's argument, both of which bore on causal issues.

Justice Scalia's opinion for the majority maintained, first, that Justice Marshall's counterfactual was inapposite. The issue was not whether the agents would have abandoned their plan to seek a warrant if their initial search had come up dry. It was whether they would have sought a warrant if they had never entered the warehouse at all:

Justice Marshall argues that "the relevant question [is] whether, even if the initial entry uncovered no evidence, the officers would return immediately with a warrant to conduct a second search." We do not see how this is "relevant" at all. To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred—not whether it would have been sought if something else had happened. That is to say, what counts is whether the actual illegal search had any effect in producing the warrant, not whether some hypothetical illegal search would have aborted the warrant.<sup>283</sup>

Justice Scalia posed the correct counterfactual question for resolving an issue of but-for causation: If the Fourth Amendment violation had not occurred, would the agents still have obtained the challenged evidence? Justice Marshall's counterfactual, however, bore on a different causal question: Did the agents' violation of the Fourth Amendment make it easier for them to obtain evidence?

The agents' unlawful entry would have been an unproductive extra step in *Murray* itself even if the agents had deliberately employed a two-search strategy. Over the course of a number of investigations, however, this strategy would have eased the agents' burdens by saving them the trouble of seeking warrants when their confirmatory searches failed to confirm. An expansive contributory-causation standard might ask whether the unlawful actions of the police in the case before the court would ease their path to the discovery of evidence generally. Unlike a standard that focused on causal effect in the case at hand, this modified standard would serve only instrumental goals. Its purpose would be to vindicate the rights of people other than the defendant in the case before the court. A court that adopted this standard, however, would ask Justice Marshall's counterfactual question.

The majority's final response to Justice Marshall's argument was that there was no reason to suspect the use of a two-search strategy in *Murray* itself:

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282. *Id.* at 540 (majority opinion). For a forceful response to this portion of the majority's analysis, see Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 *IND. L.J.* 907, 916–20 (1989).

283. *Murray*, 487 U.S. at 542 n.3 (citation omitted).

[T]here is no basis for pointing to the present cases as an example of a “search first, warrant later” mentality. The District Court found that the agents entered the warehouse “in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence.” . . . While they may have misjudged the existence of sufficient exigent circumstances to justify the warrantless entry . . . , there is nothing to suggest that they went in merely to see if there was anything worth getting a warrant for.<sup>284</sup>

This passage indicated that Justice Scalia and the other Justices in the majority might have ordered the evidence in *Murray* suppressed if the agents had been shown to have used a “search first, warrant later” strategy. Suppression in such a case, however, would be inconsistent with the requirement of but-for causation that Justice Scalia later articulated in *Hudson*. *Hudson* would ask whether, if the agents had not violated the Fourth Amendment by entering too soon, they would nevertheless have obtained the challenged evidence, and in *Murray* they would have. Agents whose investigation had developed the evidence the agents in *Murray* possessed surely would have sought and obtained a warrant and would have seized the marijuana lawfully. The agents’ reasons for entering too soon—whether to prevent the destruction of evidence or to save themselves the trouble of obtaining a warrant if their initial search came up dry—would not matter. Although Justice Scalia’s opinion for the Court in *Murray* hinted that the use of a “search first, warrant later” strategy would not go unsanctioned, his later opinion for the Court in *Hudson* would make even a confession of this misconduct irrelevant.

#### F. INEVITABLE DISCOVERY—NIX V. WILLIAMS

The independent source doctrine admits only lawfully obtained evidence. The government must show that its source was untainted by prior illegal acts. In *Nix v. Williams*, however, the Supreme Court approved a doctrine that often admits unlawfully obtained evidence.<sup>285</sup> The Court called this doctrine the “hypothetical independent source” or “inevitable discovery” exception to the exclusionary rule.<sup>286</sup>

##### 1. On a Dark Day in Iowa

Williams, a habeas corpus petitioner, escaped from a mental hospital and killed a ten-year-old girl, Pamela Powers.<sup>287</sup> He agreed to surrender to

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284. *Id.* at 540 n.2.

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

286. *See id.* at 438.

287. *Id.* at 452.

the authorities, who agreed not to question him as they transported him to the county in which the killing occurred.<sup>288</sup>

After he surrendered, Williams appeared in court on a murder charge. His appearance triggered his Sixth Amendment right to counsel and made any interrogation in the absence of his counsel unlawful. Nevertheless, as Detective Leaming and another officer drove Williams across Iowa, Detective Leaming gave him “something to think about”:

They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is . . . [I]f you get a snow on top of it you yourself may be unable to find it. . . . I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [Eve] and murdered . . . . [After] a snow storm [we may not be] able to find it at all.<sup>289</sup>

Williams considered this speech for a time and then led the police to the victim’s body.<sup>290</sup>

Williams’s case produced two Supreme Court decisions. Seven years before *Nix*, in *Brewer v. Williams*, the Supreme Court held that both Williams’s statements indicating guilt and the fact that he brought the police to the body must be excluded as the product of Detective Leaming’s violation of his right to counsel.<sup>291</sup> The issue in *Nix* was whether evidence of the condition of the body itself should be suppressed.

The Supreme Court held that, because the body inevitably would have been discovered in a lawful manner, it need not be suppressed. Before Detective Leaming delivered his Christian burial speech, the Iowa Bureau of Criminal Investigation had begun a search for the body. Two hundred volunteers were proceeding westward in a pattern that eventually would have brought it to light.<sup>292</sup>

Before this Article turns to the Supreme Court’s approval of the inevitable discovery exception, it considers two possible alternative paths to the Court’s result in *Nix*. The Court might have held that, in the absence of flagrant police misconduct, the exclusionary rule is inapplicable to prosecutions for serious crimes of violence. Or it might have held that interrogating a suspect in violation of his right to counsel requires the suppression only of primary and not derivative evidence.

