

Hudson v. Michigan and the Future of Fourth Amendment Exclusion

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I. INTRODUCTION.....	1820
II. THE LOGIC OF THE HUDSON OPINIONS: MAJORITY PREMISES, CONCURRING QUALIFICATIONS, AND DISSENTING CHALLENGES	1821
A. THE MAJORITY	1822
B. THE KENNEDY CONCURRENCE	1832
C. THE DISSENT	1833
III. TASTING HUDSON’S PORRIDGE: POSSIBLE EXTREMES AND MORE LIKELY MIDDLE GROUNDS	1835
A. NARROW UNDERSTANDINGS OF HUDSON: “TOO COLD,” “TOO SMALL,” “TOO SOFT” MORALS OF THE STORY	1836
B. BROAD UNDERSTANDINGS OF HUDSON: “TOO HOT,” “TOO LARGE,” “TOO HARD” MORALS OF THE STORY	1841
C. MIDDLE-GROUND INTERPRETATIONS OF HUDSON: SEARCHING FOR “JUST RIGHT” MORALS OF THE STORY.....	1849
1. The Causation Predicate: The Severability of Fourth Amendment Events.....	1849
2. The Attenuation Exception: A Second Branch Sprouts.....	1862
3. The Cost–Benefit Exception: A Somewhat Creative Use of Familiar Premises.....	1872
IV. CONCLUSIONS.....	1885

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I. INTRODUCTION

Early in my contemplation of *Hudson v. Michigan*,¹ I began to feel a bit like Goldilocks, the golden-haired child who trespassed into the home of the three bears, ate their food, broke their furniture, occupied their beds, and then fled when the bears returned.² This feeling did not arise from a sense that the lessons of *Hudson* and the well-known fairy tale are similar. In fact, I have never been sure of the intended message of Goldilocks,³ and, as will be seen, I remain quite uncertain about the moral of Booker T. Hudson's story, as well. Instead, my feeling sprang from a distinct impression that—like the bowls of porridge that were too hot, too cold, and just right, the chairs that were too large (or hard), too small (or soft), and just right, and the beds that were too hard, too soft, and, once again, just right—the future of the exclusionary rule foreshadowed in *Hudson* might lie at one extreme, at the other, or somewhere in between.

The more I have studied *Hudson* and the intriguing variety of interpretations and uses of it by lower courts in the short time since it was handed down, the more confident I have become that it is susceptible to both extreme and middle-ground interpretations. It can be read as exceedingly narrow, as astonishingly broad, or as an exercise in balance and moderation. Thus, the Goldilocks analogy works, but only to a point. The more I have examined the opinion and its aftermath, the more convinced I am that *Hudson* does not offer three distinct, well-defined possibilities for the exclusionary rule's future. Rather, *Hudson* suggests a number of plausible destinations for the Fourth Amendment suppression remedy, which range across a broad spectrum.

The shortcomings of the Goldilocks analogy, which became apparent as I grew more and more familiar with *Hudson*'s nuances, prompted me to search for a more appropriate fable. The story of the elephant and the six blind men quickly came to mind. In that tale, because each of the sightless men uses his hands to feel a different part of the beast, the result is a sextet of dramatically different descriptions.⁴ Each man's account is a most accurate description of the part he felt, but none comes remotely close to an

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

2. See generally JAN BRETT, *GOLDILOCKS AND THE THREE BEARS* (Dover Publ'ns, Inc. 1996) (1987); Robert Southey, *The Story of the Three Bears*, in *THE GREEN FAIRY BOOK* 234 (Andrew Lang ed., Dover Publ'ns, Inc. 1965) (1892). In some versions, the tale ends with the bears killing the wee intruder. *World Assessment—Goldilocks: What Happens when the Bears Get Home?*, *ECON. OUTLOOK*, Apr. 2001, at 20, 20.

3. At least one source states that Goldilocks is “a cautionary tale warning us to respect others' property and privacy.” BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 216 (1976). If Goldilocks is a tale of respect for privacy and property interests, then it seems like a particularly appropriate fable with which to begin my account of Fourth Amendment exclusion.

4. See generally KAREN BACKSTEIN, *THE BLIND MEN AND THE ELEPHANT* (1992).

accurate picture of the whole pachyderm. By focusing attention on each of the many facets of *Hudson* in isolation and closing one's eyes to its other aspects, it is possible to produce a similar array of depictions of the constituent parts, none of which captures the entire beast. In this Article, my object is to assume the roles of all six blind men and Goldilocks in order to provide an account that encompasses the entirety of *Hudson*. I will identify interpretations that I believe to be the most plausible versions of the exclusionary rule's future, ruling out those that, at present, seem too hot or cold, too large or small, or too hard or soft. Because *Hudson* is a signpost at a multi-pronged fork in the road—a marker that points in many directions at once—I will not offer a single, lucid prediction about the journey that lies ahead. For now, travelers in search of the twenty-first-century exclusionary rule will have to settle for a variety of possibilities and an assessment of their probabilities.

Although my primary focus will be on discerning and interpreting *Hudson's* significance for the future of the Fourth Amendment suppression remedy, evaluations and critiques of the Court's logic and of the future directions that I suggest will appear along the way. My views about the outcomes to be preferred and those to be avoided should be evident by the end. After this introduction, I begin with a thorough foundational description of the *Hudson* majority opinion and Justice Kennedy's concurrence, as well as a cursory depiction of the contrary reasoning and conclusions of the dissenters.⁵ I then dissect the opinion, first entertaining possible extreme interpretations of *Hudson* and explaining why these understandings seem ill-advised. Next, I discuss three understandings that lie between those extremes, describing their contours and exploring how each signifies likely future constrictions of the Fourth Amendment exclusionary rule. Finally, I offer a few modest, concluding reflections.

II. THE LOGIC OF THE *HUDSON* OPINIONS: MAJORITY PREMISES, CONCURRING QUALIFICATIONS, AND DISSENTING CHALLENGES

The main goal here is to lay the foundation for the analyses that follow by closely examining the premises and conclusions of the *Hudson* majority opinion and the significant contributions of Justice Kennedy's concurrence.

5. My treatment of the dissent will be brief. Although some of Justice Breyer's reasoning surely will inform my analysis, I leave thorough exploration of his premises for another day. Barring a change in Court membership, his opinion does not forecast the future of Fourth Amendment exclusion. Suffice it to say that if that opinion could garner majority support due to a change in membership or a change of heart by a Justice currently in the majority, the impact of *Hudson* on the future of the exclusionary rule would be nil. The dissenters believed that every narrowing of the suppression remedy intimated by Justice Scalia's logic was indefensible and unwise. They even rejected the quite limited constriction of the rule effected by *Hudson* in the present—that is, the holding that knock-and-announce violations cannot lead to exclusion. See *infra* Part II.C.

A. THE MAJORITY

Armed with a search warrant for drugs and guns, officers came to Booker T. Hudson's Michigan home, entered, and conducted a search authorized by the warrant.⁶ They found "[l]arge quantities of drugs" and a "loaded gun."⁷ Hudson was charged with "unlawful drug and firearm possession," and he "moved to suppress all the inculpatory evidence" from his trial.⁸ His sole claim was that the officers had violated his Fourth Amendment rights when, after announcing their presence, they waited a mere three to five seconds before entering his home.⁹ According to Hudson, the knock-and-announce rule required greater patience on the officers' parts. The trial court agreed that the officers had violated the knock-and-announce requirement and granted the suppression motion.¹⁰ The Michigan Court of Appeals reversed, "relying on Michigan Supreme Court cases holding that suppression is inappropriate" when officers fail to comply with the knock-and-announce rule before entering and searching a home pursuant to a warrant.¹¹ After Hudson was convicted of possessing drugs, the court of appeals rejected his renewed Fourth Amendment claim, and the Michigan Supreme Court denied review.¹² The single issue before the U.S. Supreme Court was "whether violation of the 'knock-and-announce' rule requires the suppression of all evidence found in the search."¹³

The majority opinion began with a prefatory sketch of the "ancient" heritage of the "common-law principle that law enforcement officers must announce their presence and provide residents with an opportunity to open the door"¹⁴ and of the Court's relatively recent conclusion, in *Wilson v. Arkansas*,¹⁵ that the edict of the common law "was also a command of the

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

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

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

12. *Id.*

13. *Id.* Justice Scalia's opening statement of the issue misleads by suggesting that the question was whether "all" or only "some" evidence secured after an improper entry had to be suppressed. In fact, as will be seen, the real question addressed and resolved by the Court was whether *any* evidence secured in a home after a failure to abide by the knock-and-announce principle is subject to the exclusionary rule. See *infra* note 19 and accompanying text.

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

15. See *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The majority referred to the *Wilson* holding as a "new constitutional rule." *Hudson*, 126 S. Ct. at 2162. Although it was "new" in the sense that prior Court rulings had not decided whether the knock-and-announce rule was part of the Fourth Amendment, *Wilson* held that the Framers had intended to incorporate the rule into the Constitution over two hundred years earlier. See *Wilson*, 514 U.S. at 934 (observing that the Court's effort to define the term "unreasonable" "may be guided by the meaning ascribed to it by the Framers" and concluding that "the Framers . . . thought that the method of an officer's entry into a dwelling was among the factors" relevant to the "reasonableness of a search

Fourth Amendment.”¹⁶ Justice Scalia observed that the rule was “not easily applied,” that there were “many situations” in which exceptions rendered announcement unnecessary, and that the showing needed to justify exemption was not demanding.¹⁷ The majority then asserted that, because the “‘reasonable wait time’ standard” that governed the putative violation in *Hudson* was “necessarily vague,” it is “unsurprising” that officers will generally be “uncertain how long to wait.”¹⁸ The Court then expressed relief that Michigan had conceded a violation in this case—making it unnecessary to decide whether the officers’ delay was too brief—and made it clear that the sole concern in *Hudson* was an issue reserved in *Wilson*: “whether the exclusionary rule is [an] appropriate [remedy] for violation of the knock-and-announce requirement.”¹⁹

The Court then launched into the resolution of this question. Justice Scalia first described the 1914 adoption of the Fourth Amendment exclusionary rule for federal courts in *Weeks v. United States*,²⁰ as well as *Mapp v. Ohio*’s²¹ 1961 application of that rule to the states as a principle of due process.²² He then set the tone for the ensuing analysis by starkly declaring that, despite the rulings in *Weeks* and *Mapp*, “[s]uppression of evidence . . .

or seizure”). Thus, although it was newly announced in 1995, the constitutional mandate was not a novel creation of the Court but had been a part of the Fourth Amendment since the 1791 adoption of the Bill of Rights.

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

17. *Id.* at 2162–63. In *Richards v. Wisconsin*, the Court pointedly declared that only a “reasonable suspicion” of danger, futility, or a threat to effective investigation is needed to suspend the announcement demand. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). The “probable cause” standard—i.e., a “fair probability” of danger, futility, or investigative hindrance—was deemed too demanding for this context. *See id.* The Court’s conclusion in *Richards* that officers did not have to knock and announce their presence and its later conclusion in *United States v. Banks*, 540 U.S. 31, 33 (2003), that officers who had knocked were excused from waiting for occupants to respond, provide illustrations of just how undemanding the reasonable suspicion standard is in the knock-and-announce context. For additional insights into the nature of the concept of reasonable suspicion and the relatively modest factual predicate that can satisfy that standard, readers should consult the opinions that have developed the stop-and-frisk doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968). *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (holding that unprovoked flight in a high-crime area provided reasonable suspicion for a detention); *Alabama v. White*, 496 U.S. 325, 332 (1990) (concluding that limited corroboration of innocuous parts of an anonymous informant’s tip gave rise to reasonable suspicion for a stop).

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

19. *Id.* This statement of the issue is more accurate than the initial statement. *See supra* note 13 and accompanying text. It captures the breadth of the question being resolved—whether the exclusion of evidence found in a dwelling is *ever* an appropriate judicial response to a violation of the knock-and-announce rule during the entry of that dwelling.

20. *Weeks v. United States*, 232 U.S. 383, 389–92 (1914). The *Weeks* Court was unanimous and treated both the search warrant requirement and the suppression sanction as clear, uncontroversial constitutional commands.

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

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

ha[d] *always* been [the Court's] *last resort*, not [its] first impulse."²³ Drawing support from several post-*Mapp* opinions, the Court laid a further foundation of hostility by observing that the substantial costs that exclusion imposes on society²⁴ had led the Court to place a "high obstacle" in the path of those seeking suppression and to reject "[i]ndiscriminate application' of the rule," confining it to situations where it is most effective and where the benefits justify the steep price exacted.²⁵ Contrary to unguarded dicta in *Mapp* that "suggested wide scope for the exclusionary rule," subsequent opinions had rejected a "reflexive" approach that would deem all evidence obtained from violations of the Fourth Amendment inadmissible in court.²⁶ Rather, the modern approach treats the unconstitutionality of a search or seizure and the appropriateness of evidentiary exclusion as quite distinct inquiries.²⁷ At this point, the majority turned to the specific grounds for refusing to extend the exclusionary rule to the evidence found in Hudson's home after the officers' concededly too hasty entry. Justice Scalia detailed three independent bases for denying suppression. The first ground was that the unconstitutionality—the entry without waiting a reasonable period after announcement—had no causal connection to the discovery of drugs and guns in the home.²⁸ Put simply, "the constitutional violation of the illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant . . . and . . . discovered the gun and drugs inside the house."²⁹

23. *Id.* (emphasis added).

24. Justice Scalia noted that it sometimes sets "the guilty free and the dangerous at large." *Id.* The notion that the exclusionary rule "sets the guilty free" is an old theme. See *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (observing that a result of suppression is that "[t]he criminal is to go free because the constable has blundered"). It has found use in modern decisions concerned with the legitimacy of evidentiary suppression. See *Nix v. Williams*, 467 U.S. 431, 447 (1984). On the other hand, the notion that the rule can increase the number of dangerous criminals who are at large and free to prey upon innocent citizens is a new rhetorical twist—one seemingly designed to suggest that the price paid for exclusion is even higher than the injustice of guilty persons escaping conviction.

25. *Hudson*, 126 S. Ct. at 2163 (citing *United States v. Leon*, 468 U.S. 897, 908 (1984)).

26. *Id.* at 2163–64.

27. *Id.* Justice Scalia observed that "but-for" causation alone may not justify exclusion. *Id.* at 2164.

28. *Id.*

29. *Id.* The majority apparently assumed that, during the extra time the officers should have waited before entering, there was nothing that Hudson could have (or would have) done to prevent the discovery of the loaded gun that was tucked into the chair where he sat or the large quantity of drugs found in his home. Perhaps the Court was simply unwilling, as a matter of law, to recognize any possible benefit that a defendant might reap from violence or from efforts to destroy contraband. Put otherwise, the majority might have been saying that Hudson either would have done nothing or was not legally entitled to any advantages from unlawful actions he might have taken.

Because but-for causation between an illegality and the acquisition of evidence is essential for invocation of the exclusionary rule,³⁰ Justice Scalia could have ended his opinion at this point.³¹ His conclusion about the absence of a causal connection between the knock-and-announce violation and the discoveries in the home foreclosed application of the *Mapp* rule to this case. Justice Scalia continued, however, turning to additional, broader grounds for declaring the rule inapplicable to Hudson's gun and drugs.

The majority accurately observed that, "even if the illegal entry . . . could be characterized as a but-for cause of discovering [the gun and drugs inside the house]," such causation did not necessarily dictate suppression.³² Under the attenuation exception to the exclusionary rule, the causal connection between an unconstitutional search or seizure and the acquisition of evidence "can be too attenuated to justify exclusion."³³ The

30. Although a causal connection between illegality and discovery is not a "sufficient" ground for exclusion, it is a "necessary" predicate. *Hudson*, 126 S. Ct. at 2164; *Powell v. Nevada*, 511 U.S. 79, 89 (1994); *Segura v. United States*, 468 U.S. 796, 830 (1984) (Stevens, J., dissenting). The exclusionary rule has never extended beyond evidence found as a direct or derivative result of an illegal search or seizure. *Cf. Murray v. United States*, 487 U.S. 533, 536–37 (1988) (noting that the exclusionary rule presumptively extends to direct and derivative products). The rule works by "removing the incentive to disregard" the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *see also Elkins v. United States*, 364 U.S. 206, 217 (1960) (asserting that the purpose of the exclusionary rule is to "compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it"). That is why the Court long ago recognized the independent source doctrine, which holds that evidence acquired by independent, legal means is not subject to exclusion despite the fact that officers have engaged in a related unreasonable search or seizure. *See Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("If knowledge of them is gained from an independent source they may be proved like any others . . ."). To exclude evidence that lacks a but-for causal link to an illegality would be to put the officers in a worse position than they would have been in had they not acted illegally. *See Nix v. Williams*, 467 U.S. 431, 443 (1984) (observing that the prosecution should not be put in a worse position because of police misconduct). This would go beyond merely eliminating incentives by preventing the state from making use of illegally obtained "profits." Although one could rationally defend such a constitutional sanction, the Supreme Court has never endorsed—and, in fact, has eschewed—such a "punitive approach." *Id.* at 445.

31. The fact that he did not pen a short, simple opinion that rested solely on the absence of causation is just one of many indications that the *Hudson* majority was bent upon accomplishing more than simply eliminating the exclusionary remedy for knock-and-announce violations.

32. *Hudson*, 126 S. Ct. at 2164. In *Wong Sun v. United States*, the Court made it clear that a but-for causal connection does not necessitate exclusion of the evidence. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (declaring that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police"). In essence, the Court was declaring that exclusion extends only to the "fruit of the poisonous tree" and that not every product of a constitutional wrong is a fruit of that wrong.

33. *Hudson*, 126 S. Ct. at 2164. The majority observed that this exception could be traced to "the early days of the exclusionary rule." *Id.* In support, it quoted *Wong Sun*, an opinion handed down just two years after *Mapp*. *Id.* (quoting *Wong Sun*, 371 U.S. at 487–88). The Court was apparently referring to the "early days" of the application of the exclusionary sanction to the states. In fact, there is a much earlier predicate for the attenuation doctrine, one that was

majority declared that attenuation could be found in two quite different situations. First, the doctrine can apply “when the causal connection is remote.”³⁴ Alternatively, and more important in *Hudson*, even when there is “a direct causal connection” between unconstitutional conduct and the discovery of evidence, attenuation “occurs when . . . the interest protected by the constitutional guarantee that has been violated would not be served by suppression.”³⁵ According to the Court, this second branch of the attenuation doctrine explains the silence in prior exclusionary rule opinions regarding “the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement.”³⁶

The search warrant requirement protects our entitlement to “shield” our “persons, houses, papers, and effects” from observation or acquisition by the government.³⁷ The exclusion of evidence that the government obtains by means of a warrantless search “vindicates that entitlement.”³⁸ Put otherwise, because the government has acquired evidence by breaching a rule whose very object is to deny access to that evidence, preventing the government from using that evidence is a rational, congruent response. According to Justice Scalia, however, the “quite different” purposes of the knock-and-announce rule “do not include the shielding of potential evidence” from the government.³⁹ Instead, its distinctive aims are (1) to protect “human life and limb” from the perils that could be posed by the self-defensive reactions of “surprised resident[s]”;⁴⁰ (2) to protect property from damage or destruction by affording occupants “the opportunity to comply with the law”;⁴¹ and (3) to safeguard a narrow class of privacy and dignity interests by affording occupants an “‘opportunity to prepare themselves for’ the entry of the police”—that is, to furnish residents the

closer in time to the announcement of the federal exclusionary rule in *Weeks*. In *Nardone v. United States*, the Court acknowledged that the connection between a police illegality and the discovery of evidence can “become so attenuated as to dissipate the taint” and render the evidence admissible. *Nardone v. United States*, 308 U.S. 338, 341 (1939). This declaration preceded *Mapp* by over two decades and was relied upon in *Wong Sun*. See *Wong Sun*, 371 U.S. at 487 (quoting *Nardone*, 308 U.S. at 341).

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

35. *Id.*

36. *Id.* at 2165. It seems more than disingenuous to suggest that this novel branch of the attenuation doctrine is the reason for the Court’s failure to indicate that knock-and-announce violations could be grounds for suppressing evidence. Justice Scalia proffered no rational basis for his speculation. The absence of such indications is more likely due to the fact that the issue had never been before the Court and the Court had not gone out of its way to address the question in dicta.

37. *Id.* (quoting U.S. CONST. amend. IV).

38. *Id.* at 2165.

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

40. *Id.*

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

chance “to collect [themselves] before answering the door.”⁴² Because the “knock-and-announce rule has never protected . . . [an] interest in preventing the government from seeing or taking evidence described in a warrant,” and because “the interests that *were* violated” by the failure to wait a reasonable time before entering Hudson’s home had “nothing to do with the seizure of evidence,” suppressing the evidence found by the officers would not have served the values underlying the knock-and-announce command.⁴³ Consequently, the second branch of the attenuation doctrine rendered “the exclusionary rule . . . inapplicable” in *Hudson*.⁴⁴

One might have thought that two independent reasons for not excluding the evidence found in Hudson’s home would have been sufficient. The majority, however, was not content to stop. Instead, it provided yet a third independent reason for refusing to exclude the firearm and narcotics discovered in Hudson’s home—that the costs of suppression outweighed any deterrent benefits that society might attain. According to Justice Scalia, even if there is a causal connection between unconstitutional conduct and the discovery of the evidence, and even if that connection is not attenuated in either relevant sense,⁴⁵ the exclusionary sanction is

42. *Id.* (quoting *Richards*, 520 U.S. at 393 n.5). It is arguable that Justice Scalia’s account of the values preserved by the knock-and-announce rule is incomplete—i.e., that it sells short the purposes of the requirement that officers provide occupants with notice of their identity and purpose. The ban on unannounced entry is probably not intended to afford individuals a sporting chance to hide or dispose of incriminating objects that the government has grounds to search for and seize. It may well not be designed to afford them a chance to conceal unanticipated indicia of illegality that police otherwise would find during a lawful search. It is entirely possible, however, that the time between announcement and entry might serve an interest in preserving the privacy of legitimate objects or information that one would prefer not to expose to the eyes of others—including law enforcement officers. Justice Scalia seemed determined to minimize the importance of the knock-and-announce rule and to create a new exception to the exclusionary rule—a version of the attenuation exception that applies to evidence with an unattenuated connection. He did not even entertain the possibility that a privacy interest in shielding from government scrutiny legitimate objects not named in a warrant could be one of the objects of the constitutional constraint upon unannounced entries. For a somewhat broader explanation of the rule’s purposes, see *Payton v. New York*, 445 U.S. 573, 617 (1980) (White, J., dissenting) (observing that the knock-and-announce rule “protects individuals against . . . fear, humiliation, and embarrassment” and prevents officers from “frighten[ing] members of the family” and “seizing items in plain view”). Cf. *Richards*, 520 U.S. at 393 n.5 (asserting that the “interests implicated by an unannounced, forcible entry should not be unduly minimized” and that those “interests are not inconsequential”).

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

44. *Id.*

45. *See id.* (“Quite apart from the requirement of unattenuated causation . . .”). By leading with this phrase, Justice Scalia—who is known to place a lot of emphasis on language, grammar, and structure, *see, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 81 (1994) (Scalia, J., dissenting) (opining that the text and grammatical structure of a federal child-pornography statute meant that strict liability was the only defensible interpretation)—made it clear that he was about to discuss an entirely independent and sufficient basis for holding the exclusionary rule inapplicable and denying Hudson the suppression remedy.

