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THE CONSTABLE BLUNDERS BUT ISN'T PUNISHED: DOES *HUDSON V. MICHIGAN*'S ABOLITION OF THE EXCLUSIONARY RULE EXTEND BEYOND KNOCK-AND-ANNOUNCE VIOLATIONS?

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INTRODUCTION

In 1961, when the Supreme Court decided *Mapp v. Ohio,*[1] it appeared that suppression of the evidence in criminal cases would be the only constitutionally acceptable sanction for violations of the Fourth Amendment.[2] Yet, almost immediately, the Court began to retrench from that position[3] and that process has continued up to its most recent exclusionary rule case, *Hudson v. Michigan,*[4] where it held that violations of the knock-and-announce rule, which itself had only recently achieved constitutional status,[5] do not warrant application of the exclusionary rule.[6] *Hudson* immediately spawned scholarly comment. While some worried that *Hudson* might have implications far beyond the knock-and-announce context,[7] others welcomed its circumcision of the exclusionary sanction.[8] This article was originally based on the hypothesis that by downplaying the seriousness of the constitutional violation in *Hudson*, while at the same time emphasizing the "massive" cost of applying the exclusionary rule in such cases,[9] the Court was in the process of carving out a new *de minimus* exception to the rule.

However, a closer study of the case revealed that, more significantly, the Court had reworked two of its traditional approaches to exclusionary rule analysis (causation and attenuation), resulting in a departure from a case-by-case determination as to whether exclusion was the appropriate sanction for a Fourth Amendment violation.[10] Instead, for the first time, the Court excluded an entire category of Fourth

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1. 367 U.S. 643 (1961).

2. *Id.* at 655 ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

3. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963) (exclusionary rule applied only if evidence is "fruit of the poisonous tree").

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

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

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

7. *See, e.g.,* Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH L. REV. 1207 (2007).

8. *See, e.g.,* Akhil Reed Amar, *The Rookie Year of the Roberts Court and a Look Ahead*, 34 PEPP. L. REV. 521 (2007).

9. *See Hudson*, 126 S. Ct. at 2166.

10. *See* section II *infra* for a more in depth analysis of the *Hudson* decision.

Amendment violations from its ambit.[11] By applying these two new tests—the "certainty" approach[12] to "but-for" causation and "impaired interest" attenuation[13]—in non-knock-and-announce cases, courts could further narrow the exclusionary sanction.[14] Now that more than a year has passed since the *Hudson* decision, it is possible to analyze the post-*Hudson* cases decided by the federal circuit courts of appeal in order to determine if any trends have emerged in its wake.[15]

Part I of this article will briefly trace the ways the Court has circumvented the exclusionary rule since its decision in *Mapp*. Part II will dissect the *Hudson* decision, specifically to expose the potentially revolutionary change it may signal in the Supreme Court's approach to the exclusionary rule. Part III will examine the post-*Hudson* cases to determine what effects *Hudson* has thus far had, and Part IV will offer some conclusions.

I. EXCLUSIONARY RULE AVOIDANCE

A. No Search

If police action directed toward a person is not a "search" or "seizure," then obviously the Fourth Amendment, by its own terms, does not apply.[16] If the amendment does not apply, the exclusionary sanction intended to punish those who violate the amendment likewise does not apply.[17] In *Katz v. United States*,[18] the Court reformulated the Court's approach to the Fourth Amendment. As Justice Stewart famously proclaimed in *Katz*:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[19]

As a result, the focus shifted from whether there was a "constitutionally protected area" to whether there was a constitutionally protected privacy interest, thus sweeping away whatever remained of the notion that the Fourth Amendment protected the citizenry only from police interference with the physical universe, *e.g.*,

11. *Id.*
12. The term "certainty" is used to distinguish this approach from another test, "inevitable" discovery, sometimes used in exclusionary rule cases. See pp. 38-40 *infra*.
13. Davies, *supra* note 7, at 1213-16 (coining the label "impaired interest" attenuation).
14. See pp. 38-39 *infra*.
15. *Hudson* has been cited more than one hundred times in the federal courts alone. More than fifty of those were criminal cases decided by the circuit courts of appeal. This article considers only those cases.
16. U.S. CONST. amend. IV. ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").
17. *See, e.g.*, Illinois v. Caballes, 543 U.S. 405, 408 (2005).
18. 389 U.S. 347 (1967).
19. *Id.* at 351 (citations omitted).

"persons, houses, papers and effects."[20] A search no longer required a physical trespass—an observation or eavesdrop would do—and a seizure could now be the acquisition of information, as well as the confiscation of property.[21] *Katz* thus portended a significant expansion of Fourth Amendment protection that would inevitably lead to more frequent use of the exclusionary rule.