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288. *Id.* at 435.

289. *Id.* at 435–36.

290. *Nix*, 467 U.S. at 436.

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

292. *Nix*, 467 U.S. at 448.

## 2. Suppressing Bodies

Justice Powell once wrote of the exclusionary rule, “The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.”<sup>293</sup> Even a zealous champion of the rule in other contexts might hesitate to apply it when the evidence a killer seeks to suppress is the body of his victim and when the government’s only wrong consists of reminding this killer in the absence of a lawyer that the body was exposed to the elements.

In *Nix*, the Supreme Court emphasized what Williams sought to suppress.<sup>294</sup> It recited Justice Cardozo’s concern in 1926 that “some court might press the exclusionary rule to the outer limits of its logic—or beyond—and suppress evidence relating to the ‘body of a murdered’ victim because of the means by which it was found.”<sup>295</sup>

This Article has observed that, in evaluating the exclusionary rule, it is necessary to weigh incongruities.<sup>296</sup> My own view, like that of the late John Kaplan, is that the escape of drug dealers and gamblers is a lesser evil than the use of unlawfully obtained evidence but that the escape of murderers, spies, armed robbers, and kidnappers is not.<sup>297</sup> I have noted, moreover, that “[a]lthough no judge has formally approved Kaplan’s proposal, nearly all judges reportedly recognize a de facto exception to the exclusionary rule when the evidence a defendant seeks to suppress is a body.”<sup>298</sup>

Strained application of the inevitable discovery doctrine has been a frequent means of implementing this de facto exception. For example, the Kentucky Supreme Court once declared that “the victim’s body inevitably would have been discovered [inside the killer’s apartment], especially as the odor of decomposition increased.”<sup>299</sup> It rejected the suggestion that the killer might have moved the body with the remark that “there is no “constitutional right” to destroy evidence.”<sup>300</sup> The Kentucky court was unwilling to recognize that a criminal might do something *wrong*. Perhaps, in Kentucky, the inevitable discovery exception makes all incriminating evidence admissible because criminals have no constitutional right to conceal it. A few courts, however, have ordered the bodies of murder victims

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293. *Stone v. Powell*, 428 U.S. 465, 490 (1976).

294. *Nix*, 467 U.S. at 446–47.

295. *Id.* at 448 (quoting *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926) (Cardozo, J.)).

296. *See supra* Part I.A.

297. *See* John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1048 (1974).

298. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 258 n.339.

299. *Hughes v. Commonwealth*, 87 S.W.3d 850, 852 (Ky. 2002).

300. *Id.* at 853; *see also* *State v. Beede*, 406 A.2d 125 (N.H. 1979); *State v. Sugar*, 527 A.3d 1377 (N.J. 1987).

suppressed, as the Eighth Circuit did in *Nix*.<sup>301</sup> John Kaplan's proposed limitation of the exclusionary rule might have offered an attractive alternative path to the result the Supreme Court reached in this case.<sup>302</sup>

### 3. Yes, We Have No Tree Fruit

Supreme Court decisions since *Nix* have marked a less attractive path to this result. These decisions have held that violations of the rules articulated in *Miranda v. Arizona*<sup>303</sup> for interrogating suspects require the suppression only of primary evidence and not of secondary fruit. When the statement of a suspect interrogated in violation of *Miranda* reveals the location of a gun, for example, the gun is admissible.<sup>304</sup> An improper two-step interrogation (questioning a suspect in violation of *Miranda*, securing his confession, and then inducing him to repeat his confession after a warning of his rights) can result in exclusion of the second confession—but only when the *Miranda* violation was deliberate, when the purpose of this violation was to produce an admissible second confession, and when the police failed to take appropriate “curative measures.”<sup>305</sup> In such a case, exclusion apparently rests on the failure of the police to warn the suspect “effectively” before obtaining his second confession, not on the fact that the second confession was a product of their initial failure to warn.<sup>306</sup>

The Supreme Court has distinguished violations of the “Fifth Amendment” right to counsel created by *Miranda* from violations of the Sixth Amendment right to counsel created by the Bill of Rights.<sup>307</sup> The Court treats violations of the Sixth Amendment as violations of the “real” Constitution, while it appears to treat violations of the Fifth Amendment right as violations of the “just pretend” Constitution.<sup>308</sup> If the petitioner in *Nix v. Williams* had not appeared before a magistrate, Detective Leaming's

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301. *Nix v. Williams*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984); *see also* *Mitchell v. State*, 742 S.W.2d 895 (Ark. 1988).

302. The principal argument against Kaplan's proposal is that it would greatly reduce the incentive to obey the Fourth Amendment in the cases in which the temptation to violate the Fourth Amendment is strongest. Moreover, even people who favor Kaplan's proposed exception may believe that it should remain *de facto*. Although courts almost never suppress the bodies of murder victims, perhaps law-enforcement officers should remain concerned that they might. Like much of the substantive criminal law, the exclusionary rule may bark harder than it wants to bite. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

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

304. *See* *United States v. Patane*, 542 U.S. 630 (2004).

305. *See* *Missouri v. Seibert*, 542 U.S. 600, 622 (2004). In *Seibert*, Justice Kennedy supplied the decisive fifth vote for excluding the second confession, and a two-step interrogation apparently will lead to exclusion only when the conditions set forth in his concurring opinion are satisfied. *See id.* at 622.

306. *See id.*; *Oregon v. Elstad*, 470 U.S. 298, 300 (1985).

307. *See, e.g.*, *United States v. Wade*, 388 U.S. 218, 226–27 (1967).