“never” available unless the gains in terms of deterring official illegality “outweigh [the] substantial social costs” of suppression.⁴⁶ The majority deemed the “costs here” to be “considerable”⁴⁷ and then described them. One cost is the “grave adverse consequence that the exclusion of relevant incriminating evidence always entails”—“the risk of releasing dangerous criminals into society.”⁴⁸ Two additional costs would result from “imposing [the] massive remedy [of exclusion] for . . . knock-and-announce violation[s]”⁴⁹: Courts would experience an unprecedented level of extensive, burdensome litigation at both the trial and appellate levels,⁵⁰ and the excessive caution of officers who fear losing evidence would produce “preventable violence against officers” and the avoidable “destruction of evidence.”⁵¹

According to the Court, the weight on the deterrent side of the balance is diminished by two significant factors—the weakness of officers’ incentives to violate the knock-and-announce rule and the availability today of other deterrent mechanisms for violations. In the majority’s view, officers do not have strong incentives to violate knock-and-announce constraints. When

46. *Hudson*, 126 S. Ct. at 2165 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998)). By saying that exclusion is “never” employed except when the deterrent gains outweigh the social costs, the Court is clearly placing the burden on proponents of exclusion to demonstrate that the gains in enforcing Fourth Amendment guarantees in this way are more substantial than the costs of barring probative evidence from the courtroom. *See id.* at 2163 (observing that the costs of suppression “present[] a high obstacle for those urging [its] application” (quoting *Scott*, 524 U.S. at 364–65)).

47. *Id.* at 2165. While the use of the word “here” might seem to restrict the analysis to *Hudson*’s case, the remainder of the discussion makes it clear that the word “here” refers to cases in which the officers have in some way violated the knock-and-announce rule.

48. *Id.* The emphasis on the release of “dangerous criminals into society” is a new rhetorical device employed to augment the weight on the costs side of the scales, making it even more difficult to justify suppression. The exclusionary rule is being accused of not only distorting the quest for justice, but also of increasing the risks of harm that law-abiding members of society must face.

49. *Id.* at 2165–66.

50. *Id.* at 2166. According to Justice Scalia, there would be “a constant flood of alleged failures to observe the rule.” *Id.* Because a defendant would have little to lose and an “enormous” amount to gain from making such a claim, and because the ambiguity of various aspects of the knock-and-announce regime would make it “difficult” for “trial court[s] to determine” and “appellate court[s] to review” whether officers have complied, the judicial system “would experience *as never before* the reality that ‘[t]he exclusionary rule . . . requires extensive litigation to determine whether particular evidence must be excluded.’” *Id.* (emphasis added) (quoting *Scott*, 524 U.S. at 366).

51. *Hudson*, 126 S. Ct. at 2166. The majority was essentially predicting that the “incongruent remedy” of suppression for knock-and-announce violations would cause officers to wait longer than necessary because of the uncertainties inherent in the reasonable-wait-time standard: Officers would not want to suffer the “massive” consequence of evidentiary suppression because they acted too precipitously, and they would have a hard time figuring out when they had waited long enough. To ensure that they would not render evidence inadmissible, police would postpone entries for unnecessarily long periods of time, thereby affording occupants opportunities to take up arms and dispose of incriminating objects.

incentives are weak, there are fewer instances of noncompliance, and a sanction designed to discourage transgressions simply cannot yield the same benefits it could in a world where potent inclinations to disregard the rule prompt frequent violation. Put simply, “deterrence of knock-and-announce violations is not worth a lot,” because officers are not powerfully motivated to ignore the rule’s commands.⁵²

In addition, there are existing devices that already furnish the deterrence needed to overcome whatever incentives an officer might have not to comply.⁵³ In the majority’s view, it would be unwise to ignore post-1961 remedial developments, which have compensated for “the inadequacies of a legal regime” that prompted the *Mapp* Court to conclude that exclusion was a “necessary deterrent[t].”⁵⁴ One pertinent development is the “slow but steady expansion” of federal civil-rights remedies,⁵⁵ including

52. *Id.* According to the *Hudson* majority, because violations of the search warrant rule can lead to the acquisition of “evidence that could not otherwise be obtained,” officers have strong motivations to ignore that requirement. *Id.* However, officers cannot “realistically” expect that a failure to honor the knock-and-announce rule would yield anything but “the prevention of destruction of evidence and the avoidance of life-threatening resistance.” *Id.* Because these dangers “suspend the knock-and-announce requirement anyway,” there is “hardly” a need to seek deterrence through evidentiary suppression. *Id.* (emphasis omitted). As I understand it, Justice Scalia is saying that because officers can legally achieve the goals that might motivate them to transgress the knock-and-announce rule’s dictates, they have little, if any, reason to act unconstitutionally. One might argue, to the contrary, that in cases where officers cannot demonstrate the dangers that justify unannounced entry, those dangers might still provide quite potent incentives to ignore the requirement. An officer’s objectively unworkable, but nonetheless genuine, fear that an occupant might respond with violence if given too much time would seem to furnish a compelling incentive to enter unannounced or before a reasonable wait. It seems entirely plausible that self-preservation, a reason not to abide by knock-and-announce restrictions, could provide a stronger incentive than the discovery of evidence that Justice Scalia believes provides powerful motivation to ignore the warrant rule. Moreover, the interest in forestalling the destruction of evidence sought under a warrant seems like it might well be as compelling as the evidence-discovery incentive that the majority believes motivates officers to ignore the warrant requirement.

53. While rejecting *Hudson*’s argument that “without suppression there [would] be no deterrence of knock-and-announce violations,” the majority went out of its way to assert that, even if that were the case, suppression would “not necessarily” be justified. *Id.* “[M]any forms of police misconduct” go “similarly ‘undeterred,’” and some involve violations of rights arguably “more significant than the right not to be intruded upon in one’s nightclothes” and situations where the police have “arguably greater” incentives than they do “for disregarding the knock-and-announce rule.” *Id.* at 2166–67. To the majority, the fact that suppression is not available in those cases makes it clear that the absence of effective deterrence alone is not a sufficient basis for invoking a suppression sanction that is not otherwise justified by the logic that underlies the exclusionary rule.

54. *Id.* at 2167.

55. *Id.* The Court asserted that the growth of 42 U.S.C. § 1983 (2000)—which provides a civil remedy against those acting “under color of any statute, ordinance, regulation, custom, or usage, of any state”—began the year *Mapp* was decided and that this statute was “extended to reach the deep pocket of municipalities” seventeen years later in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Hudson*, 126 S. Ct. at 2167. Moreover, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, decided a full decade after *Mapp*, afforded civil relief against

the legislative authorization of the recovery of “attorney’s fees for civil-rights plaintiffs.”⁵⁶ The Court cited both a marked increase in the willingness of plaintiffs to seek civil relief for misconduct and the significant growth in the “number of public-interest law firms and lawyers who specialize in civil-rights grievances.”⁵⁷ The majority found it appropriate to assume that “civil liability is an effective deterrent” in the knock-and-announce context.⁵⁸ A second post-*Mapp* deterrent development “is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”⁵⁹ Thus, the majority relied upon (1) “increasing evidence that police forces . . . take the constitutional rights of citizens seriously”; (2) broad reforms in police education, training, and supervision; and (3) the growth of sources that teach the police what is required, how to honor guarantees, and “how to craft . . . effective . . . internal discipline.”⁶⁰ Justice Scalia observed that cities themselves can be liable for failing “to teach and enforce constitutional requirements,”⁶¹ and he found it “not credible to assert that” the career-limiting impact of “internal discipline” will fail to deter the professionals who staff modern departments.⁶²

In sum, because the incentive to violate the knock-and-announce rule is “minimal” and the alternative deterrents “are substantial—incomparably greater than” they were at the time of *Mapp*—any additional deterrence that might be afforded by suppressing evidence did not outweigh the “considerable” social costs of “applying the exclusionary rule to knock-and-announce violations.”⁶³ The cost–benefit balance provided an additional, distinct reason why “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified” for violations of the knock-and-announce rule.⁶⁴

federal officers for Fourth Amendment violations. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971).

56. *Hudson*, 126 S. Ct. at 2167 (referring to 42 U.S.C. § 1988(b) (2000)).

57. *Id.*

58. *Id.* at 2167–68. The Court cited two other cases in which it had allegedly indulged this assumption: *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), and *Nix v. Williams*, 467 U.S. 431 (1984). See *Hudson*, 126 S. Ct. at 2168. These two cases do not support the proposition that it is appropriate to suspend the exclusionary rule’s operation for a particular type of Fourth Amendment wrong on the basis of an *assumption* that civil remedies are effective.

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

60. *Id.*

61. *Id.*

62. *Id.* The Court, in passing, mentioned the “evidence” that “increasing use of . . . citizen review can enhance police accountability,” but it did not describe this evidence or cite a source that might support its assertion. *Id.*

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

64. *Id.* The final part of Justice Scalia’s opinion was devoted to discussing three cases that “confirm[ed] [the] conclusion that suppression is unwarranted in this case.” *Id.* For purposes of this Article, a description of this portion of the opinion is unnecessary.

Hudson is a house built on three distinct and independent foundations.⁶⁵ The first foundation—the lack of a causal connection between the illegal entry and the discovery of the evidence—is a well-established ground for denying suppression.⁶⁶ The second foundation—attenuation because suppression would not serve the limited interests furthered by the knock-and-announce requirement—is a novel interpretation of a long-accepted exception to the exclusionary rule.⁶⁷ The final foundation—the balance of social costs imposed against the benefit of deterrence gained by exclusion—is the dominant analytical thread in modern exclusionary rule jurisprudence.⁶⁸ Its use in *Hudson* as a self-

65. The first foundation—no causation—was sketched with utmost brevity and has the most limited potential for restricting the exclusionary rule. The second foundation—attenuation—was fleshed out at somewhat greater length and has broader potential to cabin the suppression remedy. The final foundation—cost-benefit balancing—was explored and explained at greatest length and would seem to harbor the greatest possible threat to the future of the *Weeks-Mapp* sanction.

66. *Powell v. Nevada*, 511 U.S. 79, 89–90 (1994) (Thomas, J., dissenting) (observing that “causation is a necessary . . . condition for suppression”); *Segura v. United States*, 468 U.S. 796, 815 (1984) (“[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.”).

67. The attenuation exception dates back to *Nardone v. United States*, which noted that the connection between the illegality and the discovery of evidence “may have become so attenuated as to dissipate the taint.” *Nardone v. United States*, 308 U.S. 338, 341 (1939); see also *supra* notes 32–36 and accompanying text (discussing the attenuation doctrine). The exception has been reaffirmed in more than one modern exclusionary rule decision. See, e.g., *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (relying on the attenuation doctrine as a basis for admitting a witness’s testimony that was the but-for product of an illegal search); *Brown v. Illinois*, 422 U.S. 590, 598–99 (1975) (discussing and applying the attenuation doctrine of *Nardone*); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (holding that a statement made after an illegal arrest was admissible because “the connection between the arrest and the statement had ‘become so attenuated as to dissipate the taint’” (quoting *Nardone*, 308 U.S. at 341)). In all of these cases, the attenuation claim rested on the diminution of the causal connection between the illegality and the discovery of evidence. It seemed inherent in the name and character of and the rationale for the attenuation exception that it could not apply when there was a close, direct connection between a wrong and the evidence. By definition, an “attenuated” connection is one that is weakened by time, intervening events, or the nature of the illegality. See *Brown*, 422 U.S. at 603–04 (concluding that the connection between an illegal arrest and an arrestee’s confession may be attenuated based on the lack of “temporal proximity of the arrest and the confession, the presence of intervening circumstances, and . . . the purpose and flagrancy of the official misconduct” (citation and footnote omitted)). As will be seen, there is, at most, very minimal support in the case law for the alternative branch of attenuation described and relied upon in *Hudson*—a branch that applies no matter how close the physical and temporal relationship between illegality and evidence acquisition and no matter how deliberate or egregious the violation.

68. See, e.g., *James v. Illinois*, 493 U.S. 307, 319–20 (1990) (using a cost-benefit analysis in refusing to extend the impeachment exception to defense witnesses); *United States v. Leon*, 468 U.S. 897, 906–07 (1984) (“Whether the exclusionary sanction is appropriately imposed . . . must be resolved by weighing the costs and benefits . . .”); *United States v. Calandra*, 414 U.S. 338, 349 (1974) (observing that the Court must balance the costs and benefits when “deciding whether to extend the exclusionary rule”).

sufficient ground for placing an entire category of Fourth Amendment violation beyond the reach of the suppression remedy is unprecedented.

B. *THE KENNEDY CONCURRENCE*

Justice Kennedy provided the critical fifth vote for the result in *Hudson* in a six-paragraph concurrence that purported to agree with all of the reasoning described above.⁶⁹ His agreement, however, was actually qualified in quite significant ways. First, Justice Kennedy stressed that the knock-and-announce requirement is rooted in “ancient principles in our constitutional order” and that violations of the shelter it provides for “the sanctity of the home” are not “trivial.”⁷⁰ The “[s]ecurity” it furnishes for our castles, in his view, “must not be subject to erosion by indifference or contempt.”⁷¹ More important, Justice Kennedy pointedly declared that the *Hudson* decision did not cast doubt on “the continued operation of the exclusionary rule,” but was “only” a narrow holding that knock-and-announce violations do not “justify suppression.”⁷² Moreover, that holding rested on the premise that “the causal link between a violation . . . and a later search is too attenuated,” and a “failure to wait at the door cannot properly be described as having caused the discovery of evidence” in a home.⁷³ A couple of other statements by Justice Kennedy—one that expressed sympathy with one of the majority’s broader premises and another that sounded a note of warning—merit mention. Justice Kennedy did allude to the other remedies for Fourth Amendment violations that had been and could be developed.⁷⁴ On the other hand, he hinted ever so cautiously that a “widespread pattern” of knock-and-announce violations, particularly against victims unable to “protest” effectively, could prompt a modification of the general

69. The reasoning of the majority that I have summarized is contained in Parts I, II, and III of Justice Scalia’s opinion. See *Hudson*, 126 S. Ct. at 2162–68. Justice Kennedy asserted that he “join[ed] those Parts.” *Id.* at 2171 (Kennedy, J., concurring in part and concurring in the judgment). The only Part that he refused to endorse was the concluding, nonessential discussion of three supposedly supportive precedents in Part IV of the majority opinion. Justice Kennedy was not convinced that two of those cases had “as much relevance” as the majority suggested. *Id.*

70. *Id.* at 2170.

71. *Id.* Justice Kennedy seemed to want to distance himself from the majority’s undeniably pejorative suggestions about the knock-and-announce rule.

72. *Id.*

73. *Id.* at 2170–71. Unlike Justice Scalia, Justice Kennedy made no clear distinction between a lack of causation and attenuated causation. His blending of the two and his failure to discuss the question of whether suppression would serve the underlying purposes of the knock-and-announce rule create some uncertainty about his attitude toward the new face of attenuation unveiled in *Hudson*.

74. *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring in part and concurring in the judgment). He referred to current police training and discipline, civil remedies, and the possibility of future fortification by more “detailed regulations or legislation.” *Id.*

“requirement of causation that limits our discretion in applying the exclusionary rule.”⁷⁵

C. THE DISSENT

The four dissenting Justices disagreed not only with the holding in *Hudson*, but also with virtually every premise in the majority opinion. In a lengthy, detailed opinion,⁷⁶ Justice Breyer explained why exclusion must remain available for knock-and-announce violations and identified flaws in each link of the majority’s logical chain. The dissent opened with an accusation that the majority had destroyed the primary incentive for compliance with the knock-and-announce rule, thereby weakening, if not eradicating, the protection it affords.⁷⁷ Justice Breyer asserted that a failure to abide by the knock-and-announce rule renders an ensuing search unreasonable and that the “need for deterrence” is “at least comparable” to the need to deter other Fourth Amendment transgressions.⁷⁸ In the dissent’s view, the assumption that other remedies are adequate is, quite simply, contrary to *Mapp* and lacks support in fact or precedent.⁷⁹ Moreover, because the “substantial social costs” that the majority cited were no different from those resulting from exclusion for other Fourth Amendment wrongs, the majority’s reasoning was nothing less than “an argument against

75. *Id.* at 2171. From his tone and choice of words, it seems clear that Justice Kennedy viewed this option as a remote possibility that might be too costly to entertain even if officers were to ignore routinely the rule against unannounced home entries. These words of caution to law enforcement are reminiscent of, though more tepid and tentative than, a concurring admonition issued by Justice Blackmun when the Court announced the “reasonable reliance on a search warrant” exception to the exclusionary rule. *See* *United States v. Leon*, 468 U.S. 897, 927 (1984) (Blackmun, J., concurring) (“If it should emerge from experience that . . . the good-faith exception . . . results in a material change in police compliance with the Fourth Amendment, we shall have to reconsider what we have undertaken here.”). Perhaps Justice Kennedy was concerned that the reaction of law enforcement to *Hudson*’s elimination of the suppression sanction might be an epidemic of intentional violations of the knock-and-announce principle and wanted to at least float the idea that the Court had the authority to counteract such a reaction. His concern might have been prompted by the official exploitation of *Oregon v. Elstad*, 470 U.S. 298 (1985), and the consequent threat to *Miranda* that led him to declare *Elstad* inapplicable to “deliberate two-step interrogations” whose purpose is to undermine the protection against compelled self-incrimination. *See* *Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment) (concluding that *Miranda* warnings are ineffective if officers deliberately use the two-step strategy and successive confessions are related in content, unless curative measures are taken to ensure the efficacy of the warnings).

76. Counting his Appendix, Justice Breyer’s seventeen-page *Hudson* dissent is almost twice as long as the *Hudson* majority opinion. *Compare Hudson*, 126 S. Ct. at 2171–88 (Breyer, J., dissenting), *with id.* at 2160–70 (majority opinion).

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

78. *Id.* at 2175 (challenging the majority’s notion that officers are not motivated to violate the rule and, therefore, that there is a lesser need for deterrence).

79. *Id.* (responding to the majority’s heavy reliance on alternative deterrents in striking the cost–benefit balance).

the . . . exclusionary principle itself.”⁸⁰ The dissent maintained that it was simply wrong to say that evidence found following a knock-and-announce violation lacks a but-for causal connection to the unlawful entry that is inseparable from the ensuing search.⁸¹ The dissent also challenged the assertion that the attenuation doctrine dictated admission of the evidence, accusing Justice Scalia of giving that doctrine “new meaning” and pinpointing three distinct and “serious problems” with the Court’s reliance on attenuation to deny suppression.⁸² Finally, Justice Breyer asserted that the majority’s reliance on the unclarity and uncertainties of the knock-and-announce rule, and the resulting harms to officers, was an assault on the rule and an argument against “meaningful compliance.”⁸³ He suggested that concerns about the knock-and-announce rule should be addressed directly, not by disingenuously describing it as an important Fourth Amendment principle but, at the same time, rendering it unenforceable.⁸⁴ In response to the majority’s “simple unvarnished conclusion” that “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified,”⁸⁵ the dissenters asserted that “experience” confirmed that “without suppression there is little

80. *Id.* at 2177.

81. *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting). Justice Breyer took pains to demonstrate that the lack-of-causation argument rested on a misunderstanding of the inevitable discovery doctrine. *Id.* at 2178. Although the majority opinion placed no explicit reliance on that doctrine, some lower-court opinions prior to *Hudson* had interpreted the inevitable discovery limitation on the exclusionary rule to be applicable to evidence discovered after failures to honor the knock-and-announce rule. *See, e.g.*, *United States v. Sutton*, 336 F.3d 550, 552 (7th Cir. 2003) (recognizing that some courts had refused to apply the inevitable discovery doctrine, but asserting that “precluding suppression as a remedy [does not] render[] the [knock-and-announce] rule a mere formality”); *United States v. Jones*, 149 F.3d 715, 716–17 (7th Cir. 1998) (“It is hard to understand how the discovery of evidence . . . could be anything but ‘inevitable’ once the police arrive with a warrant . . .”). *But see* *United States v. Shugart*, 889 F. Supp. 963, 977 (E.D. Tex. 1995) (“[A]pplication of the inevitable discovery doctrine to evidence seized after a clear violation of the ‘knock-and-announce’ statute would completely viscerate the fundamental privacy and safety interests the statute seeks to secure.”); *State v. Lee*, 821 A.2d 922, 941 (Md. 2003) (“[T]he application of the inevitable discovery rule to a knock and announce violation runs counter to established Supreme Court knock and announce jurisprudence.”).

82. *Hudson*, 126 S. Ct. at 2180 (Breyer, J., dissenting). First, the majority had slighted the “values, purposes, and objectives underlying the knock-and-announce requirement.” *Id.* Second, Justice Scalia’s novel interpretation of attenuation was misguided. Whether the interests furthered by the rule are implicated is “beside the point,” because the object of exclusion is “more general” protection of privacy values by the deterrence of misconduct. *Id.* at 2181 (quoting *James v. Illinois*, 493 U.S. 307, 319 (1990)). Finally, the “interest-based” version of attenuation “depart[ed] from prior law,” which “simply” prescribed a determination of whether “the unconstitutional search produced the evidence.” *Id.*

83. *Id.* at 2182.

84. *Id.* at 2182–83.

85. *Id.* at 2185 (quoting *id.* at 2168 (majority opinion)).

to deter . . . violations” of the “important” constitutional safeguard against unannounced home entries.⁸⁶

III. TASTING HUDSON'S PORRIDGE: POSSIBLE EXTREMES AND MORE LIKELY MIDDLE GROUNDS

A review of lower-court opinions handed down in the short time since *Hudson* confirms that several different interpretations are possible. Some courts have been inclined to read it narrowly, confining its erosive impact. Others have discerned premises that support additional, incremental erosion of the suppression remedy. And still others have perceived a basis for challenging the legitimacy of *Weeks* and *Mapp* and an invitation to dramatically curtail the exclusionary rule. None of these understandings of *Hudson* is irrational, for there is ammunition to support each. My primary goal is to discern and explain the significance of *Hudson* for the future of the Fourth Amendment exclusionary rule, assessing the merits of the variety of possible interpretations.⁸⁷ My hope is that a relatively clear picture of the long-term impacts of *Hudson* will emerge.

86. *Id.* at 2185–86.

87. It merits mention that this Article focuses solely on the Fourth Amendment exclusionary rule. Some Supreme Court references to “the” exclusionary rule seem to suggest the view that all constitutional restrictions are identical in nature. *See, e.g.,* *Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (treating suppression of a coerced confession under the Due Process Clause as the exclusionary rule); *Nix v. Williams*, 467 U.S. 431, 446 (1984) (referring to the suppression of evidence based on a deprivation of the Sixth Amendment right to counsel as the exclusionary rule). Nothing could be farther from the truth. When statements are compelled or coerced from a suspect, the privilege against compulsory self-incrimination and the guarantee of due process bar those statements from trial because their introduction would violate the Constitution. *See* *United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality opinion) (opining that the “Self-Incrimination Clause contains its own exclusionary rule,” is “self-executing,” and provides “automatic protection” against the introduction of “involuntary statements” (quoting *Chavez v. Martinez*, 538 U.S. 760, 769 (2003) (plurality opinion))); *Chavez*, 538 U.S. at 777 (Souter, J., concurring) (observing that the Fifth Amendment is concerned with preventing the “courtroom use of . . . compelled, self-incriminating testimony”); *id.* at 774 (plurality opinion) (noting that convictions based on evidence obtained by “brutal” methods that “shoc[k] the conscience” violate the Due Process Clause (quoting *Rochin v. California*, 342 U.S. 165, 172, 174 (1952))). *Miranda*-based exclusion is primarily, perhaps even exclusively, a safeguard against courtroom violations of the Fifth Amendment privilege that are “risked” by the introduction of statements secured in violation of *Miranda*’s scheme. *See Patane*, 542 U.S. at 639 (plurality opinion) (asserting that *Miranda* created a “presumption of coercion” because of the “unacceptabl[e] . . . risk” that introduction of a statement given without warnings would violate “a suspect’s privilege against self-incrimination”); *id.* at 641 (suggesting that the deterrence of officers’ out-of-court conduct may not be an objective of *Miranda* exclusion because Fifth Amendment rights cannot be violated by mere failures to warn). Exclusion based on deprivations of the pretrial right to counsel announced in *Massiah v. United States* would also seem to be essential to prevent in-court violations of the counsel guarantee. *See Massiah v. United States*, 377 U.S. 201, 207 (1964) (holding that “the defendant’s own incriminating statements,” which were deliberately elicited after indictment without counsel, could not “constitutionally be used . . . against him at his trial”); *see also* James J. Tomkovicz, *The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 765

A. *NARROW UNDERSTANDINGS OF HUDSON: "TOO COLD," "TOO SMALL," "TOO SOFT" MORALS OF THE STORY*

Some readings of the message sent by the *Hudson* majority are quite narrow and do minimal damage to the exclusionary rule. Each reflects a possible understanding of the breadth of the "holding" in *Hudson*—that is, the legal answer to the only issue that was actually before the Court. Any interpretation broader than those entertained here qualifies as dictum reaching beyond the facts and legal question raised by the case.

