Hey Officer, Didn't Someone Teach You To Knock? The Supreme Court Says No Exclusion of Evidence for Knock-and-Announce Violations in *Hudson v. Michigan*

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Hey Officer, Didn’t Someone Teach You To Knock? The Supreme Court Says No
Exclusion of Evidence for Knock-and-Announce Violations in *Hudson v. Michigan*

In *Hudson v. Michigan*, the United States Supreme Court held in a 5-4 decision that evidence discovered by police after a knock-and-announce violation will not necessarily be excluded in court. The majority opinion, written by Justice Scalia, stated that exclusion is only appropriate where the interests protected by the knock-and-announce requirement are implicated and that hiding evidence from the government is not one of those interests. The Court further held that the substantial social costs of excluding evidence discovered upon knock-and-announce violations outweigh the deterrent effects of the exclusionary rule against police misconduct and, therefore, the application of the exclusionary rule against knock-and-announce violations is unjustified.

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2. *Id.* at 2165, 2168.
3. *Id.* at 2165.
4. *Id.* at 2168.
The dissent, written by Justice Breyer, claimed that the majority relied on misunderstandings of law and strongly asserted that exclusion of evidence is, and has always been, the only effective deterrent against knock-and-announce violations. Justice Kennedy concurred in part and in the judgment, but expressed reservations that a demonstration of a widespread pattern of knock-and-announce violations would be cause for grave concern.

The decision has important implications for both the government and citizens. On the one hand, less incriminating evidence will be excluded at trial. But on the other hand, there is a possibility that Fourth Amendment rights will be completely disregarded at the doors of both criminals and those innocently implicated in a necessarily imperfect law enforcement system.

I. FACTUAL BACKGROUND

Police obtained a warrant to search the home of Booker Hudson for drugs and firearms, and in executing the warrant, they waited three to five seconds after announcing their presence to enter the residence through the unlocked front door. Inside the home, they found large quantities of drugs and a loaded gun between the cushion and armrest of the chair in which Hudson was sitting. Hudson alleged that three to five seconds was not a reasonable wait time under the Fourth Amendment knock-and-announce requirement and moved to suppress the incriminating evidence. The trial court granted his motion, but the Michigan Court of Appeals reversed, citing a number of Michigan Supreme Court cases that held "suppression is inappropriate when entry is made pursuant to [a] warrant but without proper 'knock and announce.'" The Michigan Supreme Court denied Hudson's leave to appeal, and he was convicted of drug possession. The court of appeals rejected Hudson's renewed Fourth Amendment claim, and the Michigan Supreme Court again declined review.

5. Id. at 2177-81 (Breyer, J., dissenting).
6. See id. at 2171.
7. Id. at 2170 (Kennedy, J., concurring).
8. Id. at 2171.
10. Id.
13. Id. (citing People v. Vasquez, 602 N.W.2d 376 (Mich. 1999) (per curiam); People v. Stevens, 597 N.W.2d 53 (Mich. 1999)).
14. Id.
Court granted certiorari and held that the exclusionary rule does not necessarily apply to evidence seized upon a violation of the knock-and-announce rule.

II. LEGAL BACKGROUND

A. The Knock-and-Announce Requirement

The knock-and-announce principle was adopted from English common-law, embraced by early American courts and state constitutions, and codified by federal statute in 1917. In 1995 the Court in Wilson v. Arkansas held that the requirement of officers to knock and announce their presence in execution of a warrant is an element of the reasonableness inquiry under the Fourth Amendment. The knock-and-announce requirement is currently codified at 18 U.S.C. § 3109.

Under the knock-and-announce requirement, when executing a warrant, officers must knock, announce their presence, and wait a reasonable amount of time before forcing entry. The requirement protects three main privacy interests: (1) permitting persons the opportunity to comply and peaceably admit officers into their homes, thus reducing the risk of violence; (2) preventing unnecessary destruction of property; and (3) allowing occupants the opportunity to prepare themselves, by, for example, putting on clothes or getting out of bed. These interests underlie the greater policy set forth in

15. Id.
16. Id. at 2165, 2168.
17. Wilson v. Arkansas, 514 U.S. 927, 931-33 (1995). The Court in Wilson noted that the "knock and announce' principle appears to predate even Semayne's Case, (1603) 77 Eng. Rep. 194 (K.B.), which is usually cited as the judicial source of the common-law standard. Semayne's Case itself indicates that the doctrine may be traced to a statute enacted in 1275 . . . ." Wilson, 514 U.S. at 932 n.2 (citing 77 Eng. Rep. at 196).
18. Id. at 933.
21. Id. at 930.
23. See United States v. Banks, 540 U.S. 31, 35-36 (2003). In determining the reasonableness of an entry, the Court considered the totality of the circumstances. Id.
25. Id. The Supreme Court in Richards recognized three exceptions to the knock-and-announce requirement. Id. In order for police to be justified in a "no-knock" entry, there must be a "reasonable suspicion that knocking and announcing their presence, under particular circumstances, would be [1] dangerous or [2] futile, or [3] that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence." Id. at 394.
the Fourth Amendment for citizens to be secure in their homes against unreasonable searches and seizures.\textsuperscript{26}