308. *See, e.g.*, *Moran v. Burbine*, 475 U.S. 412, 424–25 (1986).

interrogation would have violated only his Fifth Amendment right to counsel. Today, if a violation of the Fifth Amendment right led the police to the body of a murder victim, the Supreme Court would admit the body whether or not a search had begun and whether or not the body would inevitably have been discovered.

Whether secondary evidence derived from an interrogation in violation of the Sixth Amendment right to counsel should be admitted now appears to be an open question. The Supreme Court remanded a case presenting this issue to the Eighth Circuit, which declined to distinguish violations of the Sixth Amendment from violations of *Miranda* and admitted the derivative evidence.<sup>309</sup>

As time passes and causal forces other than a wrongful act by the police contribute to the discovery of evidence, a court may appropriately declare the “taint” of the wrongful act “dissipated” and may admit the evidence despite the fact that the wrongful act was a but-for or a contributory cause of its discovery.<sup>310</sup> Drawing a sharp line between “primary” and “derivative” evidence and excluding only the former, however, cannot be justified in the administration of any exclusionary rule, whether this rule is grounded in the real Constitution or the whimsy of Chief Justice Warren. Refusing to exclude derivative evidence does not reflect a bona fide application of causal principles but merely limits the exclusionary rule by fiat.

As Justice Holmes noted in *Silverthorne Lumber Co.*, there may be no distinction at all between the first use of unlawfully obtained evidence and the second.<sup>311</sup> If an unlawfully interrogated suspect were to write out a confession, excluding this written confession while admitting a photocopy of it would be nonsensical, and admitting a second confession while excluding the first sometimes has much in common with admitting a photocopy. Although the Supreme Court has seemed to treat the exclusion of derivative evidence as a dubious extension of the exclusionary rule, the exclusion of this evidence is often essential to the rule’s coherent operation.<sup>312</sup>

#### 4. Inevitable Discovery and Causation

The inevitable-discovery doctrine determines the scope of the exclusionary rule by applying the principle of but-for causation, and in *Nix*, the Supreme Court embraced this principle wholeheartedly. It maintained that the rule was designed to place the government in neither a better nor a

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309. *United States v. Fellers*, 397 F.3d 1090, 1095 (8th Cir. 2005).

310. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

311. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

312. If the petitioner in *Nix* had said nothing to Detective Leaming but instead had led him to the victim’s body and pointed, would the body have been primary or derivative evidence? Should anyone care?

worse position than it would have occupied if no Fourth Amendment violation had occurred.<sup>313</sup>

When *Nix* was before the Iowa Supreme Court and later the Eighth Circuit, both courts approved the inevitable discovery exception with a significant limitation. This exception would not apply if the police had “act[ed] in bad faith for the purpose of hastening discovery of the [evidence in question].”<sup>314</sup> The Supreme Court rejected this limitation with the remark that it “would put the police in a *worse* position than they would have been in if no unlawful conduct had transpired.”<sup>315</sup> The Court called the lower courts’ limitation of the inevitable discovery exception “formalistic, pointless, and punitive.”<sup>316</sup>

The Court also held that an “inevitable” discovery need not be inevitable. It would be enough for the prosecution to “establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.”<sup>317</sup> To say that evidence probably would inevitably have been discovered is gibberish, but one can guess what the Supreme Court meant. The hypothesized lawful discovery need not be certain or inevitable at all; it need only be probable.

Both *Nix* and the inevitable discovery exception are incompatible with the contributory-causation standard favored by this Article. Detective Leaming took an illegal shortcut to the discovery of evidence. His violation of the Sixth Amendment made discovering the victim’s body easier. Although the government might well have discovered this evidence within several hours if Leaming had obeyed the Constitution, his violation of the Constitution changed the odds and made discovery of the body more certain.

The inevitable discovery exception is likely to sound good to anyone who assumes that causation always means at least but-for causation. When a violation of the Constitution is not a but-for cause of the discovery of

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313. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

314. *State v. Williams*, 285 N.W.2d 248, 260 (Iowa 1979); *accord Williams v. Nix*, 700 F.2d 1164, 1169 (8th Cir. 1983), *rev’d*, 467 U.S. 431 (1984). The courts disagreed about whether Detective Leaming had acted in bad faith for the purpose of hastening discovery of the body. The Iowa Supreme Court said he hadn’t, and the Eighth Circuit said he had. *See id.* at 1170 (declaring that the Iowa Supreme Court’s finding was “not fairly supported by the record”).

Detective Leaming probably was not doing what the Eighth Circuit said he did. He was not acting in bad faith to hasten an inevitable discovery. Instead, he was acting unlawfully to ensure a discovery that he feared might not occur at all. Leaming might even have believed that Williams was the only person who knew where the body was and that, after a snowstorm, neither Williams nor the police would be able to find it. Whether or not he believed that the search led by the Iowa Bureau of Criminal Investigation *probably* would reveal the location of Pamela Powers’s body, he was acting unlawfully to better the odds. Acting to improve the odds would satisfy a requirement of contributory causation but not a requirement of but-for causation.

315. *Nix*, 467 U.S. at 445.

316. *Id.*

317. *Id.* at 444.

evidence, why suppress it? Upon discovering where this exception leads, however, one may hesitate and seek limitations. Most courts and nearly all commentators have done so.