Some interpretations are implausibly restrictive, even though they can find support in the facts of the case, the language of the opinion, or both. Justice Scalia's initial phrasing of the question before the Court contains an intimation that *Hudson's* holding could be narrow. He framed the issue as "whether violation of the 'knock-and-announce' rule requires the suppression of *all* evidence found in the search."⁸⁸ Based on this language, one might construe *Hudson* as a ruling that *some* evidence discovered after a knock-and-announce violation is admissible, but that other evidence *could* be suppressed.⁸⁹ If the Court's intent was to draw a line between admissible and excludable evidence acquired by searches that follow knock-and-announce violations, what might the nature of that line be?

One possible criterion is the *type of knock-and-announce violation* that occurs. A holding constrained by the *facts of Hudson*, which involved a presumptively too hasty entry following an announcement, would be confined to failures to wait a reasonable time after knocking and announcing. That sort of improper entry would not taint evidence, while other sorts—a failure to give any notice whatsoever, for example—might lead to exclusion.

Another line is tied to the *basis for the search of the home* that follows the unlawful entry. Exclusion would be unwarranted when officers fail to knock and announce properly and then search "*pursuant to a lawful warrant.*"⁹⁰ This limitation can also be found in *Hudson's* facts and in the majority's

(1989) ("[S]ixth amendment exclusion . . . may simply be part and parcel of the in-court right to the assistance of counsel."). Because other exclusionary rules are fundamentally different in nature from the Fourth Amendment rule, the discussion of *Hudson's* impact on evidentiary suppression may have no relevance to other "exclusionary rules."

88. *Hudson*, 126 S. Ct. at 2162 (emphasis added).

89. The concluding language of Justice Scalia's opinion could also support the view that the Court was determining which evidence would be admissible despite a knock-and-announce violation and which evidence would be inadmissible due to such a transgression. After describing the opinion in *United States v. Ramirez*, 523 U.S. 65 (1998), 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?" *Hudson*, 126 S. Ct. at 2170 (emphasis added). Thus, the *Hudson* opinion is "bookended" with potential intimations that some evidence is suppressible as a result of knock-and-announce violations.

90. *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

description of Michigan Supreme Court cases relied on by the Michigan Court of Appeals.⁹¹ Failures to comply in other situations—for example, when a search is based on an absent co-occupant’s consent or is justified by an exigency that excuses compliance with the warrant requirement but not compliance with the knock-and-announce rule—might support suppression.⁹²

Another possible line might be based on the *character of the evidence contested*. *Hudson* could be understood to hold that evidence specified in a warrant (or evidence that is the object of a consented-to or exigent-circumstances entry) is immune from exclusion, while evidence or contraband seen and seized under the “plain view” doctrine could be suppressed based on the illegal entry. This reading could find roots in the facts and in the Court’s declaration that the knock-and-announce principle does not protect an “interest in preventing the government from seeing or taking *evidence described in a warrant*.”⁹³

One might also construe *Hudson*’s holding as inextricably tied to, and limited by, the concept of *causation*. Evidence, like the gun and drugs in

91. *Id.* at 2162 (majority opinion) (“[T]he Michigan Court of Appeals . . . rel[ie]d on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to [a] warrant but without proper ‘knock and announce.’”). Justice Kennedy, the essential fifth vote for the opinion and result in *Hudson*, stated that, “[i]n this case,” suppression was not required because the evidence was discovered during a “search pursuant to lawful warrant.” *Id.* at 2171 (Kennedy, J., concurring in part and concurring in the judgment).

92. Cases acknowledging a need to knock and announce typically involve the execution of search warrants. *See, e.g.*, *United States v. Banks*, 540 U.S. 31, 34 (2003) (addressing an alleged knock-and-announce violation during the execution of a search warrant); *Ramirez*, 523 U.S. at 68 (discussing a knock-and-announce claim in a case where officers obtained a “no-knock” search warrant); *Richards v. Wisconsin*, 520 U.S. 385, 387–88 (1997) (analyzing an alleged knock-and-announce violation where officers obtained a search warrant as part of a felony drug investigation); *United States v. Granville*, 222 F.3d 1214, 1216 (9th Cir. 2000) (discussing a knock-and-announce violation where officers possessed a search warrant); *United States v. Bates*, 84 F.3d 790, 797 (6th Cir. 1996) (considering officers’ failure to announce their execution of a search warrant). There is no reason why the requirement should be inapplicable to some situations involving entries under exceptions to the warrant requirement. The purposes of the knock-and-announce requirement would seem to be equally relevant to some home searches authorized by third-party consent given by an absent co-occupant. It also seems conceivable that a need to act without taking the time to secure a warrant—that is, a search pursuant to exigency—might not justify a failure to expend the time and effort involved in knock-and-announce compliance. Flight or a showing that a person would be departing with non-destructible, non-concealable items could justify a warrantless search, but they might not be bases for refusing to announce. *But see* *United States v. Sanger*, 44 F. App’x 937, 941 (10th Cir. 2002) (“[F]light[] [that] rais[es] concerns regarding evidence destruction . . . justifies an unannounced forced entry.”).

93. *Hudson*, 126 S. Ct. at 2161 (emphasis added). This arguably suggests that the rule *does* protect an interest in keeping *other* evidence away from the eyes and hands of the state. Coupling this suggestion with the opening hint that the issue was whether “all” evidence was subject to suppression, one might maintain that *Hudson* held only that knock-and-announce violations cannot justify the exclusion of evidence specified in a warrant, but can support suppression of other evidence found in the home.

Hudson, would be admissible if its acquisition was not causally connected to the failure to knock and announce. Evidence that would not have been discovered but for the unconstitutional entry, however, could fall within reach of the exclusionary rule.⁹⁴ This reading finds support in the Court's reiteration of the longstanding premise that "but-for causality is . . . a necessary . . . condition for suppression," followed by its declaration that "[i]n this case, . . . the constitutional violation of an illegal manner of entry was not a but-for cause of obtaining the evidence."⁹⁵ According to this view, if a resident can show that an officer should have afforded her additional time and that this extra time would have enabled her to dispose of or conceal the item sought by the officers (or some other unanticipated item that was discovered in plain view), a court might exclude that item due to the violation. Or if a resident, for example, were to prove that he was on his way to the door with the object described in the warrant and would have handed it over to the authorities at the door, thereby rendering the home search unnecessary and unjustified, he might establish causation between a too hasty entry and the discovery of unexpected items spotted in plain view. Those items could be suppressed due to this causal connection to the Fourth Amendment wrong.

Each of these limited readings of *Hudson* is ultimately indefensible. Justice Scalia surely did not intend his initial phrasing of the question—whether a court must exclude "all" evidence—to suggest any limitation on the Court's ultimate holding. No Fourth Amendment violation mandates the suppression of *all* evidence found as a result. It would be beyond extraordinary for the Court even to entertain the possibility that *all* evidence might be inadmissible by virtue of an illegal entry. There is no conceivable reason why recognized exclusionary rule exceptions⁹⁶ should be inapplicable to knock-and-announce violations. The opening statement of the issue, taken literally, is a rhetorical question that could only be answered

94. Of course, like the products of any unconstitutional search or seizure, evidence with a causal connection would be admissible if there were *another* established ground for excepting it from the exclusionary rule.

95. *Hudson*, 126 S. Ct. at 2164 (first emphasis added). Justice Kennedy agreed, because a "failure to wait at the door" for a reasonable period of time following an announcement that precedes a "lawful [five-hour] search . . . cannot properly be described as having caused the discovery of the evidence." *Id.* at 2171 (Kennedy, J., concurring in part and concurring in the judgment). He added that "[i]n this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant." *Id.* (emphasis added).

96. These include, for example, (1) the independent source exception, *see* *Murray v. United States*, 487 U.S. 533, 542 (1988); (2) the attenuation exception, *see* *Wong Sun v. United States*, 371 U.S. 471, 491 (1963); (3) the inevitable discovery exception, *see* *Nix v. Williams*, 467 U.S. 431, 440 (1984); and, perhaps, (4) the "reasonable reliance on a warrant" exception, *see* *United States v. Leon*, 468 U.S. 897, 922 (1984). Evidence could also be admissible to impeach the defendant's testimony. *See* *United States v. Havens*, 446 U.S. 620, 627–28 (1980).

in the negative.⁹⁷ Moreover, Justice Scalia restated the issue accurately later in his opinion: The real question “squarely before” the Court was “whether the exclusionary rule is appropriate for violation of the knock-and-announce requirement.”⁹⁸

The claim that *Hudson* addressed only the failure to wait a reasonable time following announcement is refuted by: *both* formulations of the issue as extending to knock-and-announce violations; the Court’s reliance on other uncertainties imbedded in the rule;⁹⁹ the invocation and application of the “attenuation” exception based upon the particular interests that underlie *every* facet of the knock-and-announce safeguard;¹⁰⁰ and the *unqualified* assertion that the cost–benefit balance tips against suppression.¹⁰¹ The same premises belie a restriction of *Hudson* to evidence found from warranted searches.¹⁰² Neither phrasing of the issue shows any concern with the basis of the search following the illegal entry, and the reason for the reasonableness of the home search has no bearing on the majority’s attenuation or cost–benefit analyses. Moreover, the no-causation predicate hinged on the fact that the home search was *lawful* and extends to any basis of lawfulness.¹⁰³

97. I confess that I am not sure why Justice Scalia chose to phrase the question in this potentially misleading fashion. Perhaps it was a rhetorical move, designed to tilt the case against application of the exclusionary rule from the outset. As will be seen, it would not be the only rhetorical maneuver in his opinion. On the other hand, he may have meant to ask whether all evidence was *admissible* and simply misspoke.

98. *Hudson*, 126 S. Ct. at 2163. This remedial issue was open because *Wilson v. Arkansas*, 514 U.S. 927 (1995), the case in which the Court first announced that the knock-and-announce principle had constitutional stature, “specifically declined to decide” this “issue” of “remedy.” *Hudson*, 126 S. Ct. at 2163.

99. *See Hudson*, 126 S. Ct. at 2162–63 (suggesting that the rule is “not easily applied” because of the “many situations in which it is not necessary to knock and announce” due to “reasonable suspicion” of violence, evidence destruction, or futility (quoting *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997))).

100. *Id.* at 2164. According to the majority, prior opinions involving suppression of the “fruits of . . . warrantless searches . . . [said] nothing about the appropriateness of exclusion to vindicate the interests *protected by the knock-and-announce requirement*,” because suppression is unjustified unless it furthers the values of the constitutional rule violated. *Id.* at 2165 (emphasis added).

101. *See id.* at 2165–68. Later in this Article, I will undertake a close examination of the *Hudson* Court’s cost–benefit reasoning. *See infra* Part III.C.3. That discussion makes it clear that there is nothing unique about the costs and benefits of the particular type of knock-and-announce violation that occurred in *Hudson*.

102. The negligible support for this reading comes from the facts of *Hudson* and the Court’s description of the Michigan precedent that controlled the outcome in the lower courts. *See supra* note 90 and accompanying text.

103. *See Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring in part and concurring in the judgment) (“When, for example, a violation results from want of a 20-second pause but an ensuing, *lawful search* lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence.” (emphasis added)).

Confining *Hudson's* holding to “evidence described in a warrant” is equally irrational, because each of the majority’s three critical premises is equally pertinent to any evidence found in a home.¹⁰⁴ The causation demand precludes the suppression of *any* evidence lacking a but-for connection to a violation—not just evidence described in a search warrant. The purposes of the knock-and-announce rule identified by the Court—the premise for its reliance on the attenuation exception—did not include shielding undescribed items from the authorities.¹⁰⁵ And the cost–benefit balance struck in *Hudson* would be no different for evidence that had not been specified in a search warrant.

Finally, the independence of the alternative rationales for the majority opinion refutes any contention that suppression could result if a defendant were to establish a causal connection between a knock-and-announce violation and the acquisition of evidence in his particular case. The Court pointedly declared that “even if the illegal entry . . . could be characterized as a but-for cause of discovering what was inside” *Hudson's* home,¹⁰⁶ suppression was unjustified because both the attenuation doctrine and the cost–benefit balance rendered “the massive remedy of suppressing evidence of guilt” inapplicable.¹⁰⁷

The last narrow reading of *Hudson* is the broadest characterization—and the only plausible understanding—of its “holding.”¹⁰⁸ Put simply, *Hudson* held that *no* type of knock-and-announce violation can be the predicate for excluding *any* primary or derivative evidence found during *any* otherwise lawful search of a home that follows.¹⁰⁹ The nature of the knock-and-announce transgression, the basis for deeming the ensuing search lawful, the character of the evidence found, and the existence of but-for

104. This confinement finds support *only* in the facts of *Hudson* and in a single, passing observation that the knock-and-announce rule does not guard against the government finding evidence specified in a warrant.

105. *Hudson*, 126 S. Ct. at 2165. Surely, this was no oversight and is more telling than the limiting language used to describe what the rule *does not* safeguard. The explanation for the Court’s reference to “evidence described in a warrant” may well be that the evidence in *Hudson* was of that variety. In any event, it is inconceivable that the majority would have ordered suppression of the gun if the officers had possessed a warrant only for contraband narcotics and had seized the firearm in “plain view” during a lawful search.

106. *Id.* at 2164.

107. *Id.* at 2168.

108. I refer to this as the broadest reading of the “holding” because I cannot see how the “holding” of *Hudson* could reach beyond the knock-and-announce context. The *Hudson* Court could not have resolved the question of whether exclusion is a justified remedy for any other sort of Fourth Amendment transgression.

109. It seems clear that this is how Justice Kennedy understood the holding that he was joining. See *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring in part and concurring in the judgment) (“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.”). Nothing in his opinion suggests that he held a narrower view of the import of the majority opinion.

causation would all be irrelevant to the applicability of the exclusionary rule. The persuasive reasons for rejecting each of the more restrictive readings demonstrate why *Hudson* must be understood to reach at least this far.¹¹⁰ At a minimum, *Hudson* defined and adopted a “knock-and-announce-rule exception” to the exclusionary rule.¹¹¹ Suppression claims must be based on some other kind of Fourth Amendment transgression.¹¹²

Before explaining why I believe that *Hudson*’s message and import extend beyond its holding, I hasten to the other end of the spectrum to explore, and ultimately reject, the most expansive possible readings.

B. BROAD UNDERSTANDINGS OF HUDSON: “TOO HOT,” “TOO LARGE,”
“TOO HARD” MORALS OF THE STORY

When I began this project, I thought there were several “narrow” readings of *Hudson*’s message, but only one interpretation that could be appropriately described as “broad.” Closer examination of the opinion led me to conclude that *Hudson* tells a tale of two possible expansive futures. One is a regime in which the exclusionary rule governs only violations of the search warrant requirement. The other, broadest construction is that *Hudson* foreshadows and anticipates outright abolition—a brave new world without a Fourth Amendment exclusionary rule.¹¹³ In this Part, I briefly explain and assess the merits of these two possibilities.¹¹⁴

The first expansive understanding of *Hudson* restricts evidentiary suppression to one type of Fourth Amendment violation—transgressions of

110. I say “at least this far” because, in my view, *Hudson*’s significance for lawyers and judges charged with its implementation is broader than its technical holding.

111. Justice Scalia came fairly close to an explicit statement of this interpretation when he concluded that, because “the social costs of applying the exclusionary rule to knock-and-announce violations are considerable[,] the incentive to such violations is minimal[,] . . . and the extant deterrents . . . are . . . incomparably greater[,] . . . [r]esort to the massive remedy of suppressing evidence of guilt is unjustified.” *Hudson*, 126 S. Ct. at 2168. Moreover, earlier in the opinion, he announced that the “question squarely before” the Court was “whether the exclusionary rule is [an] appropriate [remedy] for violation of the knock-and-announce requirement.” *Id.* at 2163. This formulation of the issue contains no limitation based on the nature of the violation, the basis of the home search, the character of the evidence sought to be excluded, or the existence of a causal connection. It encompasses all violations and all evidence found and was surely meant to indicate that the Court was deciding whether exclusion is *ever* an appropriate response to this type of Fourth Amendment wrong.

112. The narrower interpretations are like the blind men’s descriptions of the elephant. See *supra* note 4 and accompanying text (describing the tale of the six blind men and the elephant). Each is inadequate because it focuses on only a single constituent of the majority opinion and fails to account for the other components that contribute to and define the contours of the entirety.

113. One might instead view this as a brave “old” world, a resurrection of pre-*Mapp*, pre-*Weeks* law.

114. As was made clear in the previous subsection, statements supporting any of these expansive readings of *Hudson* are dicta, for they were not needed to resolve the knock-and-announce question before the Court.

the longstanding “cardinal principle” that warrantless searches are per se unreasonable.¹¹⁵ Exclusion would be available only when officers have found evidence as a result of failing to secure a valid warrant in circumstances where no exception applies.¹¹⁶ No other kind of Fourth Amendment wrong would justify barring probative evidence from a trial. Thus, for example, an arrest of a suspected felon in a public place on less than probable cause could not support the suppression of evidence found on his person, because there is no requirement that officers secure a warrant in order to effect such an arrest.¹¹⁷ Similarly, a detention on less than “reasonable suspicion” of criminal activity¹¹⁸ that yields tangible evidence or admissions by a suspect would have no exclusionary consequences.

The first indication that the Court could choose this course is *Hudson’s* foundational characterization of the two exclusionary rule cornerstones, *Weeks v. United States*¹¹⁹ and *Mapp v. Ohio*.¹²⁰ According to Justice Scalia,

115. See *Katz v. United States*, 389 U.S. 347, 356–57 (1967) (holding that even if officers possess probable cause that could support issuance of a search warrant and confine their search to the scope that a judge could authorize, their search is nevertheless per se unreasonable if they proceed without prior judicial authorization); see also *Johnson v. United States*, 333 U.S. 10, 13–14 (1948) (concluding that even though the facts clearly established probable cause for a search, the absence of a search warrant alone rendered that search unreasonable). Despite intense criticism leveled by commentators and Justices, see, e.g., *California v. Acevedo*, 500 U.S. 565, 581–84 (1991) (Scalia, J., concurring in the judgment) (contesting the legitimacy of the Court’s warrant rule jurisprudence); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 23–50 (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 762–81 (1994), the Court has adhered to the view that the warrant rule is a fundamental tenet of Fourth Amendment jurisprudence. See *Acevedo*, 500 U.S. at 580 (referring to the search warrant rule as a “cardinal principle” (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978))); *Trupiano v. United States*, 334 U.S. 699, 705 (1948) (stating that it is a “cardinal rule that . . . law enforcement agents must secure and use search warrants wherever reasonably practicable”). On the other hand, the number and breadth of warrant rule exceptions that the Court has recognized and developed cast some doubt upon the depth of its commitment to the warrant requirement. See *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring in the judgment) (declaring that the warrant rule has “become so riddled with exceptions that it [is] basically unrecognizable”).

116. I say “would be available” because the extant exceptions to the exclusionary rule would still apply to evidence secured in violation of the warrant demand. For example, evidence that is “attenuated” from the illegality would be admissible. See *supra* notes 32–35 and accompanying text. Also, evidence would not be suppressed if it was secured in reasonable reliance on an invalid warrant issued by a neutral and detached magistrate. See *United States v. Leon*, 468 U.S. 897, 922 (1984).

117. See *United States v. Watson*, 423 U.S. 411, 415 (1976) (holding that an officer may effect a warrantless arrest of a suspect in a public place upon probable cause that he or she has committed a felony).

118. The evolved doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968), allows limited investigatory detentions of persons when police have a “reasonable suspicion” of criminal activity—i.e., less than probable cause to believe that a crime has been or is being committed. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (approving a detention based on a suspect’s unprovoked flight in a high crime area because those two facts supported the officer’s reasonable suspicion of criminality).

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

Weeks had “adopted the federal exclusionary rule for evidence that was unlawfully seized from a home *without a warrant* in violation of the Fourth Amendment,”¹²¹ and *Mapp* had applied “*the same rule* to the states through the Fourteenth Amendment.”¹²² If the exclusionary rules promulgated by *Weeks* and *Mapp* were so limited, perhaps subsequent extensions of the suppression remedy to other Fourth Amendment wrongs were unjustifiable missteps. A return to less expansive origins might be in order.

In addition, the *Hudson* majority held that the “attenuation” doctrine precluded suppression because exclusion would not serve the objectives of the knock-and-announce rule.¹²³ In stark contrast stood the search warrant rule, a guarantee that affords an entitlement “to shield ‘[our] persons, houses, papers, and effects,’ . . . from the government’s scrutiny.”¹²⁴ Suppressing the fruits of a warrantless search is appropriate because “[e]xclusion . . . vindicates th[e] entitlement” granted by the warrant rule.¹²⁵ The Court’s identification of the warrant requirement alone as a Fourth Amendment promise whose purposes are served by exclusion could support confinement of the exclusionary rule to situations where police officers neglect the warrant demand.

The cost–benefit analysis in *Hudson* also contains seeds that could ripen into an exclusionary rule that is restricted to warrant rule violations. After noting that suppression based upon violations of ambiguous knock-and-announce standards could produce a costly avalanche of claims and burdensome litigation of difficult issues,¹²⁶ Justice Scalia maintained that exclusion based on warrant rule violations would not entail similar costs because “compliance with” that safeguard “is readily determined.”¹²⁷ And in

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

121. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006) (emphasis added). This description could support an even broader reading of *Hudson* and the forecast of an even narrower suppression sanction—one that is triggered only by *home* searches in violation of the warrant rule. This limitation might draw support from precedents indicating that home privacy is at the core of, and is of higher value than other privacies sheltered by, the Fourth Amendment. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 220 (1986) (“[A] home is a place in which a subjective expectation of privacy virtually always will be legitimate”); *Payton v. New York*, 445 U.S. 573, 585–86 (1980) (recognizing that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed” and observing that “[i]t is a ‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable” (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972))); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

122. *Hudson*, 126 S. Ct. at 2163 (emphasis added).

123. *Id.* at 2164–65.

124. *Id.* at 2165 (quoting U.S. CONST. amend. IV).

125. *Id.*

126. *See supra* note 50 (noting the litigation likely to result from knock-and-announce rule uncertainties).

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

assessing the need for exclusion, the majority declared that the alternative sources of deterrence today were “greater than the factors deterring *warrantless entries* when *Mapp* was decided.”¹²⁸ One need not strain to hear a suggestion that the exclusionary rule might be aimed solely at deterring violations of the warrant rule. In sum, at various junctures, the majority opinion in *Hudson* points toward the possibility of a future exclusionary rule restricted exclusively to evidence secured in violation of the warrant rule.¹²⁹

The most expansive reading of *Hudson* is that it is the beginning of the end for the Fourth Amendment exclusionary rule. Multiple signposts in the majority opinion point in that direction. One is the negative, misleading, and limiting characterizations of *Mapp*. After observing that evidentiary exclusion had “*always* been [the Court’s] last resort, not [its] first impulse,” Justice Scalia cast *Mapp* as a decision that had neglected to “speak . . . guardedly” and that, instead, in “[e]xpansive *dicta* . . . suggested wide scope for the exclusionary rule.”¹³⁰ The Court had “long since rejected” the inappropriately “‘reflexive’” attitude toward suppression reflected in *Mapp*’s unguarded rhetoric.¹³¹ In essence, the majority portrayed *Mapp* as

128. *Id.* at 2168 (emphasis added). The reference to warrantless *entries* could again be seen as an effort to further limit the exclusionary rule to warrantless home invasions. See *supra* note 121.