However, as Justice Harlan's influential concurrence in *Katz* suggested, the Fourth Amendment does not protect all activities that we wish to keep private, no matter how fervent that wish may be. Rather, it is only those interests as to which a claim of privacy is "reasonable" that are covered.[22] All other interests, in which assertions of privacy were "unreasonable," were not constitutionally protected.[23] And, the Court made it clear that society did not deem any claim of privacy in contraband or illicit activities "reasonable."[24] The onus was on the criminal to make sure that his illicit activities were completely shielded from any possible public scrutiny,[25] and if he failed to do so, application of the exclusionary rule was a non-issue.[26]

B. No Standing

Prior to *Katz*, certain individuals automatically had standing to raise Fourth Amendment claims—those whose property was seized and those who were "legitimately" on the premises that was searched.[27] Post-*Katz*, whether one had a justiciable Fourth Amendment claim came to depend upon whether one had a cognizable privacy interest in whatever was searched or seized, which, in turn, depended upon whether the privacy claim was reasonable.[28] Thus, a defendant could no longer assert that the seized drugs belonged to him and thereby have "standing" to litigate whether the seizure comported with the Fourth Amendment.[29] Because there can be no "reasonable" privacy interest in contraband, a defendant challenging its seizure must have a "reasonable" privacy interest in the location from which

20. U.S. CONST. amend. IV.

21. *Katz*, 389 U.S. at 353 ("[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.'" (quoting Silverman v. United States, 365 U.S. 505, 511 (1961))).

22. *Id.* at 360.

23. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40 (1988) (no reasonable privacy interest in curbside trash).

24. *See, e.g., Caballes*, 543 U.S. at 408 ("Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'").

25. *See* Scott E. Sundby, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1789-90 (1994).

26. *Cf.* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J. concurring) ("Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and, therefore, not subject to the general warrant requirement.").

27. Jones v. United States, 362 U.S. 257, 267 (1960).

28. Rakas v. Illinois, 439 U.S. 128, 140 (1978).

29. Rawlings v. Kentucky, 448 U.S. 98, 105-06 (1980).

the contraband was seized.[30] Absent that, she is out of court and so is the exclusionary rule.[31]

C. Police Administrative Searches

There are some searches and seizures that the Court has held simply do not implicate the Fourth Amendment.[32] These searches are necessary to the carrying out of the police function. They prevent the destruction of evidence by those in police custody, protect the police, others in police custody and police property, and they foreclose assertions of false claims regarding the mishandling of property seized by the police.[33] Their legitimacy does not depend upon the police having any reason to believe that the search will reveal evidence or that weapons might be found.[34] Instead, in the case of a search incident to arrest, the police must have statutory authority to make a lawful, *custodial* arrest.[35] In the case of inventory searches, either of a defendant who has been recently arrested or of property which has been lawfully confiscated, there must be pre-existing police regulations regarding inventories.[36] Assuming that these minimal preconditions are met, the seizure of incriminating evidence is not subject to Fourth Amendment scrutiny or application of the exclusionary rule.

D. Special Needs and Administrative Searches

While technically falling within the scope of the Fourth Amendment, which is not limited by its terms to criminal cases, some searches need not be based on probable cause to believe incriminating evidence will be found because they are usually conducted by the civil authorities[37] in furtherance of some legitimate government function.[38] In these cases, the Supreme Court has relaxed both the Fourth Amendment's warrant and probable cause requirements in order to permit, among other things, housing inspections,[39] school locker searches,[40] and employee drug

30. *Id.* (defendant had no privacy interest in his female companion's purse).

31. United States v. Payner, 447 U.S. 727 (1980). One of the most extreme examples of how the lack of standing eviscerates the exclusionary rule is found in *United States v. Payner*, where the defendant had no right to challenge the seizure of evidence from someone else's briefcase, even though the briefcase had been "stolen" by an IRS agent. *Id.*

32. *See, e.g.*, Robinson v. United States, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

33. *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640, 646 (1983).

34. *Id.* at 644-45.

35. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260 (1973).

36. *See, e.g., Lafayette*, 462 U.S. at 644-45 (jailhouse inventories); Colorado v. Bertine, 479 U.S. 367, 374 (1987) (inventories of automobiles and other seized property).

37. *But see* New York v. Burger, 482 U.S. 691, 717 (1987) (otherwise valid administrative search not unconstitutional because conducted by police).

38. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

39. *Id.*

40. New Jersey v. T.L.O., 469 U.S. 809 (1985).

tests.[41] Evidence thus seized during a valid administrative or special needs search is not subject to the exclusionary rule.

E. Consent Searches

The police may approach any individual, even without any suspicion that she is concealing evidence, and request permission to search her person, effects, or vehicle.[42] Consenting to a search, unlike waiving other constitutional rights, does not require that the target of the search have any particular quantum of information regarding the constitutional protection she is giving up.[43] Rather, the "voluntariness" of the consent is assessed based on the "totality of the circumstances."[44] Under this approach, whether the individual is aware that she can refuse to consent is a relevant, but not determinative, circumstance.[45] Assuming that this low threshold is satisfied, any items seized are admissible in evidence at a criminal trial.

F. Extraterritorial and Border Searches

Generally speaking, the Fourth Amendment does not apply to searches and seizures that take place outside the United States.[46] Nor does it preclude a thorough inspection by customs agents of the luggage and effects of a traveler entering the United States.[47] In these situations, seized evidence is routinely admitted in criminal trials without a Fourth Amendment challenge to its admissibility.

G. No Warrants

The two clauses in the Fourth Amendment reside uncomfortably beside each other separated only by a comma:

> [1] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, [2] and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

41. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
42. Florida v. Bostick, 501 U.S. 429, 434-35 (1991).
43. Schneckloth v. Bustamonte, 412 U.S. 218, 226-28 (1973).
44. *Id.*
45. *Id.*
46. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION § 4.04[E] at 60-62 (4th ed. 2006) ("[I]f there is sufficient American involvement in an extraterritorial search of an *American* citizen, the Fourth Amendment applies.").
47. United States v. Flores-Montano, 541 U.S. 149, 155-56 (2004) (border search requires neither probable cause nor reasonable suspicion); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (more intrusive border searches, such as strip or body cavity searches, require reasonable suspicion that the search will reveal that the traveler is smuggling contraband).