B. The Exclusionary Rule

The federal exclusionary rule was announced in the 1914 case \textit{Weeks v. United States},\textsuperscript{27} where evidence seized in a warrantless search of the defendant's home was excluded at trial.\textsuperscript{28} In formulating the rule, the Court relied heavily on language from its 1886 decision in \textit{Boyd v. United States}.\textsuperscript{29} The Court in \textit{Boyd} considered the harm from Fourth Amendment violations to be not so much the actual "breaking of his doors" or the "rummaging of his drawers," but more importantly, the infringement upon the citizen's personal liberties and securities.\textsuperscript{30} \textit{Weeks} added that not only should these essential liberties be protected, but the tendency of government officials to infringe upon them should be deterred.\textsuperscript{31} Thus, the policies behind the formation of the exclusionary rule included protecting citizens' personal rights and deterring police misconduct.

C. Initial Broad Application of the Exclusionary Rule

Shortly after \textit{Weeks}, the Supreme Court began expanding the application of the federal exclusionary rule. In \textit{Silverthorne Lumber Co. v. United States},\textsuperscript{32} state officials illegally seized evidence from an office and used it to form a cause of action against the defendants. The Government acknowledged the illegal seizure, but nonetheless insisted upon using the evidence obtained.\textsuperscript{33} The Court held that the illegally seized evidence could not be used, stating that the purpose of the

\begin{itemize}
  \item \textsuperscript{26} U.S. CONST. amend. IV.
  \item \textsuperscript{27} 232 U.S. 383 (1914).
  \item \textsuperscript{28} Id. at 388.
  \item \textsuperscript{29} 116 U.S. 616 (1886).
  \item \textsuperscript{30} Id. at 630. The Court stated: The principles laid down in this opinion affect the very essence of constitutional liberty . . . [and] they apply to all invasions on the part of the government . . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . .
  \item \textsuperscript{31} 232 U.S. at 394. The Court stated, "To sanction [government infringement of citizens' rights] would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." Id.
  \item \textsuperscript{32} 251 U.S. 385 (1920).
  \item \textsuperscript{33} Id. at 390-91.
\end{itemize}
exclusionary rule is “not merely [that] evidence [illegally] acquired shall not be used before the Court but that it shall not be used at all.” The Court reaffirmed Silverthorne nine years later in Nardone v. United States, and referring to excludable evidence, penned the popular phrase “fruit of the poisonous tree.”

In 1961 the Court in Mapp v. Ohio extended the exclusionary rule to the states through the Fourteenth Amendment. Mapp suggested a very broad application of the exclusionary rule to Fourth Amendment violations. The Court in Mapp, citing both Boyd and Weeks, also highlighted the importance of the exclusionary rule as the only effective deterrent against constitutional violations by the government. The Court noted that at the time of its decision, half of the states formerly opposed to the exclusionary rule had since adopted it because they found alternative deterrents to have been “worthless” and “futile” and to have “completely failed” in practice. Thus, according to the Court in Mapp, the exclusionary rule was the only effective restraint against constitutional violations by the government.

Almost ten years later, in Whiteley v. Warden, the Court cited Mapp and suggested a reflexive application of the exclusionary rule to Fourth Amendment violations. The broad language in Mapp and its application in Whiteley gave huge power, initially, to the exclusionary rule.

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34. Id. at 392.
35. 308 U.S. 338 (1939).
36. Id. at 341. The Court stated that “the trial judge must give opportunity . . . to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree.” Id.
38. Id. at 654-55. The Court in Mapp overruled a line of cases starting with Wolf v. Colorado, 338 U.S. 25 (1949), which had refused to extend the exclusionary rule to the states. Mapp, 367 U.S. at 650, 654-55.
39. See 367 U.S. at 655. The Court stated, “[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.” Id.
40. Id. at 656.
41. Id. at 651-52.
42. Id. at 656.
43. 401 U.S. 560 (1971).
44. This language of “reflexive application” was used in Arizona v. Evans, 514 U.S. 1 (1995), to describe how the Court in Whiteley “treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation.” Id. at 13. Out of the entire Court’s opinion in Whiteley, Justice Harlan devoted only one sentence to the exclusionary rule’s application. 401 U.S. at 569. After concluding there was a Fourth Amendment violation by the government, he simply set forth that the evidence should be excluded and did not discuss the issue further, implying a reflexive, or automatic, application of the rule. Id.
45. 401 U.S. at 569.
D. Restricting the Application of the Exclusionary Rule

Not long after Mapp, the Supreme Court began restricting the application of the exclusionary rule. In United States v. Calandra, the Court held that the rule is a remedy, not a personal right, and should only be applied as a deterrent against police misconduct. Therefore, according to the Court, evidence should not be excluded where there is little deterrent effect. In United States v. Leon and Arizona v. Evans, the Supreme Court rejected the reflexive application of the exclusionary rule suggested by Mapp and Whiteley. In both cases, the Court held that whether the exclusionary rule applies is a different issue from whether the police violated a person's Fourth Amendment rights. Most recently, in Pennsylvania Board of Probation & Parole v. Scott, the Court held that the exclusionary rule should only be used if its benefit of deterrence outweighs its "substantial social costs." Such costs include preventing effective truth-seeking by courts and allowing the guilty to go free. Thus, the recent trend in the Court's application of the exclusionary rule shows a non-reflexive application of the rule to constitutional violations and a balancing of the rule's social costs with its benefits as a deterrent.