129. I admit to some uncertainty about the precise scope of an exclusionary rule confined to warrant rule violations. The rule would seem to encompass the fruits of all searches conducted without valid warrants that could not qualify for one of the exceptions to the search warrant rule. Thus, for example, a search of a home pursuant to a patently invalid warrant would support suppression. In addition, a search of a vehicle on less than probable cause, a search beyond the area of immediate control of a lawful arrestee, a search pursuant to involuntary consent, an inventory search not adhering to standard procedures, or a frisk not supported by a reasonable suspicion that the suspect was armed and dangerous would all provide foundations for suppression. Because none of these searches could satisfy the criteria prescribed for exemption from the search warrant demand, each would constitute a violation of the search warrant rule. Evidence would probably not come within the bounds of the exclusionary rule if it were secured by means of an illegal *seizure* of a person or of property or an unreasonable *manner* of carrying out a substantively justified search.

130. *Hudson*, 126 S. Ct. at 2163 (emphasis added).

131. *Id.* at 2164. Although the vast majority of exclusionary rule opinions in the years since *Mapp* have evinced a hostile, stingy attitude toward the suppression of evidence, not every post-*Mapp* majority has been deprecatory. In *James v. Illinois*, the Court held that illegally secured evidence may not be used to impeach defense witnesses. *James v. Illinois*, 493 U.S. 307, 308–09 (1990). In support of this ruling, the majority acknowledged the importance of “truth” but asserted that “various constitutional rules limit the means” of searching “for truth in order to promote other values embraced by the Framers and cherished throughout our Nation’s history.” *Id.* at 311 (citing *United States v. Havens*, 446 U.S. 620, 626 (1980)). The majority pointedly added that “[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a *necessary cost* of preserving overriding constitutional values,” *id.* (emphasis added), and concluded with the observation that maintaining the proper scope of the exclusionary rule was essential “to ensure [the protection of] individual liberty from arbitrary or oppressive police conduct.” *Id.* at 319–20. It seems clear that the *James* Court did not consider suppression to be a “last resort” or an odious alternative to be eschewed whenever possible.

something of an outlier, a rogue decision whose approach was out of step with the grudging treatment of exclusion that had both preceded and followed it. In addition, despite his recognition earlier that *Weeks* had first adopted the exclusionary rule in 1914, Justice Scalia described the 1960s as “the early days of the exclusionary rule.”¹³² This abbreviation of the rule’s historical credentials might be seen as a further effort to undermine its legitimacy. After suggesting that the *Mapp* approach was anomalous, the majority refused to acknowledge that the rule had originated nearly a century earlier—rooting it instead in that suspect era of dubious criminal procedure rulings, the Sixties.¹³³

On the one hand, the Court denied the exclusionary rule’s longevity by tracing it to *Mapp*. On the other hand, it cast *Mapp* as a grizzled precedent that was handed down “long ago” and was responsive to “a legal regime that existed almost half a century ago.”¹³⁴ *Mapp* had endorsed the suppression sanction *before* the development of a number of other tools for enforcing the Fourth Amendment’s dictates.¹³⁵ One could not be blamed for hearing a not-so-subtle suggestion that this controversial legal doctrine had hung on past its expiration date.

Another undeniable abolitionist predicate is *Hudson’s* suggestion that today’s legal regime—unlike the regime that existed at the time of *Mapp*—provides a number of alternative deterrent mechanisms. Justice Scalia’s litany includes (1) civil-damages remedies that reach state officials, federal officials, and “the deep pocket of municipalities”;¹³⁶ (2) congressional authorization for the recovery of “attorney’s fees for civil-rights plaintiffs”;¹³⁷ (3) an increased willingness of citizens and lawyers to seek civil relief and a greater number of “lawyers who specialize in civil-rights grievances”;¹³⁸ and (4) an increase in police department “professionalism,” which has yielded a “new emphasis on internal police discipline,” more respect for constitutional rights, and “reforms in the education, training, and supervision of police officers.”¹³⁹ It would not be unreasonable to hear the suggestion that the

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

133. In addition, the *Weeks* rule had the support of a unanimous Court, while the *Mapp* rule was supported by a bare majority of Justices, one of whom refused to agree that the Fourth Amendment alone dictated the exclusion of evidence: Justice Black joined the majority only because he believed that the Fourth and Fifth Amendments together required that illegally obtained evidence be suppressed. *See Mapp v. Ohio*, 367 U.S. 643, 661–62 (1961) (Black, J., concurring).

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

135. *See infra* notes 136–42 and accompanying text (discussing the alternative deterrent devices that had developed after *Mapp*).

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

137. *Id.*

138. *Id.*

139. *Id.* at 2168 (quoting SAMUEL E. WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 51 (1993)).

costly, self-defeating alternative of excluding probative evidence from criminal trials and setting dangerous, guilty defendants free is no longer needed to keep officers in check. *Mapp* declared the alternatives that existed in 1961 to be ineffective and deemed exclusion a necessary sanction. *Hudson* described the post-*Mapp* changes in the legal landscape and was quite willing to assume that officers would be (or were being) adequately discouraged by the array of available alternatives.¹⁴⁰ It concluded that “the extant deterrents” today are not only “substantial,” but “*incomparably greater* than [those operating] when *Mapp* was decided.”¹⁴¹ *Hudson*’s faith in the efficacy of other tools for enforcing the Fourth Amendment is worlds apart from the disbelief that animated *Mapp*.¹⁴²

Perhaps the most significant indicia that *Hudson* could be a signpost on a road leading to a future without the exclusionary rule are the majority’s tone and rhetoric. The majority opinion made no effort to conceal intense antipathy toward suppression. At the outset, Justice Scalia declared that “[s]uppression of evidence . . . has *always been our last resort*, not our first impulse,” and emphasized that the exclusionary rule “sometimes” sets “the guilty free and the dangerous at large.”¹⁴³ After stressing the serious costs imposed by the rule, he observed that those who seek its application must clear a “high obstacle.”¹⁴⁴ These characterizations seem designed to render the rule a rare, and endangered, species. In addition, more than once, Justice Scalia described suppression as a “massive remedy.”¹⁴⁵ He also deemed it “incongruent.”¹⁴⁶ The deliberate choice of such adjectives surely was meant to cast suppression as a much too blunt, excessive, and disproportionate response to official errors. Finally, the *Hudson* majority intimated that the exclusionary rule’s time had come and gone, or at least

140. See, e.g., *id.* at 2167–68 (“As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”); *id.* at 2168 (deeming it “not credible to assert that internal discipline . . . will not have a deterrent effect”).

141. *Hudson*, 126 S. Ct. at 2168 (emphasis added).

142. The *Hudson* Court’s assumptions and attitude resemble those underlying *Wolf v. Colorado*, the pre-*Mapp* ruling that due process forbade unreasonable searches and seizures by state agents but did not require state courts to adhere to the exclusionary sanction. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

143. *Hudson*, 126 S. Ct. at 2163 (emphasis added); see also *id.* at 2165 (referring to the “grave adverse consequence” that exclusion always entails, i.e., “the risk of releasing *dangerous criminals* into society” (emphasis added)).

144. *Id.* at 2163 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998)).

145. *Id.* at 2165–66; see also *id.* at 2166 (describing the “consequences” of excluding evidence for knock-and-announce violations as “so massive . . . that officers would be inclined to wait longer than the law requires”). The repeated and novel use of this somewhat odd adjective to describe the exclusionary rule surely was a rhetorical flourish designed to be pejorative. Justice Scalia injected the same adjective into his analysis of the deterrence benefits of suppression for knock-and-announce violations, stating that because officers lack strong incentives for such violations, “[m]assive deterrence is hardly required.” *Id.*

146. *Id.*

that the rule was on a fast track out of town. According to the Court, it was not appropriate to “assume that exclusion” provides “necessary deterrence” for knock-and-announce violations simply because an earlier Court thought it to be a “necessary deterrence in different contexts *and long ago*.”¹⁴⁷ That assumption would force “the public today to pay for the sins and inadequacies of a legal regime that existed *almost half a century ago*.”¹⁴⁸ It would hardly be unreasonable to hear a declaration that “the heydays of . . . exclusionary-rule jurisprudence”¹⁴⁹ were at an end and that a new sheriff, or several new sheriffs, had been groomed to assume its duties.¹⁵⁰

Despite considerable support for these two expansive interpretations of *Hudson’s* message, there are reasons to eschew each—at least for the present. First, the majority opinion contains no explicit statement that the exclusionary rule should be either limited to warrant rule violations or completely abolished. The warrant-rule-violation-only conclusion draws support from restrictive, yet accurate, descriptions of *Weeks* and *Mapp* as warrantless search cases, from a declaration that the warrant rule *does* protect interests furthered by exclusion, and from a passing observation that the alternative deterrents operative today exceed those that discouraged warrantless searches in the early 1960s. There are much clearer ways to indicate that suppression should result *only* from a failure to honor the warrant requirement. Likewise, the abolition position rests on confining, disparaging portrayals of *Mapp*, a fairly substantial argument that several Fourth Amendment enforcement mechanisms are available and functioning today, and linguistic choices that betray patent hostility toward evidentiary suppression. Although these factors, when combined, provide a not insubstantial foundation for abrogation, at no point did the majority raise this possibility or cite authorities that have contested the rule’s legitimacy.¹⁵¹

147. *Id.* at 2167 (emphasis added).

148. *Hudson*, 126 S. Ct. at 2167 (emphasis added).

149. *Id.*

150. See *United States v. Ankeny*, 502 F.3d 829, 842 (9th Cir. 2007) (Reinhardt, J., dissenting) (“Part IV of Justice Scalia’s opinion attempts to link *Hudson’s* rejection of suppression as a remedy for violating the Fourth Amendment’s knock-and-announce requirement to a broader trend abandoning the exclusionary rule in other contexts”); *State v. Savage*, 906 A.2d 1054, 1083 (Md. Ct. Spec. App. 2006) (observing the “ominous forebodings for the future of the exclusionary rule” in *Hudson’s* majority opinion). *But see* *People v. Rodriguez*, 49 Cal. Rptr. 3d 811, 819 (Ct. App. 2006) (“*Hudson* does not signal [that] a majority of the Court is ready to scrap the exclusionary rule.”).

151. For examples of such authorities, see *Stone v. Powell*, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring) (“[T]he exclusionary rule has been operative long enough to demonstrate its flaws.”); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) (“[T]he history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective.”); Amar, *supra* note 115, at 785 (advocating the elimination of the exclusionary rule and observing that the Court “has concocted the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt, and has then tried to water down this awkward and embarrassing

In addition, much of the support for these two radical possibilities is intertwined with resolution of the narrow issue before the Court—whether exclusion for knock-and-announce violations is justifiable. The observation that the warrant rule *does* protect interests furthered by exclusion is an integral part of the case for extending the attenuation exception to knock-and-announce violations. The objectives of the warrant requirement provide contrast with the goals of the knock-and-announce rule. Similarly, the observation that today's alternatives are more potent than those that deterred warrantless entries at the time of *Mapp* was an inseparable part of a lengthy summary sentence explaining why the cost-benefit balance tipped against suppression for knock-and-announce errors. The Court's assumption that "civil liability is an effective deterrent" was explicitly confined to the knock-and-announce context.¹⁵² More important, the balance struck in *Hudson* hinges on costs generated by suppression for knock-and-announce violations, on the "minimal" incentive for "such violations," and on the fact that "the extant deterrences against [knock-and-announce violations] are substantial."¹⁵³ As for the rhetorical antipathy toward suppression, the depictions of the rule as "massive" and "incongruent" were tied explicitly to knock-and-announce transgressions. Moreover, the main intimation that *Mapp* was outdated was linked to a refusal to "assume that exclusion *in this context* is necessary deterrence."¹⁵⁴ In light of these limiting connections to the knock-and-announce context, courts should hesitate to endorse the broadest readings of *Hudson*.

By far, the most persuasive reason to reject both expansive interpretations is that only four Justices actually endorsed the supportive premises. Although Justice Kennedy ostensibly joined the parts of the majority opinion containing the ammunition for a general assault on the exclusionary rule,¹⁵⁵ he felt compelled to "underscore[]" that "the continued operation of the exclusionary rule, as settled and defined by our precedents, [was] not in doubt."¹⁵⁶ He then agreed with the decision to eliminate the suppression remedy for knock-and-announce violations *solely*

remedy in ad hoc ways"); Stephen J. Markman, *Six Observations on the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 423, 431 (1997) ("The exclusionary rule should be abolished altogether.").

152. *Hudson*, 126 S. Ct. at 2167–68 (stating that it is unknown how many knock-and-announce claims have been settled and how many have produced "more than nominal injury"; noting that courts allow knock-and-announce claims "to go forward, unimpeded by . . . qualified immunity"; and concluding that "[a]s far as we know, civil liability is an effective deterrent here"). Clearly, the Court *could* indulge the identical assumption for other or all Fourth Amendment contexts. The point here is that Justice Scalia used limiting language.

153. *Id.* at 2168.

154. *Id.* at 2167 (emphasis added).

155. *See id.* at 2171 (Kennedy, J., concurring in part and concurring in the judgment). The only part Justice Kennedy refused to join was the final part in which Justice Scalia discussed three cases that he found supportive.

156. *Id.* at 2170.

because the causal link between a knock-and-announce violation and the discovery of evidence is insufficient.¹⁵⁷ It seems fair to say that Justice Kennedy concurred in the majority's language and reasoning insofar as they addressed suppression for knock-and-announce violations. He made it clear, however, that he was not participating in any exclusionary rule revolution that might be seen in *Hudson's* undercurrents. Thus, while there currently may be four Justices inclined to toss *Weeks* and *Mapp* overboard, the critical fifth vote is missing. In fact, five Justices remain committed to the suppression remedy.¹⁵⁸

C. MIDDLE-GROUND INTERPRETATIONS OF HUDSON: SEARCHING FOR
"JUST RIGHT" MORALS OF THE STORY¹⁵⁹

The *Hudson* Court rested its conclusion that suppression is inappropriate for knock-and-announce violations on three distinct, independently sufficient foundations—a lack of causation, attenuation, and a cost-benefit assessment.¹⁶⁰ Each yields a middle-ground interpretation of *Hudson's* significance for the future of Fourth Amendment suppression. Moreover, because the narrowing of the suppression remedy suggested by each is independent, their potential cumulative impact upon exclusion is quite substantial.

1. The Causation Predicate: The Severability of Fourth Amendment Events

The premise that the Fourth Amendment exclusionary rule reaches only evidence with a but-for causal connection to an unreasonable search or

157. It is true that Justice Kennedy offered a mild endorsement of the notion that other remedies were now available. See *Hudson*, 126 S. Ct. at 2170. However, when read in the context of his entire concurrence, it seems patently unreasonable to read his allusion to alternatives as indicative of a willingness to dramatically limit or eliminate suppression.

158. I include the four dissenters and Justice Kennedy, who asserted that "the continued operation of the exclusionary rule . . . [was] not in doubt." *Id.* Of course, if one of these five were replaced by a Justice sympathetic to the other camp, the likelihood of a future without the exclusionary rule would certainly increase. Even if such an event were to occur, however, lower courts would be wise to await clearer indicia than those in *Hudson* before deciding that the exclusionary rule is dead.

159. My use of the phrase "just right" is not meant as a comment on the constitutional merits or validity of the interpretations in this section. My intent is to prescribe how *Hudson* is likely to evolve—that is, to identify and describe the future impacts I foresee.

160. The majority left no room for doubt that each of these grounds could alone support its holding. After stating that "but-for causality is . . . necessary" for application of the exclusionary rule, Justice Scalia asserted that the "illegal manner of entry was not a but-for cause of obtaining the evidence." *Id.* at 2164. He then opined that "even if" there was a causal connection, causation "can be too attenuated to justify exclusion," *id.*, and concluded that causation was attenuated in the knock-and-announce context. *Id.* at 2165. Finally, he observed that, "[q]uite apart from the requirement of unattenuated causation," the exclusionary rule is "never . . . applied" unless the deterrence gained outweighs the costs imposed, and decided that the scales tipped against exclusion for knock-and-announce transgressions. *Id.* (emphasis added).

seizure—that is, evidence that the government would not have acquired had it not acted unconstitutionally—is anything but novel. From *Weeks* through *Hudson*, the rule has *never* been invoked to suppress evidence lacking a causal link.¹⁶¹ The exclusionary rule reaches evidence acquired directly or indirectly from Fourth Amendment violations—that is, both primary and derivative fruits of illegality.¹⁶² It seeks to deter violations (and to preserve judicial integrity) by depriving the government of the profits of improprieties and thereby “removing the incentive” for such future improprieties.¹⁶³ It has never operated punitively, seeking to discourage misconduct by inflicting unpleasant consequences beyond the deprivation of evidentiary gains. Put otherwise, it has not ever and does not now “put the government in a worse [evidentiary] position” than it would have occupied had it not acted illegally.¹⁶⁴

If *Hudson's* reliance on the absence of causation were merely an application of the undisputed requirement of a but-for connection between evidence and illegality, it would merit no discussion in an assessment of that decision's impact. That this was no routine application of the causation principle is evinced by the view of four dissenting Justices that acquisition of the evidence in *Hudson* was, in fact, “caused” by the knock-and-announce

161. See *Segura v. United States*, 468 U.S. 796, 815 (1984) (stating that “our 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”); *United States v. Crews*, 445 U.S. 463, 471 (1980) (recognizing that the suppression remedy is inapplicable unless “the challenged evidence is in some sense the product of illegal governmental activity”).

162. *Murray v. United States*, 487 U.S. 533, 536–37 (1988) (observing that “[t]he exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search . . . and of testimony concerning knowledge acquired” and “also prohibits the introduction of derivative evidence . . . that is the product of the primary evidence”).

163. The Court first employed this language in a pre-*Mapp* opinion, *Elkins v. United States*, where it observed that the exclusionary rule's “purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960). The *Mapp* Court quoted the *Elkins* language, see *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), and later exclusionary rule opinions have repeated the phrase. See *Stone v. Powell*, 428 U.S. 465, 484 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974); see also Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1384–85 (1983) (discussing the origins and purposes of the exclusionary rule).

164. *Nix v. Williams*, 467 U.S. 431, 444 (1984). This is why the Court, soon after *Weeks's* adoption of the Fourth Amendment exclusionary rule, recognized the “independent source” doctrine. See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). Although conventional, it is misleading to describe this doctrine as an “exception” to the exclusionary rule because the rule never was designed or intended to reach evidence that is the but-for product of legal conduct. Evidence obtained from an “independent source” is not the profit of the unconnected unconstitutional act and, therefore, does not provide incentive for future illegality.

violation.¹⁶⁵ In the dissenters' view, the search of Hudson's home was unreasonable by virtue of the unlawful, unannounced entry. For purposes of evaluating constitutionality and deciding whether to suppress, they believed that there was a unitary, indivisible search.¹⁶⁶ The illegal entry that launched that search rendered the entire search unreasonable. There was a causal connection to the misconduct because the guns and drugs in the house were the product of that unconstitutional search.¹⁶⁷

The majority¹⁶⁸ rejected this unitary view of the officers' conduct, treating the home entry as a separable constitutional event from the ensuing search. While there was an "illegal *manner* of entry,"¹⁶⁹ the warranted search that followed was unquestionably legal, for it was supported by a valid warrant, and the officers did not exceed the warrant's grant of authority. Both substantively and procedurally, what they did after—and independently of—their illegal, unannounced breach of the threshold was entirely constitutional. For constitutional and exclusionary rule purposes, the majority was willing to sever the intrusion effected by the entry from the privacy invasion that followed. The former was unlawful, but the latter was wholly lawful. Moreover, the home search was not altered in the slightest by the preceding illegal entry. In essence, the majority saw the situation of a knock-and-announce violation preceding a warranted search as analogous to a situation where there are two entirely independent, unrelated searches—one reasonable and one unreasonable. If evidence is obtained from the reasonable search, it does not matter that there was an unreasonable search, even if it was performed by the same officers and was proximate in time and place.¹⁷⁰

165. Justice Breyer pointedly remarked that "taking causation as it is commonly understood in the law, I do not see how" the "illegal *manner* of entry was *not* a but-for cause of obtaining the evidence." *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting).

166. *Id.* (noting that the "unlawful behavior *inseparably* characterizes their actual entry" (emphasis added)).

167. *Id.* (maintaining that the violation was not "independently unlawful," but rather it "render[ed] the search 'constitutionally defective'" (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995))).

168. It is clear that Justice Kennedy agreed with this part of the Court's reasoning. *See infra* note 182.

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

170. The independent source doctrine had already been interpreted to encompass the *identical* items that police had previously found illegally, as long as the second discovery was not the product of the initial, illegal actions. *See Murray v. United States*, 487 U.S. 533, 542 (1988) (explaining that even if the very same evidence is found on each occasion, the rationale of the independent source doctrine—that the government should be put in the same position, not a worse position—is applicable). In one sense, situations like that in *Hudson* present even stronger cases for denying exclusion. In *Murray*, the officers acquired the evidence once illegally and then discovered the very same evidence by arguably independent, legal means. *Id.* at 535–36. According to the *Hudson* majority's understanding of knock-and-announce situations, the constitutional wrong—i.e., the illegal entry—has no causal link to the discovery of *any* evidence.

Hudson's severance approach was not entirely original. The Court had previously evinced a willingness to divide what might appear to be a single search into two constitutional parts and to judge each separately for Fourth Amendment and exclusionary rule purposes. The first such indication was in a case that involved the knock-and-announce rule. In *United States v. Ramirez*, the question was whether a "heightened standard" applied to unannounced exigency-based entries that caused property destruction.¹⁷¹ After holding that the same "reasonable suspicion" standard governed regardless of whether property was damaged,¹⁷² the Court observed that home entries must be reasonable and that "[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment."¹⁷³ The Court noted, however, that even though the method of entry might be improper, "the entry itself [would be] lawful and the fruits of the search [would] not [be] subject to suppression," if performed under a valid warrant.¹⁷⁴ Rather than viewing the search as a single constitutional event, the Court isolated the initial, unjustified seizure (i.e., the unreasonable destruction of property) from the justified search (i.e., the reasonable, unannounced entry and the exploration of the home based on a valid warrant). Evidence found in the home would be the fruit of the latter, but not the former. It would not be excludable because the unconstitutional manner of entry has no impact on the ensuing search and, thus, no causal connection to the evidence.¹⁷⁵

Wilson v. Layne declared it unreasonable for officers to bring along a third party during the execution of a search warrant for a private home unless the third party's presence is "related to the objectives of the authorized intrusion" or "in aid of the execution of the warrant."¹⁷⁶ According to the Court, the gratuitous presence of media representatives violates the Fourth Amendment, but if the search warrant is valid, "the

171. *United States v. Ramirez*, 523 U.S. 65, 69–70 (1998).

172. *Id.* at 67–68. The exigency exception to the knock-and-announce rule applies when officers have a "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of crime by, for example, allowing the destruction of evidence." *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

173. *Ramirez*, 523 U.S. at 71. It is unclear why the Court felt the need to express itself tentatively—i.e., "may violate." Property destruction is a Fourth Amendment seizure, and seizures of property must be reasonable. *See United States v. Jacobsen*, 466 U.S. 109, 124–25 (1984) (assessing the reasonableness of a seizure that involved minimal destruction of property). Consequently, it is clear that unreasonable destruction of or damage to property, like an unreasonable temporary deprivation of possession, is unconstitutional.

174. *Ramirez*, 523 U.S. at 71 (dictum) (emphasis added).

175. The categorical declaration about the inapplicability of the exclusionary rule was dictum because the issue of whether evidence obtained after an unreasonably destructive entry is subject to suppression was not before the *Ramirez* Court. Nonetheless, it is dictum that cannot be ignored; all nine Justices joined the opinion expressing that view.