##### 5. Inevitable Discovery When the Police Have Searched Without Warrants or Without Knocking

In both *Segura* and *Murray*, the police seized the challenged evidence only after obtaining valid warrants not based on their earlier unlawful observations.<sup>318</sup> In *United States v. Griffin*, the police also obtained a valid warrant not based on any illegal observation, but the case was slightly different. Police officers seized evidence shortly *before* one of their fellow officers obtained a valid warrant.<sup>319</sup>

In *Griffin*, narcotics agents had probable cause to search an apartment. One of them was sent to obtain a search warrant and the others to secure the apartment. The agents dispatched to secure the apartment, however, broke in and seized drugs without awaiting the warrant. The other agent arrived with the warrant four hours later.<sup>320</sup>

The difference between *Segura* and *Murray*, on the one hand, and *Griffin*, on the other, is the difference between the independent source and the inevitable discovery exceptions to the exclusionary rule. This difference may seem thin. If a magistrate was certain to issue a valid warrant on the basis of lawfully obtained evidence, why would anyone care whether he issued it a moment before or a moment after a search occurred? Unlike a requirement of contributory causation, a requirement of but-for causation leads to both the independent source exception and the inevitable discovery exception. Someone who envisions the issue in exclusionary-rule cases as one of but-for causation may have difficulty telling the two doctrines apart.

Yet refusing to sanction a warrantless search whenever it seemed inevitable that, had it not occurred, the police would have obtained a valid warrant would mean the end of the warrant requirement. Police officers who had probable cause to search but who searched without a warrant could almost always assert convincingly that, if they had not searched illegally, they would have obtained a warrant and discovered the same evidence.<sup>321</sup> And if a warrant issued a moment after a warrantless seizure could prevent exclusion, why not one issued a week or a month later? The Sixth Circuit excluded what the impatient agents seized in *Griffin*, stating that “police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan subsequently to get one. . . . Any other

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318. See *supra* Part VI.D–E.

319. *United States v. Griffin*, 502 F.2d 959, 960 (6th Cir. 1974).

320. *Id.*

321. See *supra* text accompanying notes 191–200.

view would tend in actual practice to emasculate the search warrant requirement of the Fourth Amendment.”<sup>322</sup>

The Sixth Circuit’s argument was convincing, yet no discovery could have been more inevitable than the one in *Griffin*. If the police had not jumped the gun, they soon would have obtained the challenged evidence lawfully. In *Griffin*, one can say with confidence that the wrongful act of the police was not a but-for cause of their discovery. The Sixth Circuit backed away from the concept of but-for causation, however, because it recognized the unfortunate instrumental consequences of applying it.<sup>323</sup> With the notable exception of the Seventh Circuit (whose position is described in the following paragraphs), so have most other courts when the police have seized evidence without a warrant that the Fourth Amendment required them to have.<sup>324</sup>

The Seventh Circuit has applied the inevitable discovery doctrine to evidence gathered by unlawful warrantless searches in several cases, the most recent of which is *United States v. Tejada*.<sup>325</sup> After arresting a narcotics suspect in an apartment, federal agents forced him to the kitchen floor and handcuffed him. Then they searched without a warrant an “entertainment center” in another room. After upholding this search as a lawful incident of the suspect’s arrest(!), the court held in the alternative that the inevitable discovery doctrine applied. Even if searching the entertainment center without a warrant had been unlawful, the agents inevitably would have searched it with a warrant because they had clear probable cause to get one.

Judge Posner’s opinion for the court recognized that applying the inevitable discovery doctrine whenever the police had probable cause to obtain a warrant would leave them with no incentive to obtain warrants.<sup>326</sup> The opinion observed, however, that failing to apply the doctrine “would confer a windfall, in violation of ‘the familiar rule of tort law,’ which has force in the criminal context as well . . . ‘that a person can’t complain about a violation of his rights if the same injury would have occurred even if they had been violated.’”<sup>327</sup> Judge Posner then concluded, “An attractive middle

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322. *Griffin*, 502 F.2d at 961.

323. *Id.*

324. 1 LFAVE, *supra* note 42, at 270 n.77 (citing cases from the Fourth, Sixth, Ninth, and Eleventh Circuits and from numerous state courts).

325. *United States v. Tejada*, 524 F.3d 809 (7th Cir. 2008); *see also* *United States v. Goins*, 437 F.3d 644, 650 (7th Cir. 2006) (declaring it permissible to open a gun case without a warrant because the police had probable cause and inevitably would have obtained a warrant); *United States v. Buchanan*, 910 F.2d 1571, 1573 (7th Cir. 1990) (upholding a warrantless search of a suspect’s clothing because the police inevitably would have sought and secured a warrant to search the hotel room in which the clothing was located); *cf.* *United States v. Souza*, 223 F.3d 1197, 1204–05 (10th Cir. 2000) (declaring that, although the failure to obtain a warrant is usually fatal, the inevitable discovery exception sometimes allows the receipt of evidence obtained through an unlawful warrantless seizure).

326. *Tejada*, 524 F.3d at 813.

327. *Id.* (citation omitted).

ground is to require the government, if it wants to use the doctrine of inevitable discovery to excuse its failure to have obtained a search warrant, to prove that a warrant would certainly, and not merely probably, have been issued had it been applied for.”<sup>328</sup>

The court’s position is indeed a middle ground. On the one hand, it is flatly inconsistent with the Supreme Court’s statement in *Nix* that the government need only “establish by a *preponderance* of the evidence that the information ultimately or inevitably would have been discovered by lawful means.”<sup>329</sup> On the other hand, it is flatly inconsistent with the Supreme Court’s statement in *Agnello* that evidence seized without a warrant must be suppressed “notwithstanding facts *unquestionably* showing probable cause.”<sup>330</sup> The Seventh Circuit’s position thus underscores the incompatibility of the inevitable discovery doctrine (also known as the requirement of but-for causation) and the Court’s traditional treatment of warrantless searches.<sup>331</sup>

The court’s “attractive middle ground” fell short of solving the problem the court noted. The Supreme Court has said that probable cause exists whenever there is “a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>332</sup> *Tejada* removes the incentive to seek warrants only when (this is a mouthful) there is “certainly and not merely probably” a fair probability that evidence will be found. If a “fair probability” that evidence will be found in a particular case is a twenty percent chance, a certainty that a fair probability exists is also a twenty percent chance.<sup>333</sup> It seems odd that a pragmatic, forward-looking, economically minded judge would disapprove a position providing appropriate incentives for the police simply to avoid conferring “windfalls.”<sup>334</sup>

Although courts other than the Seventh Circuit have proclaimed that the inevitable discovery exception should not be allowed to emasculate the warrant requirement, none have explained why a violation of this requirement differs from other violations of the Fourth Amendment. The

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328. *Id.*

329. *Nix v. Williams*, 467 U.S. 431, 445 (1984) (emphasis added).