> describing the place to be searched, and the persons or things to be seized.[48]

The text of the amendment has sparked debate as to whether it requires that all searches must be authorized by a warrant, except perhaps in emergencies, or whether a search must be merely reasonable.[49] There is language in *Katz* which implies that warrants are the rule rather than the exception.[50] However, as Justice Scalia has observed: "Even before today's decision [in *California v. Acevedo*], the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable."[51]

Despite lists of more than twenty exceptions to the amendment's warrant requirement,[52] it is clear that many of the most important ones can be grouped under the rubric "exigent circumstances." These are situations in which it would be impractical or impossible for the police to obtain a prior warrant.[53] Seen in this context, the statement in *Katz* amounts to no more than a preference for prior judicial authorization via a warrant in those circumstances where it is practicable.[54] When that is not the case, the search and/or seizure will nonetheless escape the exclusionary sanction if it is reasonable.

H. Exceptions to the Exclusionary Rule

In addition, other circumstances exist in which, even when the police do obtain evidence in violation of the Fourth Amendment, imposition of the exclusionary sanction is unwarranted. The "exceptions" to the exclusionary rule are generally justified by these overlapping rationales: 1) the exclusionary rule would have little

48. U.S. CONST. amend. IV.

49. *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471-72 (1985).

50. *Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

51. *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (citing Bradley, *supra* note 49, at 1473-74).

52. *Id.*

53. A non-exhaustive list of some of the more important examples of exigent circumstances that justify warrantless police action would include: Brigham City v. Stuart, 547 U.S. 398 (2006) (warrantless entry of home to prevent violence and restore order); Horton v. California, 496 U.S. 128 (1990) (warrantless "plain view" seizures of evidence); Maryland v. Buie, 494 U.S. 325 (1990) (warrantless security sweeps of buildings for police safety); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless searches of mobile vehicles); Terry v. Ohio, 392 U.S. 1 (1968) (warrantless "stop and frisk" of suspect on "reasonable suspicion" that he is about to commit a dangerous crime); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit of a fleeing felon justifies warrantless entry of a dwelling).

54. *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring).

or no deterrent effect on illegal police conduct,[55] or 2) the evidence obtained is too attenuated from the primary illegality to make application of the rule efficacious.[56]

Until *Hudson v. Michigan*, the Court had resolutely resisted taking a categorical approach to Fourth Amendment issues.[57] The question addressed by this article is what effect *Hudson* has had on this established approach to exclusionary rule exception analysis.

II. *HUDSON V. MICHIGAN*

In *Hudson*, the Supreme Court faced the question of what remedy is appropriate when the police violate the constitutional knock-and-announce rule.[58] Only eleven years previously, in *Wilson v. Arkansas*,[59] the Court announced it had "little doubt" that whether the police knocked and announced their presence prior to entering a residence to execute a search warrant was "among the factors" that the Framers thought should be "considered in assessing the reasonableness of a search or seizure."[60] But neither in *Wilson*, nor in two subsequent knock-and-announce cases,[61] did the Court have occasion to consider whether to apply the exclusionary rule when the knock-and-announce rule is violated.

In *Hudson,* the state conceded that there had been a knock-and-announce violation when the police waited only three to five seconds before entering Hudson's residence, wherein they seized drugs and firearms.[62] Writing for the majority, Justice Scalia appeared to take the orthodox approach to resolving exclusionary rule cases. Closer scrutiny reveals, however, that instead of orthodox, *Hudson* is revolutionary because, for the first time, the Court adopted a categorical rather than a case-by-case approach to the exclusionary rule.[63]

55. There is no deterrent effect when the violation is committed by a non-police actor. *See, e.g.,* Arizona v. Evans, 514 U.S. 1 (1995) (court clerk's mistake); Illinois v. Krull, 480 U.S. 340 (1987) (legislature's mistake); United States v. Leon, 468 U.S. 897 (1984) (magistrate's mistake). Similarly, deterrence is lacking when the evidence is not used in a criminal trial. *See, e.g.,* Immigration & Naturalization Serv. v. Lopez-Mendoza, 486 U.S. 1032 (1984) (deportation proceedings); United States v. Janis, 428 U.S. 433 (1976) (civil tax proceeding); United States v. Calandra, 414 U.S. 338 (1974) (grand jury proceeding).

56. Attenuation occurs when there is an insufficient causal nexus between the illegal act and the acquisition of the challenged evidence. *See* Wong Sun, 371 U.S. 471 (1963) and Sec. II.B. *infra.* Attenuation also occurs when there was a source entirely independent from the illegal act that would have resulted in the acquisition of the evidence or when there is another process that inevitably would have led to the discovery of the evidence. *See* Murray v. United States, 487 U.S. 533 (1988).

57. *See e.g.,* Richards v. Wisconsin, 520 U.S. 385 (1997) (rejecting a *per se* exception to the knock-and-announce rule in narcotics cases); Scott v. Harris, 127 S. Ct. 1769, 1778-79 (2007) (Scalia, J.) (rejecting an "easy-to-apply legal test" for use of deadly force to effectuate an arrest and observing that "in the end we must slosh our way through the factbound morass of 'reasonableness.'").

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

59. 514 U.S. 927 (1995).

60. *Id.* at 934.