176. *Wilson v. Layne*, 526 U.S. 603, 611, 614 (1999).

police [themselves] are lawfully present” in the home.¹⁷⁷ The presence of the police is no less lawful than if the third party had not come along, for “the violation of the Fourth Amendment is the presence of the media and *not* the presence of the police in the home.”¹⁷⁸ The Court’s unmistakable message was that any evidence found by the lawfully present police would be immune from suppression despite the unconstitutional presence of the media.¹⁷⁹

What occurred was not a single constitutional event. There were, in essence, two distinct searches—two separable home privacy invasions—the one effected by the entry of the police and the other occasioned by the entry of the unauthorized third party. Evidence yielded by the former would not be excluded simply because of a concurrent illegal search of the same premises that resulted from the unjustifiable decision to invite unnecessary persons. As long as officers do not find evidence because a third party is present,¹⁸⁰ evidence found is the fruit of the valid police search with no but-for connection to the divisible, invalid search.¹⁸¹

Hudson, *Ramirez*, and *Layne*, therefore, make it clear that the Court is willing to sever some Fourth Amendment events into constitutionally distinct phases, to judge each independently, and to decide whether suppression is available by applying the “but-for causation” requirement to each.¹⁸² What is not clear is how far the Court would extend this “severance” principle. Consequently, the magnitude of its restrictive impact on the exclusionary

177. *Id.* at 614 & n.2.

178. *Id.* at 614 n.2 (emphasis added).

179. *See id.* (opining that there was “no occasion . . . to decide whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives” whose presence was unconstitutional).

180. The discovery of the evidence would never be linked to the additional invasion of privacy caused by the third party’s presence unless the third party were to do something that enabled the officers to acquire the evidence.

181. Because *Layne* was a civil suit for damages, not an effort to suppress evidence found during the media ride-along, the Court’s indication that the suppression sanction is inapplicable to such violations is dictum. There can be no question, however, that the nine Supreme Court Justices were notifying their lower-court brethren that, in a criminal proceeding, the new Fourth Amendment claim they had recognized would typically not cost the government any evidentiary gains.

182. In *Hudson*, there was a five-Justice majority in favor of divorcing the entry from the search before evaluating causation. Justice Kennedy explicitly agreed with the majority’s assertion about causation, stating that the “evidence was discovered *not because of a failure to knock-and-announce*, but because of a subsequent search pursuant to a lawful warrant.” *Hudson v. Michigan*, 126 S. Ct. 2159, 2171 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added); *see also id.* (“[T]he failure to wait at the door cannot properly be described as having caused the discovery of the evidence.”); *id.* (“[E]xtending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits [the reach of] the exclusionary rule.”). There were also clear majorities supporting the conclusions that there were separable constitutional events in *Ramirez* and *Layne*. *See supra* notes 171–81 and accompanying text.

rule's scope is uncertain. Two of the cases where the Court has been willing to divide a home search into two constitutional events—*Hudson* and *Ramirez*—have involved illegal methods of entry and ensuing searches that were temporally distinct—i.e., the illegality preceded, and had ended by, the time of the legal search and discovery. In the other case, *Layne*, although the same officers were responsible for the *simultaneous* proper and improper privacy invasions, those invasions were effected by different individuals. The victim of unjustified third-party presence is harmed because the improperly invited third party gains access to private spaces and information. Thus, it seems fair to say that when there is temporal separation or when distinct persons are involved, the Court permits severance for purposes of determining causation.¹⁸³ If the severed, lawful conduct reaped the same evidentiary crop that it would have reaped had the unlawful conduct not occurred, the lack of a but-for link between the illegality and the evidence renders the exclusionary rule inapplicable.¹⁸⁴

The question is whether the severance approach exemplified by these opinions has broader application, extending to situations where neither time nor identity supports a division of governmental conduct into distinct constitutional events. The answer is that the opinions provide no basis for confident prediction about when an ostensibly unitary occurrence is divisible into two constitutional events. *New York v. Harris*,¹⁸⁵ a decision relied upon by the *Hudson* majority,¹⁸⁶ does suggest a broader willingness to subdivide constitutional events. In *Harris*, officers who had probable cause for a felony arrest entered a home to effect the arrest in violation of the Fourth Amendment's arrest warrant requirement.¹⁸⁷ The Court deemed the

183. I say "permits," rather than "requires," because temporal sequencing or multiple-person involvement should not alone be sufficient bases for denying a finding of causation. If an initial unlawful search or seizure enables (or enhances the productivity of) a subsequent search or seizure that is lawful when judged independently, there is but-for causation between the temporally first illegality and the later discovery. Similarly, if actors who have violated the Constitution enable (or enhance the abilities of) lawfully present actors to find evidence, there is a causal connection between the violators' transgressions and the lawful actors' acquisition of the evidence.

184. Although this may smack of the inevitable discovery doctrine, the Court avoided reference to that exclusionary rule exception, and the two situations are distinguishable. Inevitable discovery involves instances where officers acquire evidence illegally, but would inevitably have found the same evidence by other lawful means. In the situations governed by the severance approach, evidence *actually is* discovered as a result of the lawful component of the officers' conduct and would have been found *in the same way* without the occurrence of the illegality. Severance results in expansion of the independent source doctrine, which is related, but not identical to, inevitable discovery. See *Nix v. Williams*, 467 U.S. 431, 459 (1984) (Brennan, J., dissenting) (describing how these two doctrines differ).

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

186. *Hudson*, 126 S. Ct. at 2169.

187. *Harris*, 495 U.S. at 15–16. When a person who has a privacy interest in a home objects to an entry to arrest him or her for a felony, that entry is unreasonable unless officers have an

statements the arrestee made inside the home excludable, but held that any statements he made outside the home were admissible.¹⁸⁸ The majority found no need to determine whether the connection between the warrantless entry and the statements was attenuated.¹⁸⁹ It declared the exclusionary rule inapplicable because the statements outside the home were not, in fact, the product of the illegal entry—that is, they were “not the fruit of the fact that the arrest was made in the house.”¹⁹⁰ The Court, in essence, severed the ongoing seizure of the arrestee from the search of his home, even though the initial seizure occurred *during* the unconstitutional home privacy invasion. The Court did not assert that the officers would have conducted the same arrest in the same way without the illegal entry. In fact, the causal link between the entry and the in-home arrest did dictate the suppression of any statements made *inside* the home. According to the Court, however, once the officers removed the arrestee from his home, the illegal search ended. It had no continuing impact upon the ongoing seizure of the arrestee. In the majority’s view, any statements made from that point on were the product of constitutional conduct—a lawful arrest supported by probable cause.¹⁹¹ They were not the result of the prior, severable illegal entry. The unreasonable search, the initial seizure, and the subsequent, continuing seizure were not as clearly distinct from one another as the unannounced entry and search in *Hudson*, the property damage and search in *Ramirez*, or the privacy invasions effected by distinct persons in *Layne*.¹⁹² Nonetheless, a five-Justice majority was willing to treat them as distinct and independent constitutional events for purposes of determining causation and the appropriateness of suppression. *Harris*, therefore, is evidence that the severance principle has somewhat broader application.

It is conceivable that the Court would apply the same approach to a search pursuant to a warrant that specifies some items with particularity but is overbroad and too general in describing other items. If the same officer conducts a single search, exploring areas covered by both parts of the warrant, it seems entirely possible, even likely, that the Court would sever, admitting items found during the legal search pursuant to the particular

arrest warrant and probable cause to believe that the arrestee is in the home at the time of the entry. *Payton v. New York*, 445 U.S. 573, 576 (1980).

188. *Harris*, 495 U.S. at 20–21.

189. *Id.* at 19.

190. *Id.* at 20.

191. *Id.* at 20–21.

192. Perhaps this is the reason that Justice Kennedy distanced himself from Justice Scalia’s reliance on *Harris*. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2171 (2006) (Kennedy, J., concurring in part and concurring in the judgment) (asserting that he was “not convinced” that *Harris* “[has] as much relevance” to the situation in *Hudson* “as Justice Scalia appears to conclude”). It is noteworthy, however, that Justice Kennedy did not state that he disagreed with the *Harris* analysis or conclusion. His uncertainty about its relevance does not necessarily undermine the message that *Harris* delivers about the Court’s inclination to subdivide.

commands in the warrant and excluding evidence found while examining spaces authorized *only* by the general portions of the warrant. Assuming the search is deemed divisible, the evidence found during the search for the particularly described items would lack a causal relation to the illegal, general search.

Another potential severance opportunity could arise when officers lawfully seize an individual for investigation based on a reasonable suspicion of criminal activity, but treat her more coercively than is allowed during a *Terry* detention—perhaps by handcuffing her or transporting her to another location.¹⁹³ Assuming that the detention did not extend beyond the permissible time based on reasonable suspicion, a weapon or contraband found during a justified, properly confined frisk might be deemed admissible. Arguably, the same frisk would have been conducted whether or not the unreasonable handcuffing or transportation had occurred. Put otherwise, the frisk was neither enabled by nor any different from the search that the officers would have conducted on the spot without additional restraint. What might seem to be a unitary seizure—an unlawful *arrest* because it exceeded the scope of a *Terry* detention—could be divided for exclusionary rule purposes into a reasonable seizure and frisk and a separate, unreasonable infringement on the suspect's liberty.¹⁹⁴

An intriguing recent opinion, *United States v. Alvarez-Tejeda*,¹⁹⁵ suggests another situation in which the government's conduct could be severed, resulting in no causal link between the unconstitutional segment and the discovery of evidence. In that case, government agents had grounds to seize a vehicle without a warrant but effected the seizure by a deceptive, "unorthodox method" designed to preserve the secrecy of their narcotics investigation.¹⁹⁶ The district court deemed the *method* of effecting the

193. Taking a person to a police station, even briefly, is a de facto arrest and is unreasonable absent probable cause or, perhaps, a judicial detention order based upon a reasonable suspicion. See *Hayes v. Florida*, 470 U.S. 811, 814–16 (1985). Some nonconsensual movement of a suspect during an investigative detention may be permissible on a reasonable suspicion. See, e.g., *United States v. Bravo*, 295 F.3d 1002, 1011 (9th Cir. 2002); *United States v. \$109,179 in U.S. Currency*, 228 F.3d 1080, 1084–85 (9th Cir. 2000); *Whitmill v. City of Philadelphia*, No. 96-5216, 1998 WL 476187, at *2–3 (E.D. Pa. Aug. 11, 1998). It seems clear, however, that at some point transportation of a suspect will exceed the proper bounds of a *Terry* detention and effect an arrest even though the suspect is not taken to a police station.

194. Admittedly, this situation seems less susceptible to analytical severance. There is no ready temporal demarcation between the two supposed events, no distinct intrusions by different persons, and no other clear line that invites severance. Nonetheless, one can surely argue that severance is called for because the discovery of the evidence was causally unrelated to the illegal aspects of the seizure. The but-for causation principle could support a conclusion that anything found was not the product of the unconstitutional seizure that exceeded *Terry*'s scope.

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

196. *Id.* at 1015–16. The defendant was driving a vehicle that belonged to the leader of a drug conspiracy. *Id.* at 1015. The agents believed that there was contraband in the car and

seizure unconstitutional and suppressed the evidence found in the vehicle.¹⁹⁷ The court of appeals concluded that, on balance, the manner of seizing the car was reasonable, reversing the suppression order on that ground.¹⁹⁸ The court acknowledged, however, that such a seizure could be unconstitutional if officers were to “use *excessive* force” or “if the government’s tactics created a serious risk of bodily injury or escalation of violence,” undermined “trust” in “government officials,” or afforded “access to places and things [officers] would otherwise have no legal authority to reach.”¹⁹⁹ In essence, the court recognized that a *substantively justifiable* seizure of property could be conducted in an *unreasonable manner*. The parallels to *Hudson*, which involved a substantively justifiable home search effected in an illegal manner, seem clear.

The *Alvarez-Tejada* court did suggest that, under *Hudson*, “exclusion of the evidence” might not “have been an appropriate remedy” even if the “manner of executing the seizure” had been unconstitutional.²⁰⁰ In my view, *Hudson*’s causation analysis would clearly have precluded suppression, no matter how egregious the method of seizing the vehicle. The contraband would have been acquired by virtue of the same constitutionally legitimate seizure and the ensuing warranted search of the vehicle. The “constitutional violation of an illegal *manner* of [the seizure would] *not* [have been] a but-for cause of obtaining the evidence.”²⁰¹ The unreasonable facets of the officers’ conduct that occurred *after* the substantively justified seizure of the car and *before* the justified search did not enable or have any impact upon the discovery. In the words of Justice Scalia, “[w]hether that preliminary misstep had occurred *or not*,” the officers would have properly searched the lawfully seized car and would have discovered the evidence.²⁰²

In sum, *Hudson* is a declaration that the exclusionary rule is inapplicable whenever a seemingly unitary search is divisible into multiple, independent Fourth Amendment events and evidence is causally linked to the event that satisfies the Fourth Amendment, not the separate event that violates its commands. The Court’s previous applications of this *Hudson*

wished to seize it without revealing their investigation of the conspiracy. *Id.* at 1015–16. Consequently, they staged a minor accident by tapping the defendant’s bumper with another vehicle and then pretended to arrest the driver of that vehicle for drunk driving. *Id.* at 1015. The police officer directed the defendant to park his car in a nearby lot with the keys in it. *Id.* After the defendant did this, another agent posed as a car thief, driving the defendant’s car away. *Id.* Officers feigned pursuit but returned and informed the defendant “that the thief had gotten away.” *Id.* The officers then secured a warrant and searched the car, finding narcotics inside. *Id.* at 1016.

197. *Id.*

198. *Id.* at 1018.

199. *Id.* at 1017.

200. *Alvarez-Tejada*, 491 F.3d at 1018 & n.3.

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

202. *Id.*

foundation to other situations confirm that it is a general restriction upon the exclusionary rule's reach, not a constraint confined to knock-and-announce settings. In essence, it is an expansion of the "independent source" doctrine to settings where the two putative sources are ostensibly connected or intertwined. The magnitude of the severance doctrine's impact on Fourth Amendment suppression will ultimately depend on how willing the Court is to subdivide searches and seizures.

The dissenters refused to disentangle the entry in *Hudson* from the subsequent search, rejecting the notion that a connected sequence of official acts can be subdivided into constitutionally distinct constituents.²⁰³ They endorsed a unitary view of the officers' conduct. The majority, on the other hand, found separable actions whose constitutionality and causal relationship to the acquisition of evidence had to be assessed independently. It perceived an initial, unreasonable search and a subsequent, reasonable search that was untainted by the distinct "preliminary misstep."²⁰⁴ As a matter of fact and logic, neither the majority's nor the dissent's characterization of the events in *Hudson* is implausible. Both are defensible ways of describing the conduct that led the police to the drugs and gun in Hudson's home and analyzing the relevance of the exclusionary rule. A proper assessment of whether suppression is appropriate in situations like *Hudson* and in others where severance is logically possible is not advanced by branding either description as "wrong." The better analysis focuses on the implications of extending or not extending such independent source analyses to arguably unitary situations. In other words, if Justice Scalia's approach in *Hudson* is questionable, it is not because the approach reflects a flawed conception of causation, but rather because it is not at all grounded in the justifications for suppression and the independent source limitation.

The prevailing understanding of the exclusionary rule is that it is a constitutionally required deterrent of future unreasonable searches and seizures.²⁰⁵ According to the accepted wisdom, the rule eliminates incentives

203. *Id.* at 2177 (Breyer, J., dissenting) ("[S]eparating the 'manner of entry' from the related search slices the violation too finely.").

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

205. The *Mapp* Court described the rule as "constitutionally required." *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). In recent years, the Court has refrained from using those terms to describe the exclusionary rule. Nonetheless, because the Court has no power to impose supervisory rules on state courts, the exclusionary rule that originated in *Mapp* and has been applied to states ever since must have roots in the Constitution. If not, it is an illegitimate exercise of judicial power. It is possible that the exclusionary rule is constitutionally mandated, absent an effective alternative deterrent. If that were the case, the exclusionary rule would resemble *Miranda's* dictates, which, in the absence of fully effective equivalents, are constitutionally necessary protections of Fifth Amendment rights. *See Dickerson v. United States*, 530 U.S. 428, 440–42, 444 (2000) (holding that *Miranda* is "a constitutional rule," required unless replaced by an alternative that accomplishes its Fifth Amendment purposes). In addition, the Court has made it clear that officers and others in law enforcement are the object of the deterrence, not judges and lawmakers. *See Illinois v. Krull*, 480 U.S. 340, 350 (1987)

for illegality by denying officers the profits of their illegal acts. It does not penalize officers by putting them in a worse evidentiary position than they would have occupied had they not acted unlawfully.²⁰⁶

A different approach would not be inherently illogical. Illegal conduct might be more effectively discouraged if officers know that they might jeopardize the admissibility of evidence that the government would otherwise be entitled to use. A punitive approach could add to the deterrence attained by eliminating ill-gotten profits.²⁰⁷ The decision to reject that approach and the resulting but-for causation demand reflect a cost-benefit assessment. In the Court's view, the potential loss of profits—i.e., evidence with a causal link to an illegality—produces sufficient deterrence. Any incremental Fourth Amendment enforcement that might be gained by penalizing officers further is outweighed by the costs to the search for truth that would result from suppressing evidence with no causal connection. The requirement of causation is a defensible limitation rooted in prevailing exclusionary rule principles and policies.²⁰⁸

In deciding whether severing potentially indivisible conduct and applying the independent source principle is appropriate, it makes sense to employ this same cost-benefit reasoning. If a sufficient deterrent remains in

(noting that the exclusionary rule is not designed to deter the actions of legislators); *United States v. Leon*, 468 U.S. 897, 916–17 (1984) (observing that modifying judicial conduct is not an object of the exclusionary rule).

206. In *Nix v. Williams*, the Court asserted:

[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all 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.

Nix v. Williams, 467 U.S. 431, 443 (1984). These premises undergird the independent source doctrine, which applies when officers have acquired evidence through lawful conduct, but the same officers, or others, have also engaged in acts that violate the Fourth Amendment. Because the latter conduct yields no gains, excluding the evidence would impose a loss, putting the government in a worse position than it would have occupied if its agents had not acted unconstitutionally.

207. A punitive approach might also be employed to enforce constitutional commands that are not responsive to the profit-removal approach either because they do not yield profit or because other motivations make officers willing to forgo any profit they might reap.

208. The Court has not been explicit or thorough in explaining the logic of restricting a deterrence-based legal device to “profits” with a “but-for” connection. The explanation offered here fleshes out the premises relied on by the Court. However, it is entirely consistent with, and borrows from, the reasoning the Court has relied on in imposing other restrictions on the scope of the exclusionary rule. *See United States v. Havens*, 446 U.S. 620, 626–28 (1980) (concluding that the balance between the “competing interests” of deterring Fourth Amendment violations and promoting the search for “truth” and “the factfinding goals of the criminal trial” justify allowing the government to impeach a defendant’s cross-examination testimony with illegally obtained evidence); *Alderman v. United States*, 394 U.S. 165, 174–75 (1969) (explaining the standing limitation as based on an assessment of the balance between the additional deterrent gains and the costs of suppression).

place to discourage future acts like those that constitute the illegal parts of a severed episode, it is defensible to sever for purposes of assessing causation. Conversely, if severance will severely diminish, if not eliminate, the possibility of deterring conduct like the unconstitutional component of the episode, it would seem appropriate—indeed imperative—to treat the conduct as a single event and to find the but-for causation necessary for suppression.²⁰⁹ If the exclusionary rule is a constitutionally justified deterrent device, and if it could not meaningfully enforce a particular Fourth Amendment command if officers' actions were subdivided, severance should be denied.²¹⁰

If my analysis is sound, severance was unjustifiable in the *Hudson* context. The declaration that knock-and-announce violations have no causal connection to evidence found during subsequent home searches means that the prospect of suppression can furnish positively no incentive for adherence to the prohibition of unannounced, or inadequately announced, entries. In the Court's view, because evidence is never gained from the illegal entry but is always the product of the ensuing search, there is never any profit to disgorge. However, the exclusionary rule can motivate officers to respect the centuries-old knock-and-announce principle only if the entry and search are deemed to be a unitary act that is unconstitutional if any facet is unreasonable. Put otherwise, the severance doctrine should not apply, because treating home searches after unannounced entries as "independent sources" precludes enforcement of the knock-and-announce rule and preservation of its underlying values.²¹¹

209. This analysis puts aside other reasons to declare deterrence unnecessary or the exclusionary rule inapplicable. The point here is that a causation constraint that rests on sensible cost-benefit balancing and a refusal to pay too high a price for "incremental" deterrence should not govern situations where severance means that the suppression sanction could provide no meaningful motivation to honor the Fourth Amendment's dictates.

210. In my view, officers' likely perceptions should factor into the severance analysis. I think it is fair to understand the traditional attenuation doctrine as rooted in officers' *perceptions* of profit. See *Brown v. Illinois*, 422 U.S. 590, 610 (1975) (Powell, J., concurring in part) (indicating that attenuation based on *Miranda* warnings should be related "to the extent that the police *perceive* *Miranda* warnings to have . . . equalizing potential" (emphasis added)). Because remotely connected products are not likely to be viewed as the fruits of illegal labors, they provide little motivation for future illegalities. In any case where conduct is so closely linked that severance would be necessary to break a but-for causal link, if severance is denied, officers would be likely to perceive the suppressed evidence as the profit of the illegal portion of their potentially divisible conduct. Denying them this profit would remove their incentive for future illegalities of the same nature.

211. Alternative sources of deterrence are relevant to other portions of the *Hudson* analysis but are irrelevant here. Causation analysis assumes the exclusionary rule is needed to protect important Fourth Amendment freedoms but limits the rule's application to situations where the deterrence gained is worth the price exacted. Whether or not there are other sources of deterrence, the existence of causation provides a predicate for suppression, and the absence of causation means that suppression is not an available option.

Conversely, severance might well be defensible in cases like *New York v. Harris*, where an illegal entry of a home was followed by a justified arrest.²¹² For exclusionary rule purposes, the Court separated the ongoing seizure of the arrestee from the prior illegal search, holding that evidence inside the home was subject to suppression while evidence obtained outside the home was not.²¹³ The potential loss of evidence discovered in the home—including any admissions—would provide a significant deterrent for other unlawful, warrantless entries. This deterrence remains in place even if the seizure is deemed distinct from the search once the arrestee is outside his home. The declaration that there is no causal link between the unwarranted search and evidence acquired outside the home does not prevent the suppression remedy from enforcing the warrant command.²¹⁴

Fidelity to constitutional commands and ensuring their enforcement through the exclusionary rule demand that each situation where severance is contemplated be evaluated separately. The determinative criterion should be whether severance destroys the efficacy of exclusion as a means of preserving a particular guarantee. If the subdivision of conduct means that evidence never (or rarely) has a causal link to violations of that guarantee, then severance should be denied and causation found. If severance instead has essentially the same effect that it has in classic independent source situations²¹⁵—that is, if officers must still hesitate to commit the unconstitutional act because they might lose valuable evidentiary fruits—then severance should be permissible. The causation demand, a limitation on exclusion justified by defensible cost–benefit balancing, should not be extended to situations where the weights on the scales do not support its application.²¹⁶ If the exclusionary rule is legitimate, and if causation is required *because* adequate deterrence is achieved by applying the rule to situations where evidence is linked to a violation, then courts should find

212. *New York v. Harris*, 495 U.S. 14, 15–16 (1990); see *supra* notes 185–87 and accompanying text.

213. *Harris*, 495 U.S. at 19–21; see *supra* notes 188–92 and accompanying text.

214. In outcome, therefore, *Harris* is quite unlike *Hudson*. The *Harris* Court did not come close to declaring a particular kind of Fourth Amendment wrong entirely beyond the reach of the exclusionary rule. In *Harris*, severance resulted in the admission of *some* evidence acquired after a *Payton* violation, while in *Hudson*, severance resulted in the admission of *all* evidence the police acquired after a knock-and-announce violation.

215. By “classic independent source situations,” I mean those where there are two clearly separate instances of Fourth Amendment conduct by the same or different officers.