330. *Agnello v. United States*, 269 U.S. 20, 32–33 (1925) (emphasis added).

331. The Supreme Court in *Nix* apparently was oblivious to the fact that its decision would launch a virus capable of killing *Weeks*, *Mapp*, and *Agnello*. The Court may have assumed without reflection that the inevitable discovery doctrine was compatible with those decisions. *Nix* can be “reconciled” with *Agnello*, however, only through the move the Sixth Circuit made in *Griffin*—declaring that, despite its logic, the inevitable-discovery doctrine is simply inapplicable to cases in which the police have violated the Fourth Amendment by failing to obtain a warrant.

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

333. Or, perhaps, in practice it is a thirty percent chance because “certainty” demands a margin of error. In that event, *Tejada* leaves the police with no incentive to seek warrants when they believe they have a thirty percent chance that they will find what they are looking for.

334. The concluding paragraph of *Tejada* hints that the court’s ruling may be limited to cases in which the police fail to obtain warrants before searching containers and particular pieces of furniture. It may not apply when they enter houses without warrants. *Tejada*, 524 F.3d at 813.

inevitable discovery exception subverts almost all legal obligations equally.<sup>335</sup> The Michigan Supreme Court, for example, relied on this exception when it withdrew the exclusionary remedy from knock-and-announce violations.<sup>336</sup> Most other courts, however, rejected Michigan's position for the same reasons that *Griffin* rejected the government's effort to apply the inevitable discovery exception to warrantless seizures.<sup>337</sup>

Although the *Hudson* Court spoke of but-for causation rather than inevitable discovery, the two formulations are clones. They pose the same question and give the same answers. To say that the police would have obtained the challenged evidence even if they had not violated the Constitution is to say both that this evidence inevitably would have been discovered lawfully and that the constitutional violation was not a but-for cause of its discovery.

#### 6. Even the Good Guys Get It Wrong: Professor LaFave and Justice Breyer on Inevitable Discovery

Although Wayne LaFave disapproves of the ruling in *Hudson*, he considers *Hudson's* statement of the need for but-for causality "unassailable."<sup>338</sup> Someone who truly favored a standard of but-for causation could not consistently support any limitation of the inevitable discovery doctrine, however, and LaFave does. Every limitation of this doctrine—for example, *Griffin's* limitation when the police have seized evidence without a warrant—excludes evidence that the police would have obtained even if they had not violated the Constitution.

LaFave writes:

The concerns expressed by the opponents of the "inevitable discovery" rule are legitimate and ought not be dismissed out of hand. A careful assessment of their arguments, however, indicates that they are directed not so much to the rule itself as to its application in a loose and unthinking fashion. . . . In carving out the "inevitable discovery" exception . . . , courts must use a surgeon's scalpel and not a meat axe.<sup>339</sup>

LaFave then maintains that "the inevitable discovery doctrine should not be utilized . . . to paper over instances in which the police have engaged in unconstitutional shortcuts."<sup>340</sup> The inevitable discovery doctrine, however, never does anything else. Detective Leaming took an unconstitutional

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335. The sole exception is the requirement of probable cause (and it is only sometimes an exception). The inevitable discovery doctrine comes close to telling the police that, once they have probable cause, anything goes. They can ignore all the other rules.

336. *People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999).

337. See *supra* text accompanying note 110.

338. 6 LAFAVE, *supra* note 8, § 11.4(a), at 27.

339. 1 *id.* § 11.4(a), at 269 (4th ed. 2004).

340. 6 *id.* § 11.4, at 29.

shortcut to the discovery of the victim's body in *Nix*, and the police take an unconstitutional shortcut whenever they seize evidence illegally that they would have obtained lawfully in the absence of their improper seizure. LaFave also declares "that the 'inevitable discovery' rule simply is inapplicable in those situations where its use would, as a practical matter, operate to nullify important Fourth Amendment safeguards."<sup>341</sup> How nice it would be to believe it. If this statement were true, not much would be left of the exception.

In his dissenting opinion in *Hudson*, Justice Breyer wrote that the argument of Michigan's counsel "misunderstands the inevitable discovery doctrine."<sup>342</sup> He explained that "'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."<sup>343</sup> Arguing that the discovery in *Hudson* was not independent, Justice Breyer repeated his claim that the unlawful behavior consisted not of failing to knock but of entering unlawfully.<sup>344</sup> He declared once more that if the police had not entered they would not have found the drugs.<sup>345</sup>

Justice Breyer's statement that "'independent' or 'inevitable' discovery refers to discovery that did occur or that would have occurred *despite* (not simply *in the absence of*) the unlawful behavior" appears to miss the distinction between independent and inevitable discovery. Justice Breyer seemed to treat these concepts as indivisible.

As this Article has indicated, the difference between the two doctrines is subtle but important. If, in *Nix*, Detective Leaming had photographed the victim's body and left it in place, a search party unaware of his unlawful action might have discovered the body *despite* his violation. In other words, it might have discovered the body *independently*. If it had, a court could have suppressed Detective Leaming's photographs while admitting the testimony and photographs of the search party. Detective Leaming's violation of Williams's rights would not have been a contributory cause of the evidence actually presented.