61. Richards v. Wisconsin, 520 U.S. 385 (1997); United States v. Banks, 540 U.S. 31 (2003).

62. *Hudson*, 126 S. Ct. at 2162-63.

63. See Sec. II.B. *infra.*

A. Causation

Initially, the Court stated the familiar proposition that "but-for causality is only a necessary, not a sufficient, condition for suppression."[64] According to Justice Scalia, it follows, therefore, that the knock-and-announce violation in *Hudson* was neither a necessary nor a sufficient cause because "of course, the constitutional *manner* of entry was not a but-for cause of obtaining the evidence (emphasis in the original)."[65] At first glance, this looks like a mistake that even a first year law student would not have made. After all, "but-for" causation is typically established when the answer to the question, "but-for the act would the result have occurred *when* it occurred," is "no."[66] Surely any knock-and-announce violation passes this test because it measurably accelerates the time of the seizure. As a result, using the traditional "but-for" causality approach would have resulted in a case-by-case determination whether the knock-and-announce violation was not "a", but rather "the" but-for cause of the seizure and, therefore, a "necessary" precondition to suppression.

To avoid that result, Justice Scalia simply recast the "but-for" test. Echoing the language of the inevitable discovery cases,[67] he wrote that "[w]hether that preliminary misstep [the constitutional knock-and-announce violation] had occurred *or not*, the police would have executed the warrant they had obtained and would have discovered the gun and drugs inside . . . ."[68] Consequently, instead of focusing on whether the illegal act is insufficiently connected to the result, the Court will now look to see whether there is a prior legal event that would have made the result certain.[69]

B. Attenuation

Because the police already had a warrant, the seizure was certain and therefore the knock-and-announce violation was not a "but-for" cause of it. Justice Scalia did not stop there,[70] however, because "even if the illegal entry here could be characterized as a but-for cause," suppression still would not be the appropriate remedy since "causation in the logical sense alone . . . can be too attenuated to justify exclusion (citation omitted)." [71] To arrive at the conclusion that the seizure of evidence was too attenuated from the constitutional violation to justify suppression, it was necessary for the Court to reorient attenuation analysis in order to make it fit the *Hudson* facts.

64. *Hudson*, 126 S. Ct. at 2164.
65. *Id.*
66. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.02 [A] at 196 (4th ed. 2006).
67. Murray v. United States, 487 U.S. 533, 539 (1988) ("[T]ainted evidence . . . should be admissible if it inevitably would have been discovered.").
68. *Hudson*, 126 S. Ct. at 2164.
69. *Cf. Acevedo*, 500 U.S. at 565 (approving warrantless search of container seized from car, since police *a priori* must have probable cause to seize the property, issuance of a warrant is a foregone conclusion).
70. *See, e.g.*, United States v. Olivera-Mendez, 484 F.3d 505, 512 (8th Cir. 2007).
71. *Hudson*, 126 S. Ct. at 2164 (quoting United States v. Ceccolini, 435 U.S. 268, 274 (1978)) (internal quotes omitted).

The question a court asks itself when faced with an attenuation issue is "whether granting the establishment of the primary illegality, the evidence to which . . . objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[72] Attenuation normally happens when there is a significant lapse of time between the illegal act and the acquisition of the challenged evidence or there is a "significant intervening event" which breaks the "causal chain between the wrongful police act and the discovery of evidence."[73]

Hudson's facts rendered the conventional approach to attenuation inapposite, since the illegal entry and the seizure of the evidence were separated by only a matter of seconds, uninterrupted by any intervening event. Consequently, Justice Scalia refocused the attenuation inquiry from whether there has been a sufficient lapse of time between the illegal event and the acquisition of the evidence or whether there has been an intervening legal event that breaks the causal chain to "whether the interests protected by the precise constitutional rule that the police had violated . . . would or would not have been advanced by the exclusionary penalty."[74] One commentator has aptly dubbed this new approach "impaired interest attenuation."[75]

Now free to pick the interests protected by the knock-and-announce rule, the Court chose "protection of human life and limb," "protection of property," and protection of "those elements of privacy and dignity that can be destroyed by a sudden entrance."[76] However,

> [w]hat the knock-and-announce rule has never protected . . . is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[77]

With this one sweeping statement, Justice Scalia seemingly did what the Court had never done before—exclude an entire category of constitutional violations from the exclusionary sanction.[78]

C. Cost-Benefit

Having already buried the exclusionary rule in knock-and-announce cases, Justice Scalia closed the coffin when he declared, "deterrence of knock-and-announce violations is not worth a lot," while by comparison the exclusionary rule is a "mas-

72. *Id.* (quoting *Wong Sun*, 371 U.S. at 487-88) (internal quotes omitted).
73. Davies, *supra* note 7, at 1214.
74. *Id.*
75. *Id.* at 1215.
76. *Hudson*, 126 S. Ct. at 2165.
77. *Id.*
78. *Cf.* Davies, *supra* note 7, at 1215 n.60 ("[T]he *Hudson* Court also deviated from its earlier attenuation analysis by taking a *per se* approach to all lawless knock-and-announce violations.").

sive remedy" in such cases.[79] And since "the exclusionary rule has never been applied except where its deterrence benefits outweigh its 'substantial social costs,'"[80] the Court's hyperbolic characterization of the insignificance of the constitutional violation, when compared to extreme consequences that application of the exclusionary remedy would have on society,[81] bolstered the Court's earlier conclusion that the suppression of evidence is never appropriate in a knock-and-announce case.