216. My suggestion is that when severance and the resulting application of the causation principle eliminate (or all but eliminate) the suppression remedy, the severance option should not be available. My analysis would seem to have some kinship with Justice Kennedy’s exceedingly cautious hint that, if the ruling in *Hudson* were to endanger the knock-and-announce rule, the Court might have to suspend the ordinary causation demand. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2171 (2006) (Kennedy, J., concurring in part and concurring in the judgment).

causation when a conclusion that there is no causal link would preclude adequate deterrence.²¹⁷

2. The Attenuation Exception: A Second Branch Sprouts

Causation is a necessary, but not always sufficient, basis for Fourth Amendment exclusion.²¹⁸ A limited number of true exceptions to the exclusionary rule authorize the admission of evidence with a but-for causal connection to an illegality.²¹⁹ Of all the true exclusionary rule exceptions, the attenuation exception has the deepest roots. The notion that evidence with a but-for link to an illegality is admissible “when the causal connection is remote”²²⁰ predated *Mapp v. Ohio* by twenty years²²¹ and has been reaffirmed in post-*Mapp* decisions.²²² Therefore, the *Hudson* majority’s

217. Under the independent source doctrine, the discovery of evidence must be “wholly independent” of the violation for that evidence to be admissible. *Murray v. United States*, 487 U.S. 533, 545 (1988). Indeed, the foundation of the doctrine is “a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial.” *Id.* at 544–45. It is arguable, therefore, that even in “classic” independent source contexts—that is, those that involve clearly separate law enforcement actions—suppression might be justified if a refusal to suppress evidence that has no causal link to the illegal action were to preclude effective enforcement of a particular Fourth Amendment promise.

218. *Hudson*, 126 S. Ct. at 2164. Justice Brennan believed that the Fourth Amendment guarantees individuals a constitutional right not to have illegally obtained evidence used against them. *See United States v. Leon*, 468 U.S. 897, 935 (1984) (Brennan, J., dissenting) (asserting that the Fourth Amendment “comprises a personal right to exclude all evidence secured by means of unreasonable searches and seizures”). Yet, not long after the Court decided *Mapp*, he authored a majority opinion asserting that not all evidence that the government has acquired as a result of an illegal search or seizure needs to be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (“We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police.”).

219. In addition to the “attenuation” exception, these “true exceptions” include the “inevitable discovery” exception, *see Nix v. Williams*, 467 U.S. 431 (1984); the “reasonable reliance on a warrant” exception, *see United States v. Leon*, 468 U.S. 897 (1984); the “reasonable reliance on a statute” exception, *see Illinois v. Krull*, 480 U.S. 340 (1987); and the “impeachment use” exception, *see United States v. Havens*, 446 U.S. 620 (1980). I refer to these as “true” exceptions because they allow evidence that falls within the scope of the exclusionary rule—i.e., primary or derivative evidence—to be introduced at trial. In addition, evidence obtained in violation of the Fourth Amendment is admissible in grand-jury proceedings and in civil tax and civil deportation cases. *See infra* note 297.

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

221. *See Nardone v. United States*, 308 U.S. 338, 341 (1939) (asserting that the causal “connection may have become so attenuated as to dissipate the taint”).

222. *See United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (finding a witness’s testimony at a perjury trial attenuated from an unreasonable search of an envelope that did have a causal connection to the testimony); *Brown v. Illinois*, 422 U.S. 590, 603 (1975) (holding that the connection between an illegal arrest and an arrestee’s incriminating statements can be attenuated, but that the delivery of *Miranda* warnings does not automatically attenuate the connection); *Wong Sun*, 371 U.S. at 491 (concluding that admissions made after an illegal arrest

reliance on attenuation to justify the admission of the items found after the officers' knock-and-announce violation would be unremarkable and without significance for the future of Fourth Amendment exclusion were it a conventional application of the accepted doctrine. Justice Scalia's explanation and application of attenuation, however, is both novel and potentially quite expansive. This version of attenuation holds the promise (or threat, depending on one's perspective) of considerable future erosion of the exclusionary rule's domain.

The traditional attenuation exception allows the admission of evidence gained from an unreasonable search or seizure if "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint'" of the unconstitutionality.²²³ The very nature of this exception and its underlying rationale restrict its application to derivative evidence. The connection between an illegality and primary evidence (evidence directly or immediately obtained) is both proximate and strong, not "remote" or "attenuated." Moreover, the ostensible logic justifying this hole in the suppression remedy is that officers are adequately deterred by the threat of losing evidence with a close tie to an illegality. Because evidence with an attenuated connection is unlikely to provide a strong incentive for future transgressions, suppression has only limited, incremental deterrent value. The always-high social costs of excluding that evidence outweigh the gains in Fourth Amendment enforcement.²²⁴ Thus, when time or significant intervening events sufficiently weaken the chain between a Fourth Amendment violation and the acquisition of evidence, that evidence may be admitted under the attenuation exception.²²⁵ This traditional branch of attenuation is consistent with the cost-benefit reasoning that underlies modern exclusionary rule jurisprudence.

The firearm and contraband found in Hudson's home did not qualify for admission under the traditional attenuation doctrine because they were primary, immediately acquired products, not derivative evidence with a

were, under the circumstances, sufficiently attenuated to be purged of the primary taint of the arrest).

223. *Wong Sun*, 371 U.S. at 487 (quoting *Nardone*, 308 U.S. at 341).

224. See *Brown*, 422 U.S. at 609 (Powell, J., concurring in part) (noting that, when the connection between illegality and evidence is attenuated, "the deterrent effect of the exclusionary rule no longer justifies its cost"); see also *Ceccolini*, 435 U.S. at 275-79 (making it clear that the legitimacy and application of the attenuation exception are rooted in and hinge upon the balance of social costs and deterrent benefits that underlie the exclusionary rule).

225. The Supreme Court has identified "temporal proximity," "intervening circumstances," and "the purpose and flagrancy of the official misconduct" as factors relevant to the attenuation calculus. *Brown*, 422 U.S. at 603-04. This list is not necessarily exhaustive. The character of the illegality would seem to be relevant either because more culpable or extreme misconduct requires a more potent deterrent or because society has a greater interest in discouraging such misconduct. Either explanation would support an effort to maximize deterrence by excluding more remote evidence when illegalities are purposeful or flagrant.

weakened connection to the unconstitutionally hasty entry. The majority brought the evidence under the attenuation umbrella by discerning (or devising) a second, quite different branch of the attenuation exception—one with clear application to primary products of Fourth Amendment wrongs. According to Justice Scalia, “[a]ttenuation also occurs when, *even given a direct causal connection*, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”²²⁶ He identified the distinctive interests underlying the knock-and-announce rule²²⁷ and then pointedly observed that, unlike the warrant rule, the knock-and-announce safeguard does *not* further a core Fourth Amendment privacy interest—the interest in “shielding . . . potential evidence from the government’s eyes.”²²⁸ Because knock-and-announce interests “have nothing to do with the seizure of . . . evidence,”²²⁹ they would not be served by suppression. Consequently, the alternative branch of the attenuation exception applied, and “the exclusionary rule [was] inapplicable.”²³⁰

According to this middle-ground interpretation of *Hudson*, when the police acquire evidence through unconstitutional conduct, the exclusionary rule applies only if suppression serves the interests safeguarded by the particular Fourth Amendment rule that has been violated. The impact of this principle might be insubstantial were it not for the further assumption that the *sole* interest served by suppression is preventing governmental access to private information—i.e., barring officers from seeing or taking items that individuals have concealed. If that is the case, then evidentiary suppression can be triggered *only* by violations of Fourth Amendment protections whose object is to restrict official access to confidential information.²³¹

The traditional branch of the attenuation exception reaches every kind of Fourth Amendment wrong, but it encompasses only the remote products of those wrongs. The alternative branch broadly authorizes the introduction of *all* products of an unconstitutional act whenever the command transgressed is not designed to shelter confidential information. It would seem to be applicable not only to knock-and-announce missteps, but also to

226. *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (emphasis added).

227. These interests include the protection of life and limb, the protection of property, and the preservation of the limited privacy and dignity interests that can be destroyed by a sudden entrance but are safeguarded by an “opportunity to collect oneself before answering the door.” *Id.* at 2165.

228. *Id.*; *see also id.* (“[T]he knock-and-announce rule has *never* protected . . . [the] interest in preventing the government from seeing or taking evidence described in a warrant.” (emphasis added)).

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

230. *Id.*

231. Put otherwise, the only Fourth Amendment dictates that the exclusionary rule enforces are those designed to “shield[] potential evidence from the government’s eyes” and hands. *Id.*

violations of other rules that prescribe the constitutional *manner* of home entries or other searches.²³² Constitutional prescriptions for “how to conduct searches” do not serve the “shield” function cited by the *Hudson* majority.²³³ More significant, however, is the potential application of this doctrine to any case involving evidence found as a result of an unconstitutional *seizure* of a person or property. The Fourth Amendment’s prohibitions of unreasonable seizures of individuals and effects are arguably designed to serve liberty and possessory interests, respectively, not to shield potential evidence from government eyes. According to the logic of *Hudson*, because suppression does not serve the interests beneath those rules, the exclusionary rule is inapplicable.

If my understanding of *Hudson*’s newly sprouted attenuation branch is accurate, then the suppression remedy will be available *only* for violations of those Fourth Amendment rules that forbid unreasonable *searches* in order to preserve the secrecy of information they would reveal. The warrant rule and the demand for probable cause to search are examples.²³⁴ Similarly, the requirements of reasonable suspicion for a weapons frisk,²³⁵ a protective sweep,²³⁶ or a school search²³⁷ are rules whose violation could lead to exclusion.²³⁸ The greatly expanded attenuation exception developed in *Hudson* would constrict the exclusionary rule dramatically, confining its scope to a limited, albeit significant, class of Fourth Amendment violations.

232. This would be the case even if there was an ostensible or arguable causal link between the violation and the acquisition of the evidence. As long as entries are severed from the searches that follow, such a causal link may not be possible—i.e., severance may preclude but-for causality between a “manner of search” violation and the subsequent acquisition of evidence. Nonetheless, if causation were shown, this novel attenuation branch would dictate suspension of the exclusionary rule because restraints upon the manner of entry serve interests like property protection. *See, e.g.,* *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (holding that the showing needed to justify an unannounced entry is not more demanding when officers damage or destroy property in order to enter, but observing that “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment”).

233. *See Hudson*, 126 S. Ct. at 2165 (“The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence . . .”).

234. Any time an officer were to exceed the scope of a warrant rule exception—for example, by searching beyond an arrestee’s area of immediate control, beyond the bounds of the consent given, or beyond the permissible breadth of an inventory of an arrestee—he or she would be in violation of the warrant rule and/or the probable cause demand, and suppression would be available for the items found.

235. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (authorizing frisks for weapons when an officer has “reason to believe that he is dealing with an armed and dangerous individual”).

236. *See Maryland v. Buie*, 494 U.S. 325, 341–42 (1990) (concluding that officers may conduct a “protective sweep” when they have reasonable suspicion that the home in which they are conducting an in-home arrest harbors dangerous persons).

237. *See New Jersey v. T.L.O.*, 469 U.S. 325, 329–33 (1985) (deciding that a school official may search a student upon reasonable suspicion that the search will uncover evidence of a violation of the law or the school rules).

238. This list is not intended to be exhaustive, only illustrative of the sorts of rule violations that could still lead to the exclusion sanction.

The question is whether this narrowing of the suppression remedy is logically defensible.

At first glance, the alternative branch of the attenuation exception seems like an odd bird, a mislabeled neonate with no ostensible relationship to its grizzled cousin. As its name suggests, the attenuation exception was developed for evidence with a relatively weak connection to Fourth Amendment wrongs. Its extension to evidence with a direct and immediate link to official misconduct is uncomfortable at best.²³⁹ Moreover, there is no substantive similarity between a doctrine admitting remotely connected evidence and one that covers evidence found by violating a rule whose purpose would not be served by suppression. Finally, prior cases had not employed the attenuation label for any situations except those involving weakly linked evidentiary profits.²⁴⁰

Justice Scalia suggested that there was precedential support for his novel slant on attenuation. He cited the assertion in *United States v. Ceccolini* that “penalties visited upon the Government, and . . . public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.”²⁴¹ *Ceccolini*, however, applied the traditional attenuation exception, and the language quoted furnishes absolutely no support for the contention that attenuation applies when suppression would not serve the interests underlying a guarantee. The “law” referred to by the *Ceccolini* Court was the exclusionary rule, not the Fourth Amendment provision violated. The point of the quote was that evidence should not be suppressed unless the deterrent “purposes” of the exclusionary rule are adequately served by suppression.²⁴² In context, the Court was saying that, when a causal link is truly attenuated, the “penalties” imposed by suppression do not “bear” an adequate “relation” to the deterrent “purposes” that the exclusionary rule “is

239. Of course, it would not be the first time that Fourth Amendment terminology did not accurately describe the situation it governs. The “open fields” doctrine, for example, dictates that certain spaces are beyond the protection of the Fourth Amendment, even though those spaces may be neither “open” nor “fields.” *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984) (“An open field need be neither ‘open’ nor a ‘field’ as those terms are used in common speech.”).

240. The inapt name, dissimilarity, and lack of precedent do not mean that the new attenuation branch is necessarily misguided. Those facts do suggest, however, that it might have been more appropriate to recognize it as a distinct exception with a more fitting label.

241. *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (quoting *United States v. Ceccolini*, 435 U.S. 268, 279 (1978)).

242. This was hardly a revolutionary point. The Court has often emphasized that the exclusionary rule is applicable only where its Fourth Amendment enforcement goals would be “most efficaciously served.” *United States v. Calandra*, 414 U.S. 338, 348 (1974); *see also* *Stone v. Powell*, 428 U.S. 465, 486 (1976) (commenting that the exclusionary rule “has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons”); *United States v. Janis*, 428 U.S. 433, 454 (1976) (remarking that where the rule “does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted”).

[designed] to serve.”²⁴³ In sum, the language lifted from *Ceccolini* was a pithy expression of the logic that underlies the *traditional* branch of attenuation. It is disingenuous to suggest that it offers any support for the newer version.

The other precedent that Justice Scalia cited was *New York v. Harris*.²⁴⁴ In *Harris*, officers, seeking to arrest a felon, entered a home in violation of the arrest warrant requirement of *Payton v. New York*.²⁴⁵ In explaining why statements made by the arrestee outside his home were admissible, the Court did assert that suppression “would not serve the purpose of the rule that made [the] in-house arrest illegal” and that the purpose of that rule was “vindicated” by excluding evidence acquired inside the home.²⁴⁶ These assertions *did* mean what Justice Scalia suggested—that exclusion would not further the home privacy interests beneath *Payton*’s warrant requirement. When read as a whole, however, the *Harris* opinion provides no significant support for the variety of attenuation described in *Hudson*.

First, *Harris* held that the statements made outside the home were admissible because there was *no causal connection* between the illegal home entry and the acquisition of those statements.²⁴⁷ “[A]ttenuation analysis” was not “appropriate” in *Harris* because that doctrine is relevant *only* when “evidence is in some sense the product of illegal governmental activity.”²⁴⁸ The assertion that suppression would not serve the purpose of the *Payton* rule was an effort to bolster the “no causation” conclusion.²⁴⁹ There was no suggestion that attenuation had occurred, despite a causal connection, because suppression would not serve the purpose of the *Payton* rule. In fact, the Court disavowed any reliance on the attenuation doctrine.²⁵⁰

Second, a pivotal part of *Harris*’s reasoning was that the suppression of evidence acquired inside the home (including any statements the arrestee made there) furnished ample deterrence of *Payton* violations and, therefore, adequately enforced the vital home privacy interests served by the *Payton* rule.²⁵¹ Right after asserting that suppression would not further the purpose

243. *Ceccolini*, 435 U.S. at 279.

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

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

246. *Id.* at 20.

247. *Id.* At 19–21; *see supra* note 214.

248. *Harris*, 495 U.S. at 19 (quoting *United States v. Crews*, 445 U.S. 463, 471 (1980)).

249. The quote that Justice Scalia conscripted immediately followed the explanation that there was no causal link between the illegal home entry and the later obtainment of the arrestee’s statements elsewhere. The assertion that suppression of those statements would not serve the purpose of the arrest warrant rule was preceded immediately by the words “[t]o put the matter another way.” *Id.* at 20. This transitional phrase makes it clear that the “purpose-would-not-be-served-by-suppression” rationale was inextricably tied to the “no causation” premise.

250. *Id.* at 19.

251. *Id.* at 20 (“The warrant requirement for an arrest in the home is imposed to protect the home, and [once] anything incriminating the police gather[] from arresting [a person] in

of the arrest warrant requirement, the Court discussed at some length how the exclusionary rule would provide ample protection for the *Payton* rule because officers still stood to lose a lot from violating that rule.²⁵² In the Court's view, the "incremental deterrent value" of suppressing the statements made outside the home would have been "minimal."²⁵³ Thus, the declaration that the suppression of some evidence would not serve the purposes of the violated Fourth Amendment rule was made with full recognition that the exclusion of other evidence would still serve those purposes. *Harris*, therefore, furnishes no foundation for an exception that deprives certain types of violations of all exclusionary rule support.

Finally, the *Harris* Court neither explained nor justified its intimation that exclusion is inappropriate when suppression would not serve the purpose of the violated Fourth Amendment rule. The Court offered no reason why this might be a legitimate limitation on the scope of exclusion.²⁵⁴ Put simply, even if it had been a freestanding basis for exempting evidence from exclusion, courts should not perpetuate the "purpose-would-not-be-served" rationale unless they can reconcile it with the logic and objectives of Fourth Amendment exclusion.

Like its ill-fitting name, the dearth of precedential support for the newly sprouted branch of attenuation doctrine does not mean that it is indefensible. The real question is whether it makes constitutional sense to exempt from suppression evidence with a "direct causal connection" to an illegality on the ground that exclusion would not serve "the interest protected by the constitutional guarantee that has been violated."²⁵⁵ In my opinion, the doctrine has an undeniable, understandable, but entirely superficial appeal. It has no substantive merit.

Hudson's variety of attenuation rests on two premises. The first is that it is inappropriate to exclude evidence when exclusion would not further the values of the violated guarantee. The second, more important foundation is that exclusion serves the interest underlying a Fourth Amendment mandate *only* when that interest is an entitlement to keep "potential evidence" from the government.²⁵⁶ Ordinarily, the announcement of a new exception to the exclusionary rule is accompanied by a description of the relevant costs and benefits—that is, the Court typically explains why the social costs outweigh

his home, rather than elsewhere, has been excluded . . . the purpose of [the warrant requirement has been] . . . vindicated.”)

252. *Id.* (“[T]he police know that a warrantless entry will lead to the suppression of any evidence found . . .”).

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

254. Perhaps that is because it was *not* an independent, sufficient ground for declaring the statements admissible, but was instead a small, unnecessary reason that was inextricably tied to the “no causation” premise and to confidence that the exclusionary rule would still deter violations of the rule at issue.

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

256. *Id.* at 2165.

the deterrent gains of suppression.²⁵⁷ The *Hudson* majority offered no cost-benefit justification for the new face of attenuation, no explanation of why its underlying premises support exemption from exclusion.

From one perspective, the first premise—that exclusion is appropriate only when the interests underlying the transgressed rule are furthered—is unarguable. If suppression would provide officers with no (or insignificant) motives for respecting a Fourth Amendment command in the future, doing nothing (or little) to safeguard its objectives, exclusion would be pointless and unwise.²⁵⁸ It is clear, however, that this is not the meaning of Justice Scalia’s first premise. Excluding evidence found in the immediate aftermath of a knock-and-announce violation²⁵⁹ clearly *could* provide officers with an incentive for compliance, preserving the interests served by that rule. The same is true for evidence discovered by unlawfully seizing an individual. Suppression of evidence obtained from the individual would remove the incentive for illegal seizures, promoting the vital liberty interests that are the object of restricting officers’ authority to seize persons.

Justice Scalia’s apparent meaning was that evidence should not be barred when suppression would not afford *immediate* protection in the courtroom for the interests of the individual seeking suppression—i.e., the interests that were infringed upon by a Fourth Amendment violation that occurred outside the courtroom. By depriving the government of evidence, suppression “reshields” it from government eyes and hands. To the extent possible, it restores the status quo ante, eliminating the unlawful access and once again concealing the items or information discovered. If suppression furthers Fourth Amendment interests by “reshielding” evidence, then it can advance the purposes of a Fourth Amendment guarantee only when those purposes include shielding evidence from government access. Put otherwise, the newly crafted attenuation branch appears to rest on an assumption that the aim of the exclusionary rule is to erase the government’s evidentiary gains because doing so remedies the harm effected by an unreasonable search. The only time courtroom suppression can undo the damage done out of court is when officials have breached an entitlement to “shield” items from the eyes, hands, or minds of government agents.

The flaws in this logic are glaring. It is rooted in the long-rejected notion that the exclusionary rule is present oriented, designed to provide

257. See, e.g., *United States v. Leon*, 468 U.S. 897, 922 (1984) (“[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial [social] costs of exclusion.”); *Nix v. Williams*, 467 U.S. 431, 446 (1984) (“[T]he societal costs of the exclusionary rule far outweigh any possible benefits to deterrence that a good-faith requirement might produce.”).

258. This reasoning, of course, assumes that one accepts the view that deterrence is essentially the sole justification for Fourth Amendment exclusion.

259. For purposes of this analysis, Justice Scalia assumed a causal connection between the violation and the evidence. Consequently, such evidence would be the “profit” of the violation.

reparation for the person injured by a search or seizure, making him or her whole—restoring, to the best of our ability, the privacy that was unconstitutionally breached. While this is a possible conception of the goals of suppression, it most certainly is *not* the understanding that has prevailed for nearly four decades. The modern Court has repeatedly emphasized, contrary to intimations in *Weeks*²⁶⁰ and *Mapp*,²⁶¹ that the exclusionary rule is not a right belonging to the victim of an illegal search or seizure and is not intended to compensate her for the harm done or to undo the unlawful invasion of privacy that has occurred.²⁶² In part, this conception is based on the notion that privacy cannot be restored, that the injury cannot be remedied.²⁶³ More important, it is rooted in a belief that the Fourth Amendment provides out-of-court shelter from government searches and seizures, but grants no courtroom right, no entitlement to bar probative evidence from trial.²⁶⁴ In fact, the exclusionary rule is entirely future-oriented, seeking to deter all law enforcement officers from committing

260. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the refusal to return illegally obtained evidence was “a denial of the constitutional rights of the” defendant and that the trial court committed “prejudicial error” by “permitting [the] use [of the evidence] upon the trial”).

261. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (declaring it “logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right”); *id.* (describing “the exclusion of the evidence” obtained in violation of the guarantee against unreasonable searches and seizures as the “most important constitutional privilege” protected by that guarantee).

262. See *United States v. Calandra*, 414 U.S. 338, 347 (1974) (observing that “[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim” or to restore the lost privacy); see also *United States v. Janis*, 428 U.S. 433, 443 n.12 (1976) (reaffirming that the purpose is to prevent future transgressions, not repair past injuries).

263. See *Linkletter v. Walker*, 381 U.S. 618, 637 (1965) (declaring that “the ruptured privacy of the victims’ homes and effects cannot be restored” and that “[r]eparation comes too late”); accord *Janis*, 428 U.S. at 443 n.12; *Calandra*, 414 U.S. at 347.