If, however, Detective Leaming had discovered the body illegally and taken it to the morgue, the search party no longer could have discovered it *despite* his violation (or *independently*). The inevitable discovery exception, however, might still apply. The issue would be whether the search party *would* have found the body where Williams left it if Detective Leaming had not removed it—in other words, whether they would have found the body *in the absence of* his violation. If Leaming had removed the body, his unlawful

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341. 1 *id.* § 11.4(a), at 271–72 (4th ed. 2004).

342. *Hudson v. Michigan*, 126 S. Ct. 2159, 2178 (2006) (Breyer, J., dissenting).

343. *Id.*

344. *Id.* at 2177.

345. *Id.* at 2179.

actions would have been a contributory cause (though perhaps not a but-for cause) of the government's possession of the body. Perhaps the dissenting Justices' insistence that discovery must occur *despite*, and not simply *in the absence of*, a constitutional violation indicated that they approved only the independent source doctrine and not the inevitable discovery doctrine. It was the dissenters and not Michigan's counsel, however, who misunderstood the inevitable discovery doctrine. They made it sound less threatening to Fourth Amendment rights than it is.

### 7. The Active-Pursuit Limitation

A substantial number of courts have held that the inevitable discovery doctrine applies only when the challenged evidence would have been discovered by an investigation already underway at the time of the constitutional violation. An equal number, however, have rejected this limitation.<sup>346</sup> The dissenters in *Hudson* appeared to endorse what commentators call the "active-pursuit" limitation.<sup>347</sup>

LaFave apparently considers the active-pursuit limitation too narrow. He favors use of the inevitable discovery doctrine in active-pursuit cases and at least one other category of cases as well:

Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these investigative procedures were already in progress prior to the discovery via illegal means . . . or where the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later.<sup>348</sup>

LaFave's co-authored casebook describes as "relatively easy cases" those in which "the evidence discovered through an illegal warrantless search would have been discovered in an inventory search."<sup>349</sup>

Courts have focused on the active-pursuit limitation because it is consistent with the facts of *Nix*; because, unlike the good-faith caveat, it was not foreclosed by the *Nix* opinion; and because the concurring and dissenting justices in *Nix* who sought to describe the majority's holding

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346. See Stephen E. Hessler, Note, *Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 MICH. L. REV. 238, 245 & nn. 38 & 39 (2000) (listing the Second, Fifth, Eighth, and Eleventh Circuits as favoring this limitation and the First, Sixth, Ninth, Tenth, and Third Circuits as opposing it).

347. See *Hudson*, 126 S. Ct. at 2178 (Breyer, J., dissenting) ("The question is not what police might have done had they not behaved unlawfully. The question is what they did do. Was there set in motion an independent chain of events that would have inevitably led to the discovery and seizure of the evidence . . .").

348. 1 LAFAVE, *supra* note 42, at 278-79 (emphasis added).

349. See YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 919 (11th ed. 2005).

narrowly emphasized the fact that the search party in that case was already at work.

Justice Stevens wrote in a concurring opinion:

The uncertainty as to whether the body would have been discovered can be resolved in [the state's] favor here only because . . . petitioner adduced evidence demonstrating that at the time of the constitutional violation an investigation was already under way which, in the natural and probable course of events, would have soon discovered the body.<sup>350</sup>

Justice Brennan's dissent declared, "[T]he Court concludes that unconstitutionally obtained evidence may be admitted at trial if it inevitably would have been discovered in the same condition by an independent line of investigation that was already being pursued when the constitutional violation occurred."<sup>351</sup>

Although the *Nix* majority did not say that "an independent line of investigation already being pursued" was necessary, it lent some color to Justice Brennan's characterization when it wrote that "inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification."<sup>352</sup> A police officer's testimony about the virtuous things he would have done if he had not done the unconstitutional things is not testimony about demonstrated historical facts and often is incapable of verification.

Whether a lawful investigation was already underway is of evidentiary significance in resolving questions of inevitable discovery and but-for causation. An active investigation obviously makes lawful discovery more likely. In addition, there is often more reason to credit testimony about an ongoing investigation than to credit the statements of police officers about what they would have done in a counterfactual world.

The active-pursuit limitation, however, requires courts to draw a yes-or-no line somewhere along a spectrum of investigative plans and activities and to specify the moment when an investigation begins. Was the search in *Nix* underway as soon as an official of the Iowa Bureau of Criminal Investigation decided to conduct it? As soon as this official told someone else of his plan?<sup>353</sup> As soon as he announced the plan publically? As soon as he sought volunteers? As soon as he assessed what resources were available and decided where to search? As soon as the search team assembled? As soon as

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350. *Nix v. Williams*, 467 U.S. 431, 456–57 (1984) (Stevens, J., concurring).

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

352. *Id.* at 444 (majority opinion).

353. *See United States v. Hammons*, 152 F.3d 1025, 1029–30 (8th Cir. 1998) (holding that the government "was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violation" because the officer who violated the Constitution by coercing a suspect's consent had said prior to this violation that, if he failed to obtain the suspect's consent, he would send for a drug-detecting dog).

it took the field? Might it have been enough that the Iowa Bureau of Criminal Investigation previously had conducted large-scale searches for the bodies of murder victims and surely would have done so again?

The more active the pursuit, the more evidentiary significance it has. Rather than litigate about where to locate the start line, courts might examine the entire spectrum of police plans, preparations, and investigative activities. And they might look at other things too. Active pursuit is significant only as evidence, and it is not the only significant evidence.