Significantly, however, the Court did not bother to explain why the result in this case was not controlled by its earlier decisions in *Miller v. United States*[82] and *Sabbath v. United States.*[83] In both of those cases, the Court held that evidence obtained as a result of knock-and-announce violations committed by officers who entered dwellings to make warrantless arrests, should have been suppressed.[84] While 18 U.S.C. § 3109, the statutory incarnation of the knock-and-announce rule,[85] applies only to entries to execute search warrants, both Courts tested "the validity of the entry to execute the arrest without warrant . . . by criteria identical with those embodied in 18 U.S.C. § 3109."[86] In *Miller*, Justice Brennan, writing for the Court, specifically rejected the notion that suppression of the evidence was unwarranted for what might "appear as a technicality that inures to the benefit of a guilty person."[87]

> The petitioner could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.[88]

Instead of suppression of the evidence, civil damages will be the only remedy because even though "few published decisions to date announce huge awards for knock-and-announce violations," "[a]s far as we know, civil liability is an effective

79. *Hudson*, 126 S. Ct. at 2165-66. So we would not miss the point, Justice Scalia used the adjective "massive" to describe the exclusionary rule penalty in three consecutive paragraphs of the opinion. *Id.*

80. *Id.* at 2165 (citations omitted).

81. *Id.* at 2165-66. The substantial social costs were that "exclusion of relevant incriminating evidence" risks "releasing dangerous criminals into society" and that imposing that "massive remedy" would invite a "constant flood" of specious claims of knock-and-announce violations by criminals who would have nothing to lose by entering this "lottery" with its grand prize of a "get-out-of-jail-free card." *Id.*

82. 357 U.S. 301 (1958).

83. 391 U.S. 585 (1968).

84. *Miller*, 357 U.S. at 313-14; *Sabbath*, 391 U.S. at 586.

85. United States v. Ramirez, 523 U.S. 65, 73-74 (1998) (noting that both *Miller* and *Sabbath* held that § 3109 codified the common law knock-and-announce rule, which the Court later held was part of the Fourth Amendment "reasonableness inquiry" in *Wilson* and *Richards*).

86. *Miller*, 357 U.S. at 306; *see also Sabbath*, 391 U.S. at 588.

87. *Miller*, 357 U.S. at 313.

88. *Id.* at 313-14. *See* Orin Kerr, *Remedies for Knock-and-Announce Violations in Federal Court after Hudson v. Michigan*, http://www.orinkerr.com/2006/07/11/ (last visited Feb. 24, 2008) ("Professor Moran, who argued the *Hudson* case for the defendant, . . . thinks that Scalia's majority opinion in *Hudson* was just being really sloppy, and effectively overruled *Miller* and *Sabbath* without saying so or even recognizing the tension between the *Miller* and *Sabbath* cases on one hand and *Hudson* on the other.").

deterrent here, as we have assumed it is in other contexts."[89] This conclusion is the antipode of that reached by former Justice Potter Stewart writing in 1983, at the midway point between *Mapp* and *Hudson*:

> But [civil damages] do little if anything to reduce the likelihood of the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the [F]ourth [A]mendment. There is only one such remedy—the exclusion of illegally obtained evidence.[90]

This observation seems particularly apt in the context of knock-and-announce violations since most of them are surely the result of overzealousness rather than maliciousness.

D. The "Trio" of Cases

Finally, the Court relied upon "[a] trio of [its] cases," borrowing strands from each, to bolster the conclusion that it had already reached.[91] From *Segura v. United States,*[92] it reasoned that if a warrant issued after the illegal entry could be an "independent source" for a later legal search, then surely "a search warrant obtained *before* going in must have at least this much effect (emphasis in original)."[93] In *New York v. Harris*,[94] it found the seed—"Harris' statement was 'the product of an arrest and being in custody,' it 'was not the fruit of the fact that the arrest was made in the house rather than someplace else'"[95]—that blossomed into "impaired interest" attenuation analysis in *Hudson*. And lastly, it read the dicta in *United States v. Ramirez*,[96] as a "clear [ ] expression . . . of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule."[97]

While to be sure these elements are to be found in those cases, their application in *Hudson* required some judicial *leger de main*. First, the independent source doctrine in *Segura*, which is conceptually similar to the inevitable discovery doctrine,

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

90. 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, 1389 (1983).

91. Since Justice Kennedy did not join in this portion of the opinion, it was not endorsed by a majority of the Court. *Hudson*, 126 S. Ct. at 2172 (Kennedy, J. concurring) ("I am not convinced that [*Segura* and *Harris*] have as much relevance here as Justice SCALIA appears to conclude . . . ." (citations omitted)).

92. 468 U.S. 796 (1984).

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

94. 495 U.S. 14 (1990).

95. *Hudson*, 126 S. Ct. at 2169 (quoting *Harris*, 495 U.S. at 20).

96. 523 U.S. 65 (1998).

97. *Hudson*, 126 S. Ct. at 2170. Rather than a "clear expression," the proposition in *Ramirez* was at best hypothetical, since the Court only observed that "excessive or unnecessary destruction of property in the course of a search *may* violate the Fourth Amendment . . . (emphasis added)." *Ramirez*, 523 U.S. at 71.