264. Oddly, Justice Scalia has, on more than one occasion, gratuitously referred to the exclusionary rule as a “trial right” that might be waived by an aggrieved individual. See *United States v. Grubbs*, 547 U.S. 90, 99 (2006) (asserting that the “Constitution protects property owners . . . by providing . . . a right to suppress evidence improperly obtained” (emphasis added)); *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (“What [the defendant] is assured by the *trial right of the exclusionary rule* . . . is that no evidence seized in violation of the Fourth Amendment will be introduced . . . unless he consents.” (emphasis added)). The Court has definitively rejected that view in a host of opinions, some of which have been joined by Justice Scalia, and it seems clear, from his opinion in *Hudson*, that Justice Scalia does not understand Fourth Amendment suppression to be a right. If Justice Scalia *does* believe his own words, then either judicial abolition of the *Weeks-Mapp* rule is legally impossible or that rule is, like the *Miranda* doctrine, a constitutionally required protection that can be supplanted only by a fully effective equivalent. See *Dickerson v. United States*, 530 U.S. 428, 438–42 (2000) (deciding that *Miranda* is a constitutionally required rule that must be honored unless replaced by an equally effective alternative). Considering Justice Scalia’s view that *Miranda* is constitutionally illegitimate, see *id.* at 461 (Scalia, J., dissenting), it seems unlikely that his repeated description of suppression as a trial right was intended to root the exclusion doctrine in logic similar to that supporting *Miranda*.

similar Fourth Amendment wrongs in the days, months, and years to come. It focuses not upon the offended individual (except insofar as he is a member of the class of beneficiaries less likely to be victimized in the future), but upon all “the people” entitled to the Fourth Amendment’s privacy, liberty, and property protections.²⁶⁵ The exclusionary rule *does* serve the interests underlying the rules governing searches and seizures, but it does not serve them immediately, within the confines of the courtroom. Rather, it promotes Fourth Amendment purposes by discouraging future deprivations.

A proper understanding of the role of the suppression doctrine in preserving constitutional interests unmask the illogic of the attenuation doctrine announced in *Hudson*. The knock-and-announce rule’s underlying interests—even if they are as limited as the majority asserts²⁶⁶—would undoubtedly be served by depriving officers of directly connected fruits, sending the message that such violations cannot yield profit.²⁶⁷ To the extent that future officers—chary of losing valuable evidence—would comply with the rule, human life and limb, property, and the privacy and dignity interests violated by unannounced entry would all be protected. Similarly, if officers knew that they could lose evidence found on persons arrested without probable cause or detained without reasonable suspicion, the result would be protection of the liberty and dignity interests furthered by the prohibition on unreasonable seizures.²⁶⁸

In sum, the new face of attenuation unveiled in *Hudson* is misnamed, lacks precedential support, and, most importantly, rests on a patently erroneous conception of the exclusionary rule’s constitutional role.²⁶⁹ It is a specious doctrine with enormous potential to cabin the exclusionary rule and render it unable to serve core Fourth Amendment values.²⁷⁰ Without further consideration, explanation, or endorsement by a majority of the Supreme Court,²⁷¹ lower courts should hesitate to extend it to other Fourth Amendment realms.²⁷²

265. See U.S. CONST. amend. IV (granting “the people” a right to be “secure . . . against unreasonable searches and seizures”).

266. See *supra* notes 227–30 and accompanying text.

267. Of course, knock-and-announce violations could still yield the profit authorized by legitimate exceptions to the exclusionary rule, such as the traditional attenuation exception and the impeachment exception.

268. Suppression would also protect the privacy interests lost when the arrested person is searched incident to the arrest or when the detained person is frisked for weapons.

269. The endorsement of an exception rooted in such fatally flawed logic is yet another indication of general hostility to the exclusionary rule.

270. Because of the serious destructive potential of this exception, this interpretation of *Hudson*, while classified as “middle ground” here, surely is located toward the “too broad” extreme of the interpretive spectrum.

271. It bears note that Justice Kennedy did not clearly endorse this new variety of attenuation. While he asserted that he agreed with most of the majority’s reasoning, he only

3. The Cost–Benefit Exception: A Somewhat Creative Use of Familiar Premises

The final middle-ground interpretation of *Hudson* also holds the potential for significant constriction of the scope of suppression. After concluding that the causation requirement and attenuation exception each justified admission of the items found in Hudson’s home, Justice Scalia asserted that, even if there was a but-for connection and even if attenuation did not apply,²⁷³ the evidence would still have been admissible because the costs of excluding the evidentiary products of a knock-and-announce violation outweigh any deterrent benefits.²⁷⁴ It is impossible to forecast the impact of this cost–benefit “exception” on the future of Fourth Amendment exclusion. Close examination of the Court’s premises, however, sheds considerable light on the spectrum of possibilities.

According to Justice Scalia, excluding evidence obtained from knock-and-announce violations would impose “considerable” social costs—costs beyond the “grave adverse consequence” of risking the release of “dangerous criminals into society,” which suppression “always entails.”²⁷⁵ First, criminal defendants would have little to lose but an “enormous” amount to gain; a successful motion would lead to “suppression of all evidence,” which “in many cases” would yield “a get-out-of-jail-free card.”²⁷⁶ The result would be a torrent of time-consuming litigation that would burden trial and appellate courts with particularly difficult questions. Second, officers’ uncertainty about the time they must wait after giving notice would engender a fear of losing evidence, which would cause them to “refrain[] from timely entry after knocking and announcing.”²⁷⁷ The costly

specified agreement with the “no causation” predicate and suggested that he was subscribing to the cost–benefit analysis. *See Hudson v. Michigan*, 126 S. Ct. 2159, 2170–71 (2006) (Kennedy, J., concurring in part and concurring in the judgment). Moreover, he indicated that he did not find *Harris* to be as pertinent as Justice Scalia had suggested. *Id.* at 2171. Consequently, it is not clear that there is majority support for the new attenuation branch and its fallacious logic.

272. In *Hudson*, the newly minted branch of the attenuation doctrine is one of three independent justifications for eliminating the suppression remedy for knock-and-announce violations. *See id.* at 2164–68 (majority opinion). Elimination of *Hudson*’s attenuation foundation would not change the result as long as the other two predicates for denying exclusion—a lack of causation and cost–benefit balancing—are accepted.

273. *Id.* at 2165 (stating that the cost–benefit analysis was “[q]uite apart from the requirement of *unattenuated causation*” (emphasis added)).

274. *Id.* at 2168 (concluding that because “the social costs” of exclusion for knock-and-announce violations “are considerable,” the “incentive” for violating the rule is “minimal,” and the alternative “extant deterrents” are great, “the massive remedy of suppressing evidence of guilt is unjustified”).

275. *Id.* at 2165.

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

277. *Id.*

consequence would be “preventable violence against officers” and “the destruction of evidence.”²⁷⁸

On the other side of the scales, Justice Scalia discovered diminished deterrent gains. He noted that, initially, one must assess officers’ motivations to violate a rule, for “the value of deterrence depends on the strength of the incentive to commit the forbidden act.”²⁷⁹ Officers’ incentives for “ignoring knock-and-announce” constraints are weak, because the two gains they could realistically expect—preventing the “destruction of evidence” and avoiding “life-threatening resistance”—can typically be achieved *without* violating the rule.²⁸⁰ The apparent point was that the weak incentives for violating the rule diminish the need (and the desire) for the deterrence that suppression effects. In sum, there is less work for the exclusionary rule to do in this area.

Justice Scalia then proceeded to explain why there currently are ample alternative deterrents to knock-and-announce violations, mechanisms that render the exclusionary rule less “necessary” than it otherwise would be.²⁸¹ The first alternative is federal civil-damages remedies for violations by state, city, and federal officers.²⁸² The force of these remedies is not undercut by the relatively small damages awards that might be expected, because the congressional authorization of “attorney’s fees for civil-rights plaintiffs” has increased the willingness of both “[c]itizens and lawyers” to seek redress and has “greatly expanded” the number of “lawyers who specialize in civil-rights grievances.”²⁸³ Moreover, the dearth of reported cases involving “huge

278. *Id.* The argument is that the knock-and-announce rule’s lack of clarity would yield deterrent overkill—that is, hesitance to exercise legitimate constitutional authority.

279. *Id.*

280. *Id.* (stating that these “dangers” are a basis for “suspend[ing] the knock-and-announce requirement anyway” upon a showing of mere “reasonable suspicion”). Justice Scalia’s reasoning at this point seems to be in some tension with the notion that knock-and-announce violations do not enable officers to acquire evidence. If entering when it is not justified would enable an officer to thwart evidence destruction, then it would seem that there is a but-for causal connection between the illegal entry and the acquisition of the evidence. Put otherwise, the knock-and-announce violation has enabled the officer to acquire evidence that otherwise would have been lost.

281. *Hudson*, 126 S. Ct. at 2166. Hudson argued that, without suppression, knock-and-announce violations would not be discouraged. *Id.* Justice Scalia replied that this claim was “not . . . true.” *Id.* He then observed that even if it were true, exclusion would not “necessarily” be justified, citing examples of even more egregious constitutional wrongs that are “undeterred” because suppression is not an available remedy. *Id.* His point was that the cost-benefit scales do not necessarily favor suppression simply because a refusal to suppress would leave a particular constitutional command entirely unenforced. One could certainly take issue with this position and argue that there is logic in extending the exclusionary rule, where it is feasible, to enforce constitutional commands that are ignored under the current doctrinal constraints imposed on the suppression remedy. That argument, however, need not be explored here.

282. *Id.* at 2167.

283. *Id.* It is possible that Justice Scalia did not mean to attribute the increased willingness to bring claims and the increased number of attorneys practicing in the area solely to the availability of fees, but it was the only cause he cited for these phenomena.

awards” was an “unhelpful statistic” that did not suggest that civil-rights damages were an ineffective deterrent.²⁸⁴ First, it is not clear that “only large damages would deter . . . misconduct” or that “large . . . attorney’s fees” would not have that effect.²⁸⁵ Second, neither the number of settled claims involving huge awards nor the number of knock-and-announce violations that have “produced anything more than nominal injury” is known.²⁸⁶ Third, there is evidence that courts do not let the “qualified immunity” doctrine impede civil claims for knock-and-announce violations.²⁸⁷ For all of these reasons, the Court thought it appropriate to “assume[,]” as it had “in other contexts,” that “civil liability is an effective deterrent” for knock-and-announce violations.²⁸⁸ Another extant source of deterrence is the increased “professionalism of police forces.”²⁸⁹ Officers are discouraged from violating the knock-and-announce rule by “a new emphasis on internal discipline,” and by “reforms in the education, training, and supervision” that encourage “respect” for “constitutional guarantees in various situations.”²⁹⁰ The growth of “various forms of citizen review” of police conduct can also serve to motivate officers to comply with rules like the knock-and-announce command.²⁹¹ Cost-benefit analysis of exclusionary rule issues is neither novel nor unprecedented. It has controlled the resolution of suppression questions for nearly four decades.²⁹² What is unique is the singling out of a

284. *Id.*

285. *Id.*

286. *Hudson*, 126 S. Ct. at 2167. Justice Scalia’s apparent points are that settled, but unreported, claims involving large awards would deter and that if there are few claims with large actual damages, this would explain the scarcity of large awards. It is difficult to see how *unknown* settlements would send a message to law enforcement. Moreover, if only sufficiently large damages awards would serve as deterrents, then the fact that knock-and-announce violations rarely, if ever, justify such awards would seem to preclude meaningful deterrence.

287. *Id.* The apparent point is that the deterrent force of civil damages would not be undercut by the availability and officers’ expectations of immunity from liability, as it sometimes is in other contexts.

288. *Id.* at 2167–68. For a critical discussion of the precedents that the Court cited to support the assertion that it had previously indulged this assumption, see *supra* note 58.

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

290. *Id.* (quoting WALKER, *supra* note 139, at 51). According to Justice Scalia, “financial liability” for “[f]ailure to teach and enforce constitutional requirements” provides incentives for such reforms. *Id.* In addition, the fact that departments are today “staffed with professionals” whose career success can be threatened by “internal discipline” enhances the likely “deterrent effect” of such discipline. *Id.*

291. *Id.*

292. See *Alderman v. United States*, 394 U.S. 165, 174–75 (1969) (“[T]he additional benefits of extending the exclusionary rule to other defendants would [not] justify further encroachment upon the public interest in prosecuting those accused of crime . . . on the basis of all the evidence which exposes the truth.”). Just five years after *Alderman*, the Court explicitly referred to the “balancing process” that underlies suppression analysis, asserting that the exclusionary rule is “restricted to those areas where its remedial objectives are thought most efficaciously served.” *United States v. Calandra*, 414 U.S. 338, 348 (1974).

particular type of Fourth Amendment violation and the decision that the cost–benefit balance justifies a declaration that *no evidence* with an unattenuated causal link to that type of violation would ever be subject to suppression because of that violation.²⁹³ This use of the utilitarian scales to create an exception to the exclusionary rule for an entire category of constitutional transgression is unprecedented. Prior balancing analyses have permitted *only certain people* to claim suppression;²⁹⁴ allowed *some types* of illegally discovered evidence to be introduced;²⁹⁵ authorized the use of illegally obtained evidence *for certain, limited purposes*;²⁹⁶ and let evidence be introduced in *certain kinds* of proceedings.²⁹⁷ Never has the Court targeted a particular Fourth Amendment command and declared that the costs of exclusion are uniquely weighty, that officers have weak incentives to transgress and ample alternative reasons to comply, and that the resulting

293. Under *Hudson's* balance of interests, no individual is entitled to suppression in *any* proceeding, and the evidence is admissible for *any* relevant purpose. There is absolutely no indication that either the bad-faith character or the egregious nature of a violation could support suppression. Moreover, both of *Hudson's* alternative foundations—no-causation and attenuation—are applicable no matter what the character or nature of the violation.

294. This is the “standing” doctrine that allows only those who have been the victims of a search or seizure to claim suppression of evidence discovered as a result. See *Rakas v. Illinois*, 439 U.S. 128, 132–34 (1978).

295. I am referring here to the traditional branch of attenuation, see *Brown v. Illinois*, 422 U.S. 590, 603–04 (1975), to the inevitable discovery exception, see *Nix v. Williams*, 467 U.S. 431, 446–50 (1984), and to the “reasonable reliance on a warrant” exception, see *United States v. Leon*, 468 U.S. 897, 922 (1984). The *Leon* exception probably comes closest to *Hudson*. Still, the *Leon* doctrine does not preclude all exclusion of evidence acquired on the basis of an invalid warrant. According to the Court, some warrants cannot reasonably be relied upon. See *id.* at 923 (cautioning that exclusion will follow if the warrant is not issued by a neutral and detached magistrate, if an application contains intentionally or recklessly false information, if the showing of probable cause is extremely deficient, or if the warrant is clearly violative of the particularity demand). Moreover, the balance struck by the *Leon* majority was different in character from the balance described in *Hudson*. The cost side of the balance in *Leon* did not rely on unique costs such as excessive police hesitance due to unclarity that could result in violence or lost evidence. And in assessing the deterrent side, the Court did not suggest that officers had minimal incentives to violate the requirement that they obtain valid warrants. Nor did the majority rely at all on the alternative sources of deterrence that have evolved since *Mapp*—factors that were central and dominant in the *Hudson* balance. In *Leon*, the logic was that officers would not be deterred from violating the Fourth Amendment because, by hypothesis, their conduct has been objectively reasonable and no more could or should be expected of them. See *id.* at 919–20.

296. I am referring here to the impeachment exception. See *United States v. Havens*, 446 U.S. 620, 624–28 (1980) (discussing the extent of the exception).

297. The Court has held that suppression is not available in a number of settings: (1) civil tax proceedings, see *United States v. Janis*, 428 U.S. 433, 454 (1976); (2) federal habeas corpus claims (unless the claimant did not receive a “full and fair” opportunity to litigate the claim in the state court), see *Stone v. Powell*, 428 U.S. 465, 481–82 (1976); (3) grand-jury proceedings, see *Calandra*, 414 U.S. at 351–52; and (4) civil-deportation hearings, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984). Not long after *Mapp*, however, the Court held that the exclusionary rule *does* apply to “quasi-criminal” forfeiture proceedings against “property not intrinsically illegal in character” in which “the forfeiture is clearly a penalty for the criminal offense.” *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700–01 (1965).

balance precludes *any* suppression. In sum, *Hudson's* creative cost–benefit analysis produced a different sort of incursion upon the exclusionary rule's scope, which might well be stretched to reach other kinds of Fourth Amendment missteps.

In addition, the Court's *reasoning*—the tools it used to assess the weights on the scales—reflected atypical considerations that were largely absent²⁹⁸ from prior balances.²⁹⁹ The mode of analysis and the variables relied upon suggest the possibility of extension to violations of other Fourth Amendment rules, perhaps even a substantial number. Unlike the logic used to justify previous exceptions, Justice Scalia's reasoning has few limitations that would restrain its application in other contexts.

At the outset, Justice Scalia proffered no reason why his cost–benefit reasoning was limited to the knock-and-announce rule or other rules restricting the “manner” in which a search or seizure is conducted. There is no explicit indication that this new cost–benefit exception could not extend to other types of Fourth Amendment wrongs. The question is whether the variables in *Hudson's* balance might be apposite to other kinds of transgressions.

In deeming the social costs of exclusion for knock-and-announce violations “considerable,”³⁰⁰ Justice Scalia cited three distinct costs. The first—the risk of releasing dangerous criminals—is always a cost of suppression³⁰¹ and, thus, would factor into the balance for *any* Fourth Amendment violation. The second cost is the burden on the legal system likely to result from suppression for knock-and-announce violations. The Court foresaw an avalanche of extensive litigation, in part because of the motivation furnished by the “enormous” payoff for criminal defendants, and

298. Admittedly, there is a modest suggestion in *Leon* of some concern with “overkill”—that is, that the exclusionary rule would cause officers to refrain from exercising constitutionally legitimate authority. *See Leon*, 468 U.S. at 919–20 (asserting that the effect of suppression when officers reasonably rely on warrants could be to make them less willing to do their jobs). This was not included among the “costs” of exclusion, but, instead, was cited as a reason for concluding that no desirable deterrence would be produced by suppression. Also, in *Nix v. Williams*, brief, passing mention of civil alternatives appears among the reasons offered for not including a lack of bad faith requirement in the inevitable discovery exception. *Nix*, 467 U.S. at 445–46.

299. Justice Scalia did not acknowledge that there was anything special about his approach in *Hudson*. To the contrary, one might hear his statement that “the exclusionary rule has *never* been applied except” when deterrent gains outweigh social costs, *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (emphasis added), as a suggestion that categorical cost–benefit balancing of the sort he employed is typical—indeed, that it is even required. In addition, his later statement that the Court had assumed that civil remedies were effective in other contexts might be heard as a suggestion that a critical part of *Hudson's* reasoning about deterrent values had a solid pedigree.

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

301. Justice Scalia recognized the fact that this cost was not unique to knock-and-announce contexts. *See id.* (noting that exclusion “always entails” this risk).

in part because of the difficulty of determining whether officers have complied with the knock-and-announce rule.³⁰² No matter what rule has been violated, however, the “jackpot” for a criminal defendant would seem to be equally “enormous.”³⁰³ Suppression is suppression, and because the likelihood that a defendant will go free does not vary based on the nature of the transgression, the motivation to litigate seems equally strong for other potentially unreasonable searches and seizures. The Court did suggest that the opportunities to make colorable claims and the complexities of the litigation were unique in the knock-and-announce context due to the ambiguity and amorphousness of the governing standards. In truth, however, many Fourth Amendment rules are equally ambiguous and amorphous, and determining whether officers have complied could be just as difficult and time-consuming.³⁰⁴ Put simply, the premises that led the Court to predict costly, burdensome litigation over knock-and-announce compliance could be readily discovered in a host of other Fourth Amendment areas.

The final cost of suppression for knock-and-announce violations—the risk of violence against officers and lost evidence—was tied specifically to the knock-and-announce context and the uncertainty of its governing standards.³⁰⁵ Unable to determine when an entry is legitimate, and fearful of

302. *Id.* at 2166.

303. *Id.*

304. The “probable cause” norm for searches and seizures is hardly the picture of clarity or precision. *See* *Illinois v. Gates*, 462 U.S. 213, 238–39, 243 n.13 (1983) (concluding that the question is whether a magistrate has a “substantial basis” for finding “a fair probability” or a “substantial chance” that evidence will be found (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960))); *see also* *Atwater v. City of Lago Vista*, 532 U.S. 318, 366 (2001) (O’Connor, J., dissenting) (“Probable cause itself . . . is not a model of precision.”); *United States v. Leon*, 468 U.S. 897, 914 (1984) (asserting that “[r]easonable minds frequently may differ” over whether the probable cause standard has been satisfied). “Reasonable suspicion,” a determinative Fourth Amendment standard in certain contexts, is also ambiguous and imprecise. *See generally* *Alabama v. White*, 496 U.S. 325 (1990) (investigative detention); *Maryland v. Buie*, 494 U.S. 325 (1990) (protective sweep of a home); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of school children); *Michigan v. Long*, 463 U.S. 1032 (1983) (limited weapons search); *United States v. Place*, 462 U.S. 696 (1983) (investigative detention of personal possessions). Moreover, at least outside the context of vehicles, *see* *New York v. Belton*, 453 U.S. 454, 459–69 (1981) (holding, in order to provide officers with bright-line guidance as to their authority, that the entire passenger compartment is within the area of immediate control of a recent occupant of a vehicle), the area that may be searched incident to an arrest—that is, the area within an arrestee’s immediate control—is not delimited by any bright line. The examples of necessary Fourth Amendment ambiguity could be multiplied. It seems clear that officers must implement open-ended, vague, and uncertain standards much more often than they are able to rely upon clear, rigid, bright lines. And, in all such cases, courts must expend the time and effort necessary to resolve disputes over the officers’ decisions. *Cf.* *Scott v. Harris*, 127 S. Ct. 1769, 1778 (2007) (rejecting, in a majority opinion by Justice Scalia, the notion that an “easy-to-apply legal test” can govern the reasonableness of a seizure by deadly force, and declaring that “in the end,” the Court must “slosh [its] way through the factbound morass of ‘reasonableness’”).

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

tainting probative evidence by jumping the gun, officers would hesitate when entry was, in fact, permissible—that is, they would likely err on the side of excess caution. This excessive deterrence would afford occupants opportunities to resist with violence and to dispose of the objects sought by officers. Once again, other rules have similar—even equal—ambiguities that could produce comparable uncertainty and reluctance to exercise constitutionally legitimate authority. The results would sometimes be unnecessary increases in violence and would often be losses of valuable evidence.³⁰⁶

In sum, one cost of exclusion cited by Justice Scalia in *Hudson* is imposed whenever evidence is suppressed, while the other two, although linked specifically to the character of the knock-and-announce rule, could easily pertain to many Fourth Amendment rules. Supreme Court Justices and lower-court judges, if so inclined, could easily conclude that equally weighty social costs flow from suppression for other Fourth Amendment errors. On the other hand, it would be equally easy to declare that two of the costs are uniquely substantial for knock-and-announce violations and that the price of exclusion in other contexts is not as high. My hardly original point is that the cost side of the balance is quite malleable, one might say manipulable.³⁰⁷

306. The potential for increased violence due to hesitation in response to vague standards would seem to be present in contexts where officers must decide whether to use deadly force. In one deadly force setting, the governing standard requires an officer to decide whether there is “probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm,” *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), a standard laden with ambiguity. Another setting involving the choice to employ deadly force requires an officer to decide whether, considering all the facts, the balance of interests renders his decision reasonable. See *Scott*, 127 S. Ct. at 1778. Weapons frisks of persons and automobiles and protective sweeps of homes for dangerous persons are governed by the nebulous “reasonable suspicion” criterion. See *Buie*, 494 U.S. at 335–37; *Long*, 463 U.S. at 1049–50. Reluctance to disarm a person or vehicle or to search through a dwelling due to uncertainty about whether the facts justify such actions could certainly produce unnecessary violence and injury. Moreover, the “exigent circumstances” exception to the warrant requirement prescribes a standard that is far from clear or easily applied. See *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (determining that a warrantless arrest of a suspect in his home was unconstitutional because the state failed to show exigent circumstances); *Vale v. Louisiana*, 399 U.S. 30, 33–34 (1970) (declining to hold that an arrest on the street outside of the defendant’s home justified a warrantless search of the home). It necessitates a factbound assessment of the totality of the circumstances and does not even specify the level of likelihood of harm that suffices for warrantless searches. Uncertainty about whether the facts give rise to sufficient exigency to search a home or office or to arrest a culprit could yield excessive hesitation that might well allow a suspect to dispose of evidence or permit a dangerous felon to escape and perpetrate further harms. The preceding is an illustrative, but not exhaustive, catalogue of situations in which the concerns cited in *Hudson* would be relevant to and could influence the exclusionary rule balance.