Williams might have placed his victim's body in the public square so that it would be discovered at daybreak. If he had, the body's lawful discovery would have been more certain than in *Nix* itself, yet the police might not have begun a search or other "active pursuit" at the time Detective Leaming delivered the Christian burial speech. Admitting evidence of the body in *Nix* and not in a case in which Williams had brought Leaming to the public square would make little sense. The active-pursuit limitation guards against self-serving police testimony, but it restricts the inevitable discovery exception artificially.

#### 8. Limiting Inevitable Discovery.

In one respect, the active-pursuit limitation seems not only artificial but backwards. Responding to the Eighth Circuit's concern that, without a good-faith caveat, the inevitable discovery doctrine would reduce the "deterrent effect of the Exclusionary Rule . . . too far,"<sup>354</sup> the Supreme Court wrote in *Nix*, "A police officer who is faced with the opportunity to obtain evidence will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered."<sup>355</sup> The more active the investigation, however, the more likely an officer is to take account of it in deciding whether to take a shortcut.

In *Griffin*,<sup>356</sup> for example, the police were actively pursuing a course that would have led to the lawful discovery of evidence. One agent was seeking a search warrant when the other agents broke into the defendant's home.<sup>357</sup> A magistrate later issued the warrant, leaving no doubt that the course of investigation already underway would have led to lawful discovery. The Sixth Circuit, however, recognized the risk of abuse and did not allow the police to take advantage of the investigation already begun.

The invitation to shortcuts issued by the inevitable discovery doctrine seems especially clear in LaFave's second category of "relatively easy" cases—those in which "the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing

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354. *Nix*, 467 U.S. at 445 (quoting *Williams v. Nix*, 700 F.2d 1164, 1169 n.5 (8th Cir.1983)).

355. *Id.*

356. *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974) (discussed *supra* Part VI.F.5).

357. *Id.* at 960.

event would definitely have occurred later.”<sup>358</sup> Courts frequently invoke the inevitable discovery exception to admit evidence that the police have obtained by searching automobiles without probable cause. The courts note that, if the police had not searched a vehicle unlawfully, they or other officers would have towed it to an impound lot where an officer would have inventoried its contents. The courts then find that the improperly seized evidence would have been discovered at the time of the inventory search.<sup>359</sup> The effect of these rulings is to assure the police that whenever they observe a vehicle in a place from which it is likely to be towed they may search it unlawfully without fear of exclusionary consequences.

LaFave excoriates *Hudson* for accepting the government’s argument that “if we hadn’t done it wrong, we would have done it right.”<sup>360</sup> In the inevitable discovery decisions that he approves, however, the government’s argument is no different. The government maintains, “This is an easy case. If we hadn’t done it wrong, we would have done it right when we conducted an inventory search or when the independent line of investigation we were already pursuing bore fruit.”

Indeed, in every inevitable discovery case, the government makes one of two arguments. It says either “if we hadn’t done it wrong, we would have done it right” or “if we hadn’t done it wrong, someone else would have done it right.” Neither of these claims is attractive, but the claim that “someone else would have done it right” is less troubling. This claim is less likely to rest on the testimony of the offending officers themselves and is less likely to describe a discovery that they anticipated. Perhaps the inevitable discovery exception should be limited to cases in which a private party or a governmental agency other than the offending law enforcement agency would have discovered the unlawfully obtained evidence.

More basically, limitations of the inevitable discovery exception should focus less on ensuring the inevitability of the discovery (as the active-pursuit limitation does) and more on ensuring that the doctrine does not encourage violations of the Fourth Amendment (as the *Griffin* limitation does and as the good-faith limitation rejected in *Nix* would have). This Article has noted the Supreme Court’s statement in *Nix* that “[a] police officer who is faced with the opportunity to obtain evidence will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.”<sup>361</sup> An appropriate restriction might take this statement seriously and limit the inevitable discovery exception to cases in which the offending officers could not have anticipated someone else’s

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358. 1 LAFAVE, *supra* note 42, at 278–79.

359. *See, e.g.*, *United States v. Mendez*, 315 F.3d 132, 137–39 (2d Cir. 2002); *United States v. Kimes*, 246 F.3d 800, 803–05 (6th Cir. 2001).

360. *See supra* text accompanying note 76.

361. *Nix*, 467 U.S. at 445.

discovery of the challenged evidence.<sup>362</sup> Any inevitable discovery exception is incompatible with the standard of contributory causation advocated by this Article, but if the exception were modified to disallow the argument that “if we hadn’t done it wrong, we would have done it right,” a contributory-causation standard could be relaxed to accommodate it.

Moreover, something like an inevitable discovery exception seems essential in one situation. Courts should not use the exclusionary rule to suppress publicly available information. The police might have beaten a suspect with a phone book to force him to reveal his phone number, but even this conduct should not lead courts to suppress the phone number if the police or anyone else could just have opened the book and found it. An unlawful police action should not prevent the use of publicly available information forever.<sup>363</sup> One could invoke causal principles to support this result (if the police had not beaten the suspect, they inevitably would have discovered his phone number lawfully), but one also could state the rule without reference to causal principles (the Constitution never requires the suppression of publicly available information).

G. BRINGING ALONG THE CURIOUS—WILSON V. LAYNE

In *Wilson v. Layne*, police officers violated the Fourth Amendment by allowing journalists to accompany them when they entered a home to make an arrest.<sup>364</sup> The case presented no issue under the exclusionary rule, but the Supreme Court observed in a footnote:

[I]f 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.<sup>365</sup>

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362. One difficulty with this suggested limitation of the inevitable discovery doctrine is that the limitation does not seem to fit the facts of *Nix*. Formally, *Nix* was a case in which the government maintained, “If we hadn’t done it wrong, someone else would have done it right.” Detective Leaming was a member of the Des Moines Police Department. Another agency, the Iowa Bureau of Criminal Investigation, was conducting the search for Pamela Powers’s body. Nevertheless, Detective Leaming was aware of the search, and the two agencies were working together. Once Williams began cooperating by leading unsuccessful searches for the victim’s shoes and a blanket—even before he agreed to reveal the body’s location—the agents supervising the search called it off. These agents joined Leaming before the body was discovered. *Id.* at 435–36.