"applies . . . to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality."[98] For example, in *Segura*, a search warrant issued nineteen hours after agents illegally entered an apartment and arrested the occupants was an "independent source" for the later seizure of evidence in the apartment because the warrant made no reference to the illegal observations and the magistrate who issued it was unaware of them.[99] By contrast, in *Hudson* the illegal act (the knock-and-announce violation) was connected directly to the acquisition of the challenged evidence.[100]

In *Harris*, the defendant's jailhouse confession was not deemed the fruit of an earlier illegal, warrantless arrest in his home, which violated the Supreme Court's holding in *Payton v. New York.*[101] Because there had been a significant lapse in time between the *Payton* violation and the jailhouse confession and because the jailhouse confession was preceded by a valid waiver of the defendant's *Miranda* rights, the jailhouse confession was too attenuated from the illegal arrest to warrant suppression.[102]

It is important that in both of these cases the evidence obtained as a direct result of the constitutional violations was suppressed. In that respect *Hudson* represents a significant break from the Court's prior approach, precisely because it refused to apply the exclusionary rule to the direct fruits of the violation of a constitutional rule, whereas previously the Court had applied the rule unless there was a subsequent and independent legal event which justified the seizure.[103]

In the last of the "trio," the *Ramirez* Court reached the unremarkable conclusion that because breaking the window to enter the defendant's residence to execute a search warrant was "clearly reasonable" and, therefore, not a "Fourth Amendment violation," it did not have to decide "whether, for example, there was [a] sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence."[104] Rather than supporting *Hudson*'s sweeping holding that categorically excludes application of the exclusionary rule in all knock-and-announce cases, *Ramirez* merely suggests that an "impermissible manner of entry," like any other constitutional infraction, will be analyzed on a case-by-case basis in order to determine whether suppression is warranted.

98. *Murray*, 487 U.S. at 537.
99. *Segura*, 468 U.S. at 799-801.
100. It is curious that Justice Scalia relied on *Segura* rather than *Murray*, an opinion that he also authored, because as he observed in *Murray*, *Segura* sanitized only the evidence not observed during the initial, illegal search, while *Murray* extended the independent source doctrine to the same evidence observed during the illegal search and thus is factually more similar to *Hudson*. *See Murray*, 487 U.S. at 537-38.
101. 445 U.S. 573 (1980).
102. Davies, *supra* note 7, at 1221.
103. *See Murray*, 487 U.S. at 537-38.
104. *Ramirez*, 523 U.S. at 72 n.3

III. THE POST-*HUDSON* CASES

Neither causation, nor attenuation, nor cost-benefit had ever before resulted in the sort of categorical approach to the application of the exclusionary rule found in *Hudson*. Indeed, it was only the addition of the "impaired interest attenuation" twist on attenuation analysis that could have produced such a result. This is so because whether exclusion is appropriate now hinges on whether "the interests [protected by the knock-and-announce rule] . . . were violated in this case."[105] And, since those interests—protection of life and limb, property, privacy, and dignity—"have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable."[106] Because these interests are the same in every knock-and-announce rule case, there are no knock-and-announce violations where applying the exclusionary remedy would be justified.

It is this feature of *Hudson* that is truly revolutionary and its message has been clearly received by the lower courts. Of the nine circuits that have considered the question,[107] all have reached the same conclusion as a Sixth Circuit panel which stated perfunctorily, "the Supreme Court . . . decided in *Hudson* that violations of the knock-and-announce rule do not require suppression of evidence."[108] Moreover, these cases make it clear that there is no knock-and-announce violation that would be flagrant enough to warrant exclusion.[109] Thus, the exclusionary rule was not applied in a case where the knock-and-announce violation was conceded,[110] where a knock-and-announce warrant could have been obtained but was not,[111] and where there was an allegedly invalid knock-and-announce warrant.[112] Finally, the three circuits that have squarely considered the issue extended the holding in *Hudson* to violations of § 3109, despite the Supreme Court's holdings in *Miller* and *Sabbath*.[113]

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

106. *Id.*

107. *See, e.g.*, United States v. Acosta, 502 F.3d 54, 61 (2d Cir. 2007); United States v. Ankeny, 490 F.3d 744 (9th Cir. 2007); United States v. Bethal, 245 FED. App. 460 (6th Cir. 2007); United States v. Bruno, 487 F.3d 304 (5th Cir. 2007); United States v. Askew, 203 F. App'x 414 (3d Cir. 2006); United States v. Brown, 189 F. App'x 722 (10th Cir. 2006); United States v. Gaver, 452 F.3d 1007 (8th Cir. 2006); United States v. Jenkins, 207 F. App'x 3 (D.C. Cir. 2006); United States v. Pelletier, 469 F.3d 194 (1st Cir. 2006).

108. *Bethal*, 245 FED App. at 473.

109. *Cf.* United States v. Mosley, 454 F.3d 249, 259 n.15 (3d Cir. 2006) (noting that not even a home owner has "standing" to move to suppress evidence based solely on a knock-and-announce violation); *but see* Amar, *supra* note 8, at 524 ("Hudson itself directly applies only to a small number of knock-and-announce situations. It can be read in a very narrow way, if we were inclined to do so.")

110. *See Bethal*, 245 FED App. at 460.

111. *See Ankeny*, 490 F.3d at 744.

112. *See Brown*, 189 F. App'x at 722.