307. See *Leon*, 468 U.S. at 942 (Brennan, J., dissenting) (asserting that the balancing of costs and benefits performed by the Court “is a virtually impossible task for the judiciary to perform honestly or accurately,” and that “the reality is that the Court’s opinions represent inherently

The *Hudson* majority described the costs that factored into its balance in two paragraphs. It devoted roughly three times as much attention to a description of why the deterrent values of suppression were limited. The initial reason—the weakness of officers’ incentives—was linked specifically to knock-and-announce missteps. In the Court’s view, officers realize that they need not violate the rule to prevent violence or the destruction of evidence, because those interests can justify unannounced entries, rendering violations unnecessary.³⁰⁸ It is difficult to say whether this questionable premise could logically be extended to many other Fourth Amendment rules. There surely are other contexts where officers’ interests in searching or seizing could often be served by satisfying a relatively undemanding standard for compliance with the Fourth Amendment.³⁰⁹ It seems unlikely, however, that this premise would apply to a substantial number of constraints upon searches and seizures.³¹⁰

The majority’s other reasons for concluding that exclusion had limited deterrent value were not limited to knock-and-announce violations. The growth of civil-damages remedies, increased availability of attorney’s fees, and expansion of legal services would support the “assumption” that “civil liability is an effective deterrent”³¹¹ for other Fourth Amendment violations.

unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data”).

308. If officers rarely need to violate the rule because they could achieve their ends by following its dictates, then the major costs of suppression for violations—harm to officers, lost evidence, and setting criminals free—would seem to be infrequently incurred. As a result, those costs are arguably not as weighty as suggested in the previous part of the opinion. More important, the relevant question here would not seem to be whether officers would frequently have reason to violate the knock-and-announce rule, but whether they would have a strong motivation to ignore the rule in instances where they were not able to satisfy its commands. The interests in protecting themselves and others and in preventing the destruction of the objects of their interest would seem to be inherently powerful motivations, not weak incentives to transgress.

309. The “not high” reasonable suspicion showing, *Hudson*, 126 S. Ct. at 2163 (quoting *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)), that governs unannounced entries was borrowed from the investigative-detention and weapons-frisk contexts and operates in other settings, such as the protective sweep of a home. If the ease of establishing a reasonable suspicion and complying with the knock-and-announce rule minimizes officers’ incentives for violating that rule, then the same ease arguably would diminish officers’ motivations to ignore the constitutional minimum that is required to seize or pat down suspects or scan homes for dangerous persons. There would then be a lesser need for the deterrence that suppression provides.

310. If courts were to find this premise broadly applicable, it would pose a serious threat to the exclusionary rule. If officers generally had weak incentives to violate Fourth Amendment commands, the deterrent benefits of suppression would rarely, if ever, be high and could easily be counterbalanced by the omnipresent costs.

311. *Hudson*, 126 S. Ct. at 2167–68. The sole premise tied to knock-and-announce violations is that lower courts had not allowed qualified immunity to stand in the way of claims. *Id.* This premise played a very minor role in the Court’s multiple responses to the argument that the lack of cases involving large damage awards suggested that civil liability was not an effective

Moreover, the bases for concluding that enhanced professionalism would prevent knock-and-announce transgressions—new emphasis on discipline, improved education and supervision, and increased citizen review—are no less relevant to other Fourth Amendment wrongs.

Thus, most of the reasoning that led the Court to minimize the gains in constitutional enforcement could be readily extended to other constitutional rules. Assuming that the weak-incentives rationale was inapplicable, courts inclined to invoke the new cost–benefit exception could find that premise unnecessary.³¹² The civil-remedies and police-professionalism factors alone could lighten the deterrent side of the scales enough to tip the balance.³¹³

To conclude, the logic supporting *Hudson's* creation of and independent reliance upon a “cost–benefit exception” to the Fourth Amendment exclusionary rule may find widespread application beyond the knock-and-announce context. On the other hand, a limited number of premises could support distinctions when other kinds of Fourth Amendment violations are involved. The question is whether lower court judges should take a cautious approach or read *Hudson* as an invitation for frequent balancing that could lead to “massive” erosion of the exclusionary rule.

The nature and tenor of Justice Scalia’s approach to cost–benefit balancing suggest an intent to unleash a major threat to Fourth Amendment exclusion—a desire to afford judges a sharp new tool for cutting holes in the suppression remedy.³¹⁴ A reason for extreme caution in so reading *Hudson*, however, is that Justice Kennedy’s support was essential. Although he joined the cost–benefit section of Justice Scalia’s opinion and specifically alluded to the alternative deterrents cited by the majority,³¹⁵ there is good reason to

deterrent. It hardly seems essential in *Hudson*. Moreover, it seems unlikely that there would be evidence that qualified immunity has more seriously impeded other sorts of Fourth Amendment claims.

312. There is nothing in *Hudson* to suggest that the weak-incentives rationale was an essential underpinning of the cost–benefit assessment.

313. On the other hand, those reluctant to undermine the exclusionary sanction could avoid extending the cost–benefit exception by finding that the incentives for knock-and-announce violations are uniquely tepid and then declaring that the weak-incentives factor was essential to the balance struck by the Court in *Hudson*.

314. Particular indications of this intent and desire include his opening assertion that exclusion is *never* called for when costs exceed benefits, his endorsement of a novel cost–benefit exception that requires no specific doctrinal showing and hinges solely on the type of Fourth Amendment wrong, and, most important, his reliance on a number of premises with undeniable relevance in all other situations.

315. *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring in part and concurring in the judgment) (asserting that “[o]ur system . . . has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully,” and observing that these safeguards are supplemented by “civil remedies”). Justice Kennedy also alluded to the “litigation” costs of suppression for knock-and-announce violations. *See id.* at 2171 (stating that

believe that Justice Kennedy is not yet prepared to sanction a sweeping cost-benefit exception. He insisted that “the continued operation of the exclusionary rule” was “not in doubt,”³¹⁶ narrowly rooted his agreement with the *Hudson* outcome in a lack-of-causation foundation,³¹⁷ and even intimated that if “widespread” violations of the knock-and-announce rule “were shown,” he would have “grave concern” and might even be willing to revise the longstanding “requirement of causation.”³¹⁸ Without further signs that Justice Kennedy is so inclined (or a change in Court membership), judges should hesitate to extend *Hudson*’s cost-benefit exception to other Fourth Amendment realms.

The majority’s cost-benefit analysis is certainly not indefensible. Close examination of its logic, however, reveals weaknesses that raise concerns about its legitimacy. As already noted, the notion that the knock-and-announce rule’s costly ambiguities are somehow extraordinary seems questionable, at best. Many Fourth Amendment rules harbor equivalent ambiguities likely to lead to just as much litigation and just as much excess caution by officers. Moreover, when preventable violence is the likely result of excessive hesitance, one might expect officers to err on the side of action and be willing to risk suppression of evidence likely to be lost anyway. Thus, there is no empirical proof, and genuine reason to doubt, that the knock-and-announce rule is especially costly in the ways the Court suggested.

I have already suggested that the Court’s reliance on the premise that officers have only weak incentives to commit knock-and-announce violations is flawed because the question is not whether they are often able to satisfy their concerns while acting lawfully, but whether there are potent motives for acting unlawfully when that is the only option. Fears of death, injury, and evidence elimination would seem to furnish particularly strong incentives for ignoring constitutional constraints.

In addition, the declaration that civil remedies, lawyers’ fees, and increased professionalism provide ample deterrent forces is nothing more than say-so, unsupported by any empirical evidence. It is directly opposed to the assumption that underlies *Mapp*—that exclusion is a “constitutionally required . . . deterrent safeguard,” because alternatives such as damages and discipline are ineffective.³¹⁹ To be sure, Justice Scalia declared that the legal

extension of the exclusionary rule to knock-and-announce contexts “would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20”).

316. *Id.* at 2170.

317. *Id.* at 2170–71.

318. *Id.* at 2171.

319. See *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). With regard to the efficacy of alternatives, the *Mapp* Court validated the view that Justice Murphy had expressed in *Wolf v. Colorado*: “Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative

landscape has changed because civil-damages alternatives have expanded and are more attractive options, and because there are more lawyers willing to pursue them, but he offered no concrete reasons to believe that a fear of civil damages will provide disincentives comparable to those provided by evidentiary suppression. Similarly, he cited no proof that increased professionalism would lead to compliance with constitutional commands at a level similar to that prompted by the threat of suppression. Moreover, he failed to acknowledge that this professionalism could be the result of the exclusionary rule's regime and that the removal of that enforcement mechanism might incline officers with understandable reasons to ignore the Fourth Amendment to revert to their old ways. In sum, while *Hudson's* assumptions about the deterrent efficacy of other mechanisms could be accurate, the Court furnished no evidence that either the knock-and-announce rule or other Fourth Amendment commands would be enforced without the suppression sanction.

For many years, cost-benefit balancing has governed Fourth Amendment exclusionary rule analysis. The assessments of the weights on the scales have always reflected the assumptions, beliefs, and assertions of the Justices, rather than any empirically measured or quantified factors.³²⁰ Thus, it is far from surprising to find cost-benefit reasoning in *Hudson* or to discover that it is rooted in unproven assertions. Still, there are noteworthy differences between Justice Scalia's balancing act and the Court's prior cost-benefit analyses.

First, as noted earlier, the use of balancing analysis to exempt a particular Fourth Amendment command entirely from the reach of the suppression remedy is unprecedented. In prior opinions, cost-benefit balancing has produced and been tethered to narrower, more specific doctrines that exempt only some evidence from exclusion.³²¹

to the rule of exclusion. That is no sanction at all." *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).

320. See *United States v. Leon*, 468 U.S. 897, 942 (1984) (Brennan, J., dissenting) (observing that "[a]lthough the . . . language" used by the Court in balancing costs against benefits "suggests that some specific empirical basis may support its analyses, the reality is that the Court's opinions represent inherently unstable compounds of intuition, hunches, and occasional pieces of partial and often inconclusive data").

321. I am referring to evidence that falls within one of the established exceptions—e.g., evidence found by means of an independent source, evidence that would inevitably have been discovered, attenuated evidence, evidence used to impeach, and evidence found by reasonable reliance on warrants, statutes, or clerical errors by judicial-branch employees. Never before has the Court relied upon the costs and benefits of exclusion to declare that *no* evidence obtained as a result of a particular type of Fourth Amendment transgression will ever be barred from *any* courtroom proceeding. The "reasonable reliance on a warrant" exception comes closest, but it does not preclude suppression *every* time the violation is a search or seizure pursuant to an invalid warrant. See *id.* at 922–23 (majority opinion) (specifying the instances in which evidence is subject to exclusion even though officers have acted pursuant to a warrant). Moreover, as will

More important, the premises and assumptions informing the *Hudson* balance are distinctive. Typically, the cost side of the balance has been deemed weighty, because the loss of probative evidence always defeats the search for truth and undermines society's efforts to protect itself against those who have violated the law, enabling some to escape just punishment.³²² The Court has typically announced, with little proof or specificity, that these ever-present costs are substantial in the particular situation at issue.³²³ The costly and distracting burden of litigating exclusionary rule issues, a factor that has occasionally played a part in prior balances,³²⁴ assumed a much larger role in *Hudson*. Moreover, the assumption that officers would be excessively deterred by a fear of losing evidence for a particular type of violation and that serious harms would result has not played a role in prior analyses.³²⁵ There is some tension between that premise and the fundamental objective of the exclusionary rule.³²⁶ No system of deterrence can be perfect, ensuring that officers

be seen, the logic underlying the *Leon* doctrine is quite different from that which supports *Hudson's* cost-benefit assessment.

322. See, e.g., *id.* at 907 (“An objectionable collateral consequence of [the exclusionary rule’s] interference with the criminal justice system’s truth-finding function is that some guilty defendants may go free or receive reduced sentences”); *United States v. Havens*, 446 U.S. 620, 626–27 (1980) (taking into account, in striking the balance, that “arriving at the truth is a fundamental goal of our legal system,” and that not allowing the government to use illegally seized evidence for impeachment purposes is costly to the search for truth); *Stone v. Powell*, 428 U.S. 465, 490 (1976) (“Application of the [exclusionary] rule . . . deflects the truthfinding process and often frees the guilty.”). This refrain predates *Mapp*. See *Irvine v. California*, 347 U.S. 128, 136 (1954) (“[T]he rule of exclusion . . . results in the escape of guilty persons . . .”).

323. See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 (1998) (declaring, without evidence, that the “exclusionary rule . . . imposes *significant costs*,” not only “undeniably detract[ing] from the truthfinding process,” but also “allow[ing] *many* who would otherwise be incarcerated to escape the consequences of their actions” (emphasis added)); *Leon*, 468 U.S. at 907, 908 n.2 (declaring that the “*substantial social costs* exacted by the exclusionary rule . . . have long been a source of concern,” despite recognizing that “[m]any . . . researchers have concluded that the impact of the exclusionary rule is insubstantial” (emphasis added)).

324. See *Scott*, 524 U.S. at 366 (stating that the “exclusionary rule frequently requires extensive litigation”); *United States v. Calandra*, 414 U.S. 338, 349 (1974) (concluding that applying the rule “would delay and disrupt . . . proceedings”).

325. In *Leon*, there is a suggestion that if suppression were to result from unreasonable searches when officers reasonably relied on a warrant, they might react by neglecting to engage in constitutionally legitimate conduct. See *Leon*, 468 U.S. at 920 (suggesting that suppression could affect future conduct only by making an officer “less willing to do his duty” (quoting *Stone*, 428 U.S. at 539–40 (White, J., dissenting))). This passing allusion to the possibility of excessive deterrence, however, was a very small part of the Court’s assessment of the “deterrent value” side of the balance, and it did not rest on the premise that the inherent ambiguity of the controlling Fourth Amendment standards would induce hesitation to exercise legitimate law enforcement authority.

326. Moreover, if damages and professional discipline are effective deterrents—i.e., if they motivate officers to comply with Fourth Amendment commands, as the Court is willing to assume—it seems sensible to anticipate the very same excessive deterrence due to the ambiguity and uncertainty of the governing rules. Why would *effective* civil deterrents of unconstitutional

refrain from *all* unconstitutional means of law enforcement and *only* from unconstitutional avenues. The declaration that the reactions to suppression for knock-and-announce violations would be peculiarly excessive, yielding particularly noteworthy underuse of valid, desirable law enforcement authority, is surely a new wrinkle.

Finally, in all or almost all prior instances, the question addressed by the cost side of the balance has been whether the “additional” costs of exclusion in a particular situation can be justified. The Court has assumed that *some* costs would be sustained for a particular type of error and has focused on the *further* price paid for excluding evidence in the specific situation at issue. Thus, *Hudson’s* description of the cost side of the balance ventures into uncharted territory by declaring that *no* social costs resulting from suppression for knock-and-announce violations are justifiable.

The deterrent side of the *Hudson* majority’s balance may be even more distinctive. In prior cases, a certain amount of exclusion for a particular type of violation has been a given. The focus has been on the “incremental” enforcement of Fourth Amendment strictures resulting from further suppression, with the Court typically declaring, without evidence, that depriving law enforcement of the profit at issue would yield relatively insubstantial deterrent benefits.³²⁷ The cost–benefit discussion in *Hudson*, on the other hand, assumes that *no* exclusion will ever result from knock-and-announce violations and focuses on whether there is a need for *any* deterrence from the suppression sanction.

The first assumption indulged in *Hudson*—that incentives to commit a particular kind of transgression are weak because officers can attain their goals lawfully—has not appeared in earlier opinions.³²⁸ More significant is the heavy reliance on the putative evolution of other forces that today carry

entries be any more precise in their effects or any less likely to motivate officers to hold back when they have the authority to act? If the answer is that officers would be more willing to sustain damages in order to prevent violence or evidence destruction, then it would appear that civil sanctions would not be as effective as exclusion in discouraging improper entries.

327. See *New York v. Harris*, 495 U.S. 14, 20 (1990) (asserting that suppression of the defendant’s statements would yield only minimal “incremental deterrent value”); *United States v. Janis*, 428 U.S. 433, 458 (1976) (“[T]he imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, *additional* deterrence.” (emphasis added)); *Alderman v. United States*, 394 U.S. 165, 175 (1969) (refusing to alter the standing demand because “the additional benefits of extending the exclusionary rule” did not “justify” the costs); see also *Scott*, 524 U.S. at 371 (Souter, J., dissenting) (observing that because of the deterrence effected by application of the exclusionary rule at trial, the Court has assessed “the degree (or incremental degree) of deterrence that could be expected from extending the exclusionary rule” to other proceedings); *New Jersey v. Portash*, 440 U.S. 450, 458 (1979) (stating that the Court’s balance of interests in resolving two *Miranda* exclusionary rule issues was informed by the “incremental deterrence of police illegality” that would result from suppression of statements offered for impeachment purposes).

328. Perhaps the reason for that is the questionable logic that underlies the assertion that officers have weak incentives to ignore knock-and-announce restrictions. See *supra* note 308 and accompanying text.

much of the deterrent burden shouldered by the exclusionary rule in earlier times.³²⁹ The availability of effective alternatives has rarely factored into prior exclusionary rule balances,³³⁰ and the premise has certainly never played anything like the prominent role it played in *Hudson*. It appeared to be a dominant, decisive weight in the majority's scales.

In sum, *Hudson's* cost-benefit analysis is extraordinary. It is difficult to predict the impact of *Hudson's* freestanding cost-benefit exception to the exclusionary rule. It has enormous potential to diminish the scope of Fourth Amendment suppression. The logic and language evince palpable hostility toward the exclusionary rule, disagreement with its foundational logic, and an attitude that could ultimately lead to the dismantling of *Weeks* and *Mapp*. With the current Court membership, however, the erosion will probably be modest and incremental.³³¹ If a majority were to coalesce, there are two possible routes leading to the same destination. The Court could slowly, but surely, shrink the exclusionary rule down to nothing but a minor nuisance. Alternatively, the reasoning reflected in *Hudson's* cost-benefit analysis could support a revolutionary declaration that a new era has begun in which the Constitution can and will be enforced without enabling guilty, dangerous persons to gain their freedom by suppressing the truth.

IV. CONCLUSIONS

I set out to unearth *Hudson v. Michigan's* significance for the future of the Fourth Amendment exclusionary rule, never expecting to find the complexity and variety of possibilities revealed by close examination. Unlike Goldilocks, I discovered not three simple choices, but an array of possible understandings that span a broad spectrum. I have described several interpretations that can find textual support, deemed some too stingy and some too generous, and concluded that the likely long-term impact will be between the spectral extremes. *Hudson* unquestionably effected some erosion of the *Weeks-Mapp* rule, declaring knock-and-announce violations unenforceable by suppression. *Hudson*, however, is much more than a *sui generis* ruling about the exclusionary rule for knock-and-announce violations. It seems highly likely that *Hudson* is intended to lead to further

329. Exactly when this transition occurred and these other remedies came of age is uncertain. Moreover, the maturation of the alternatives to suppression has hardly been documented in the exclusionary rule decisions leading up to *Hudson*. The announcement that they had become adequate surrogates for suppression was not foreshadowed and could hardly have been anticipated.

330. *But see* *Nix v. Williams*, 467 U.S. 431, 446 (1984) (asserting, in a Sixth Amendment exclusion opinion, that the likelihood of "departmental discipline and civil liability" may discourage "police misconduct").

331. Even in *Hudson*, the Court did not do any damage that was not already being done by the other doctrines relied upon to deny suppression for knock-and-announce violations. Thus, it would still be unprecedented for a Court to rely on the cost-benefit exception alone to deny suppression for a particular type of Fourth Amendment violation.

restriction of the exclusionary rule.³³² *Hudson* did not expressly abolish the suppression remedy, though indicia strewn throughout the opinion suggest that four Justices could be inclined in that direction. Justice Kennedy's unavoidable declaration of allegiance to the exclusionary rule, however, indicates that such a radical step is not imminent.³³³

The erosion likely to flow from *Hudson* falls between the sui generis and abolition extremes. Barring a change in Court membership, *Hudson's* constriction of the suppression remedy will depend on future interpretations and applications of the three middle-ground premises that form the opinion's core. There will likely be a limited number of additional situations in which the Court will sever Fourth Amendment conduct and declare the unreasonable portion causally unrelated to the acquisition of evidence. There is also a fair chance that the Justices will find additional, potentially numerous opportunities to invoke the new branch of attenuation. And surely it is possible that a majority will identify other settings in which the cost-benefit balance alone dictates another hole in the truth-concealing, self-defeating exclusion sanction.³³⁴

Although I can confidently predict that each of these options is likely to find some use, I am reluctant to forecast the nature and degree of the cumulative impact. It is impossible to foresee which paths will prove most inviting or how fast a majority might wish to move. My unwillingness to predict the fate of the exclusionary rule is attributable to Justice Kennedy's pivotal role, my genuine uncertainty about his willingness to participate in further efforts to prune the suppression tree, and my inability to know how the Court will change. If a single member of the *Hudson* majority were supplanted by someone sympathetic to the dissenters' position, the seeds planted in *Hudson* would not sprout, and a majority might even uproot *Hudson* itself, deciding that it was a serious constitutional misstep.³³⁵ On the

332. If the Court had wished to limit the impact, there were much narrower ways to write the opinion. One narrow option would have been to tie the holding solely to the inevitable discovery exception, a ground that was the focus of the debate in the lower courts. *See, e.g.*, *People v. Henley*, No. 246113, 2004 WL 1586988, at *1 (Mich. Ct. App. July 15, 2004) ("Violation of the knock-and-announce rule does not require suppression of the evidence because Michigan has adopted the 'inevitable-discovery' exception"); *People v. Banks*, No. 227653, 2002 WL 1424435, at *2 (Mich. Ct. App. June 28, 2002) ("[V]iolation of the knock-and-announce requirement is subject to the inevitable discovery exception"). Everything about Justice Scalia's opinion suggests a deliberate effort to lay a foundation, perhaps even provide a roadmap, for the future.

333. On the other hand, we seem closer to outright eradication than at any time in the near half century since *Mapp*.

334. It should be evident by now that the "no causation" route has the least-expansive potential. The "attenuation based on underlying interests" avenue could support admission of illegally obtained evidence in a significant number of new situations. In addition, the erosive possibilities of the cost-benefit approach seem very extensive.

335. The doctrine of stare decisis and the undesirability of making it painfully evident that the meaning of the Constitution depends upon the Justices' identities can impede rapid

other hand, if any of the dissenters were to be replaced by another Justice hostile to the exclusionary rule, *Hudson's* premises could enable steady, rapid, and dramatic limitation of the suppression sanction. An impatient five might even use the opinion as a springboard for the ultimate plunge—a declaration that the era of exclusion is over. For those inclined to discard a doctrine that has withstood a firestorm of criticism for nearly half a century, *Hudson* has stocked the shelves with arms and ammunition. The target awaits. Whether the Court will load and fire remains to be seen.

overruling of major constitutional decisions. Nonetheless, when dissenting Justices have felt strongly that the majority has taken the wrong course—and it seems clear that the dissenters in *Hudson* qualify—they have been known to reverse directions soon after a replacement affords them the power to do so. Justice Scalia himself was instrumental in such a decision. In *Dixon v. United States*, he authored an opinion overruling *Grady v. Corbin*, 495 U.S. 508 (1990), a three-year-old opinion written by Justice Brennan for a five-Justice majority. See *Dixon v. United States*, 509 U.S. 688, 703–04 (1993). Justice Scalia had strenuously opposed the ruling in *Grady*. Once Justice Thomas replaced Justice Marshall, Justice Scalia had the majority necessary to overrule *Grady*, thereby narrowing the definition of what constitutes the “same offence” for purposes of the Double Jeopardy Clause’s protection against multiple prosecutions. See *id.*