363. See *United States ex rel. Roberts v. Ternullo*, 407 F. Supp. 1172, 1178 (E.D.N.Y. 1976) (holding that the use of an improper subpoena to obtain mechanics liens does not require suppression of the liens when they were on file in the county clerk’s office under the names of the defendant’s businesses).

364. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

365. *Id.* at 614 n.2.

The presence of reporters or other unauthorized parties during a search does not contribute to the discovery of evidence. Although their presence violates the Fourth Amendment, a contributory-causation standard would not require the suppression of evidence seized during the search. Were the unauthorized parties actively to aid the police in their search, however, the result would be different. Their help would have made the discovery of evidence easier whether they discovered this evidence themselves or simply saved the police from searching in unproductive places. Unlike a standard of but-for causation, a standard of contributory causation would require suppression of the evidence they had helped seize.

## VII. CONCLUSION

Here is a plan for removing the teeth from *Miranda v. Arizona*.

Empirical studies show that more than three-quarters of all suspects under interrogation waive their *Miranda* rights.<sup>366</sup> *Miranda* has reduced the rate at which suspects confess very slightly or not at all.<sup>367</sup> A reasonable inference from the studies is that, when the police have secured a confession in violation of *Miranda*, they probably would have obtained this confession even if they had complied with *Miranda*. Accordingly, under the logic of *Hudson v. Michigan*, the suspect's confession should not be suppressed. The *Miranda* violation was not a but-for cause of the confession. *Hudson* produces a *Miranda* even Torquemada could live with.<sup>368</sup>

But something is wrong with this picture. This illustration<sup>369</sup> reveals that requiring a but-for causal relationship between a governmental wrong and the challenged evidence is neither natural nor inevitable nor "unassailable" in the administration of an exclusionary rule. No one seems ever to have suggested that a concept of but-for causation should limit the rule that confessions obtained following *Miranda* violations must be excluded.

Rather than envision the issue as one of but-for causation, someone might say of a case in which the police obtained a confession without giving the *Miranda* warnings:

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366. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996); see also Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996).

367. Compare Paul G. Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 438 (1996) (claiming that 3.8 percent of the suspects who would have been convicted before *Miranda* avoided conviction by virtue of that decision), with Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 506 (1996) (showing that Cassell's research was seriously defective and that the figure was at most 0.78 percent in the immediate post-*Miranda* period).

368. The suspect certainly should be afforded an opportunity to show that his case differs from the norm and that the inference drawn from the empirical evidence does not fit. In the absence of a but-for causal relationship between the *Miranda* violation and the suspect's confession, however, *Hudson* suggests that the confession should be received.

369. I have borrowed the illustration from Craig Bradley and embellished it. See Bradley, *supra* note 282, at 913.

The suspect had a right to these warnings, and the required warnings *might* have made a difference. The police made their task of securing a confession easier by omitting them. They left out a required step and unlawfully tilted the odds in their favor. The law should provide an incentive for them to do what it instructs them to do, and the suspect's confession should be suppressed.<sup>370</sup>

This Article has sought to make sentiments like these operational by developing a concept of contributory causation.

Prior to the decision in *Hudson*, no more than one-and-one-half Supreme Court decisions were clearly inconsistent with the standard of contributory causation proposed by this Article. They were *Nix v. Williams*, in which the Court approved an inevitable discovery exception to the exclusionary rule, and one-half of *New York v. Harris*, in which the Court admitted one of two statements a suspect made after the police arrested him unlawfully inside his home without a warrant.<sup>371</sup> Dozens of decisions, however (including the other half of *Harris* and such Fourth Amendment landmarks as *Weeks* and *Mapp*), were compatible with a contributory-causation standard and plainly inconsistent with the standard of but-for causation articulated in *Hudson*. In fact, a standard of contributory causation would be more restrictive of the exclusionary rule than the one the Supreme Court traditionally has applied. Traditionally, the Court has called police officers who fail to obtain a warrant or fail to knock trespassers and has ordered the suppression of whatever evidence their wrongful presence enabled them to obtain.

*Hudson* may give rise to an inevitable discovery doctrine without the limitations that lower courts have created in an effort to civilize it. The Supreme Court may hold, for example, that, as long as the police had probable cause for a search, their unlawful failure to obtain a warrant was not a but-for cause of their seizure, for they would have made this seizure even if they had complied with the Constitution. But the Court is unlikely to press *Hudson's* logic to the point of overruling the many cases inconsistent with it. The requirement of but-for causation may instead become part of the "formulaic constitution"—invoked on some occasions and silently disregarded on others.<sup>372</sup> The law of the exclusionary rule may remain ad hoc and incoherent, and tension may persist between the older cases that do not require but-for causation and the newer cases that sometimes do. Were the courts to attempt to resolve this tension without destroying the exclusionary rule, the concept of contributory causation could be useful.

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370. The Supreme Court has not yet said of the failure to give *Miranda* warnings, "As far as we know, civil liability is an effective deterrent here." See *Hudson v. Michigan*, 126 S. Ct. 2159, 2167–68 (2006).

371. Two other decisions—*Segura v. United States* and *Murray v. United States*—were arguably in tension with the proposed contributory-causation standard. See *supra* Part VI.D–E.

372. See Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165–69 (1985).