113. *See Acosta*, 502 F.3d at 54, 61 (neither *Miller* nor *Sabbath* are "direct" holdings that suppression is the remedy for a § 3109 violation); *Bruno*, 487 F.3d at 306 (*Miller* and *Sabbath* distinguished because they both focused on whether a knock-and-announce violation had occurred and not on the remedy for such a violation, the question which the *Hudson* Court squarely addressed); United States v. Southerland, 466 F.3d 1083, 1086 (D.C. Cir. 2006) (*Hudson* is Court's "most recent pronouncement" and "only thorough analysis of the issue"); *cf.* United States v. White, 2007 FED App. 0288N (6th Cir. 2007) (city policemen executed warrant; no suppression because § 3109 applies only to federal agents). *But see* Kerr, *supra* note 88 (arguing that "*Hudson* left the federal statutory suppression remedy intact"). Professor David Moran, who argued *Hudson* for the defendant, bet Professor Kerr

While these results were at least predictable, the question remains what impact *Hudson* will have in non-knock-and-announce cases. In the cases decided thus far, there are some conflicting signals. One court, citing Justice Kennedy's concurring opinion in *Hudson* ("the continued operation of the exclusionary rule . . . is not in doubt"[114]), stated its view that *Hudson*'s relaxation of the exclusionary rule applies only to knock-and-announce violations.[115] By contrast, a panel of the Seventh Circuit opined that in cases "[w]hen a warrant is sure to issue (if sought), the exclusionary 'remedy' is not a remedy, for no legitimate privacy interest has been invaded without good justification . . . . "[116] Thus, the exclusionary rule might "sensibly be confined to violations of the reasonableness requirement."[117]

There is, however, no clear evidence in which of these directions the circuit courts are moving. *Hudson* has been cited more than twenty times in non-knock-and-announce cases, most frequently for its generalizations that suppression is a "last resort" rather than a "first impulse,"[118] that suppression is appropriate "only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs,"[119] and that "but-for causality is only a necessary, not a sufficient, condition for suppression."[120] But, these cases are factually dissimilar from *Hudson*; *i.e.,* the illegal act preceded the legal one and not the other way around. Thus, the courts have generally resolved exclusionary rule questions by straightforward causation, attenuation, and cost-benefit analyses, rather than adopting *Hudson*'s "certainty" or "impaired interest attenuation" theories.[121]

United States v. Hector[122] is the only case in which a court has explicitly adopted both the *Hudson* Court's "certainty" approach to causation and its "impaired interest" approach to attenuation. In *Hector,* the police had a valid search warrant but failed to serve a copy of it at the time of the search.[123] An earlier Ninth Circuit case had decided that "a search 'may be presumptively unreasonable if officers fail entirely to serve a sufficient warrant at any time before, during or immediately after a search of a home.'"[124] In light of *Hudson,* the *Hector* court found it unnecessary to decide whether a subsequent Supreme Court case[125] had overruled

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$500 that "no appellate court would buy [his] argument." *Id.* As things have gone so far, it is a good thing that Professor Kerr did not take the bet.

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

115. United States v. Cos, 498 F.3d 1115, 1132 n.3 (10th Cir. 2007).

116. United States v. Elder, 466 F.3d 1090, 1091 (7th Cir. 2006).

117. *Id.* (citing *Hudson*, 126 S. Ct. at 2159).

118. *See, e.g.*, United States v. Herring, 492 F.3d 1212, 1217 (11th Cir. 2007); United States v. Abdi, 463 F.3d 547, 556 (6th Cir. 2006); United States v. Sells, 463 F.3d 1148, 1154 (10th Cir. 2006); United States v. Hill, 459 F.3d 966, 977 (9th Cir. 2006).

119. *See, e.g.*, United States v. Delancy, 502 F.3d 1297, 1314 (11th Cir. 2007) (quoting *Hudson*, 547 U.S. at 586).

120. United States v. Marasco, 487 F.3d 543, 547 (8th Cir. 2007); *see also* United States v. Torres-Castro, 470 F.3d 992, 999 (10th Cir. 2006).

121. *See, e.g., Delancy*, 502 F.3d at 1297.

122. 474 F. 3d 1150 (9th Cir. 2007).

123. *Id.* at 1153.

124. *Id.* at 1154 (quoting United States v. Martinez-Garcia, 397 F.3d 1205, 1212 n.3 (9th Cir. 2005)).

125. United States v. Grubbs, 547 U.S. 90 (2006).

that case, because "regardless of whether the failure to serve a copy of the warrant was a violation of the Fourth Amendment, the exclusionary rule should not be applied in this case."[126] The *Hector* court echoed *Hudson* when it stated that, "[r]egardless of whether the police officers had actually shown Hector the search warrant, they would have executed it and recovered the drugs and firearms inside his apartment,"[127] and, since

> the purpose of handing the occupant . . . the warrant . . . is to head off breaches of the peace by dispelling any suspicion that the search is illegitimate, . . . [t]his interest does not implicate the seizure of the evidence described in the search warrant nor would it be vindicated by suppression of the evidence seized (citations omitted).[128]

Aside from *Hector*, several other courts have found *Hudson*'s "certainty" approach to "but-for" causation appealing. Representative of those cases is *United States v. Olivera-Mendez*,[129] in which the court considered whether the brief extension of a traffic stop by twenty-five seconds, during which the officer made "brief and fruitless inquiries about drugs," was a "but-for" cause of the later discovery of the drugs. It rejected the defendant's contention that it was, because

> [t]he canine sniff took place during a period while Trooper Kolz was waiting for a response from a dispatcher on a traffic-related inquiry. This interval, and the accompanying canine sniff, would have occurred with or without the twenty-five second period dedicated to drug-related questions, and the use of the dog did not 'change the character' of the stop.[130]

IV. CONCLUSION

Apart from the universal acceptance of *Hudson*'s categorical approach to the exclusionary rule in knock-and-announce cases, the other obvious trend in the post-*Hudson* cases is the demise of the rule as a remedy for statutory violations of any kind unless the statute itself provides for suppression.[131] Beyond that it is not pos-

126. *Hector*, 474 F.3d at 1154 (citation omitted).
127. *Id.* at 1155.
128. *Id.*
129. 484 F.3d 505, 511 (8th Cir. 2007).
130. *Id.* (quoting *Caballes*, 543 U.S. at 408). *See also* United States v. Chavira, 467 F.3d 1286, 1291-92 (10th Cir. 2006) (during a lawful traffic stop, officer's illegal search of the car's vehicle identification number, which preceded the defendant's consent to search, was not the "but- for" cause of the discovery of cocaine in the gas tank); *Torres-Castro*, 470 F.3d at 999-1000 (illegal protective sweep of the defendant's residence not the "but-for" cause of subsequent consent to search because "[t]he statements from the girlfriend . . . furnished a strong objective basis for the officers to ask [the defendant] about the presence of a gun and to request permission to search his home for it.").
131. *See* United States v. Forrester, 495 F.3d 1041 (9th Cir. 2007) (no suppression for violation of pen register statute), *accord* U.S. v. German, 486 F.3d 849 (5th Cir. 2007); *Abdi*, 463 F.3d at 547 (no exclusion for

sible to generalize that there have been inroads into the case-by-case approach to the exclusionary rule for other constitutional violations. *Hector* is the only case that comes remotely close to employing a categorical approach, but there are significant differences between it and *Hudson*. First, in *Hector* the constitutional status of the rule requiring that a copy of the warrant be served was in doubt; therefore, *Hector* could be read as a no-suppression-for-statutory-violation case. Second, in *Hector* the manner of entry and seizure were legal, regardless of the failure to leave a copy of the warrant. Consequently, the violation was not even a "but-for" cause of the discovery of the evidence and suppression was unwarranted on that ground alone.[132]

Similarly, in the cases like *Olivera-Mendez* that appear to adopt *Hudson*'s "certainty" approach to "but-for" causation, there are also significant distinguishing features. For example, in *Olivera-Mendez* the brief, unlawful extension of the traffic stop was not a "but-for" cause of search and seizure because it did not accelerate the time that the search took place; nor did it affect the decision to use the drug sniffing dog or the results of the sniff, which led to the discovery of the evidence. Thus, *Olivera-Mendez*, and the others like it, fit much more comfortably than *Hudson* within the confines of the independent source or inevitable discovery doctrines.

Nonetheless, there remains a possibility that *Hudson*'s novel approach to causation and attenuation could still further eviscerate the exclusionary rule. For example, a court could apply "impaired interest" attenuation in cases involving the use of excessive force to effectuate an arrest.[133] If a court defined the interests protected by the excessive force rule as the prevention of physical injury to the arrestee, improvement in relations between police departments and the citizenry, and reduction in the number of excessive force law suits against the police,[134] it could conclude à la *Hudson* that suppression was never an appropriate remedy when excessive force is used to effectuate an arrest,[135] since even if violated those interests "have nothing to do with the seizure of the evidence."[136] Our "roughed up" arrestee, like our surprised search target, would then be left to seek his remedy in civil damages.[137]

Even more ominously for exclusionary rule fans, *Hudson*'s "certainty" approach to "but-for" causation could easily be expanded to include any case in

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violation of statute governing "administrative" arrests of illegal aliens). Another case, Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006), decided by the Supreme Court later in the same term as *Hudson*, also contributed to this development. In *Sanchez-Llamas*, the Court refused to create a judicial remedy for the violation of a treaty where the treaty did not itself contain a remedy. *Id.* at 2680. The *Abdi* Court cited *Sanchez-Llamas* in support of its conclusion that "the exclusionary rule is an appropriate sanction for a statutory violation only where the statute specifically provides for suppression as a remedy or the statutory violation implicates underlying constitutional rights such as the right to be free from unreasonable search and seizure." *Abdi*, 463 F.3d at 556.

132. *See, e.g, Olivera-Mendez*, 484 F.3d at 512.

133. Tennessee v. Garner, 471 U.S. 1 (1985).

134. *See, e.g., Hudson*, 126 S. Ct. at 2168 ("Failure to teach and enforce constitutional requirements exposes municipalities to financial liability.").

135. *But see Ankeny*, 490 F.3d. at 751-52 (considering whether the use of excessive force in executing a search warrant rendered the search "unreasonable").

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

137. Amar, *supra* note 8, at 524.

which the police had probable cause, but failed to get a warrant, when one "certainly" would have been issued and the evidence "certainly" would have been discovered.[138] As Professor Amar has observed,

> [i]n many, many cases, actually, the Supreme Court has excluded evidence where there was probable cause. A warrant clearly would have issued but it didn't on the facts of these cases. Now are the Justices going to apply *Hudson*'s causation analysis in these cases? If so, this would actually be a pretty big exception to the exclusionary rule.[139]

It seems likely that we will have to await another Supreme Court exclusionary rule case to know whether *Hudson* will spawn this "big exception."

138. *Id.* at 525.
139. *Id.*