E. Exceptions to the Exclusionary Rule

The exclusionary rule's application has been restricted through a number of exceptions. Two principle exceptions are (1) the attenuation exception and (2) the inevitable discovery exception.

47. Id. at 347-48.
48. Id. at 348.
51. Leon, 468 U.S. at 905-06; Evans, 514 U.S. at 14.
54. Id. at 363 (quoting Leon, 468 U.S. at 907).
55. Leon, 468 U.S. at 907; Stone, 428 U.S. at 490.
56. There are several exceptions to the exclusionary rule, but the two most relevant in Hudson v. Michigan, 126 S. Ct. 2159 (2006), are the attenuation and inevitable discovery exceptions. One other exception that closely resembles the inevitable discovery exception is the independent source exception. To meet this exception, the government must prove that the evidence was discovered as a result of a legal source independent of the tainted source. See Segura v. United States, 468 U.S. 796, 815-16 (1984). The Supreme Court recognized this doctrine as far back as Silverthorne, 251 U.S. at 392, and Nardone, 308
1. The Attenuation Exception. Attenuation occurs when the causal connection between the illegal government conduct and the discovery of evidence is so remote as to "dissipate the taint" from the illegal conduct.\textsuperscript{57} This concept was briefly noted in \textit{Nardone}.\textsuperscript{58} Almost twenty-five years later, the Court in \textit{Wong Sun v. United States}\textsuperscript{59} used the attenuation analysis to include a defendant's statement that was sufficiently attenuated from the government's illegal conduct. Wong Sun had been arrested illegally, but he voluntarily returned to the police days after being released and gave a statement.\textsuperscript{60} The Court held that the statement was admissible because the connection between the voluntary statement and the illegal arrest "had become so attenuated as to dissipate the taint."\textsuperscript{61}

The Supreme Court has also held that interests relating to the exclusionary rule, as well as those protected by the Fourth Amendment, are factors in the attenuation analysis.\textsuperscript{62} In \textit{United States v. Ceccolini},\textsuperscript{63} a police officer was on break inside a store and engaged in casual conversation with an employee when he discovered an envelope full of money and gambling slips. The officer asked the employee to whom the envelope belonged, and the employee told the officer that Ceccolini had left it with her and given her instructions to give it to someone. Five months later, Ceccolini denied any gambling involvement in front of a grand jury. The issue on appeal was whether the employee's testimony could be used as evidence of perjury against Ceccolini. The district court ruled, and the court of appeals affirmed, that the employee's testimony

\textsuperscript{57} \textit{Nardone}, 308 U.S. at 341.
\textsuperscript{58} \textit{Id.} The Court stated, "As a matter of good sense, [a causal connection] may have become so attenuated as to dissipate the taint." \textit{Id.}
\textsuperscript{60} \textit{Id.} at 475-76.
\textsuperscript{61} \textit{Id.} at 491 (quoting \textit{Nardone}, 308 U.S. at 341).
\textsuperscript{63} 435 U.S. 268 (1978).
should be excluded because, regardless of the time between both statements, the causal connection was direct and uninterrupted.\textsuperscript{64}

The Supreme Court reversed, reasoning that attenuation analysis is not a simple, logical, or scientific analysis.\textsuperscript{65} Rather, the Court held, the attenuation analysis necessarily consists of other elements.\textsuperscript{66} These other elements include the interests protected by the exclusionary rule, such as deterrence of police misconduct, and the constitutional principles protected by the exclusionary rule, such as citizens' rights.\textsuperscript{67} According to the Court, whether or not those interests would be furthered by exclusion is an element of the attenuation analysis.\textsuperscript{68} Therefore, because exclusion would have no deterrent effect upon a police officer like the one in \textit{Ceccolini}, who was apparently acting honestly, the Court held that exclusion was inappropriate.\textsuperscript{69}

In \textit{United States v. Leon},\textsuperscript{70} the Court noted that the attenuation exception was a method of balancing the deterrent effect of the exclusionary rule with its social costs.\textsuperscript{71} In short, it attempts to establish the point at which the consequences of police misconduct are so attenuated that the deterrent effect of the exclusionary rule can no longer justify the cost of excluding the evidence, as in \textit{Ceccolini}.\textsuperscript{72}

\textbf{2. The Inevitable Discovery Exception.} The inevitable discovery exception to the exclusionary rule applies when discovery of evidence would have occurred inevitably, despite the illegal act.\textsuperscript{73} The rule was adopted by the Supreme Court in the 1984 case \textit{Nix v. Williams}.\textsuperscript{74} In \textit{Nix} a murder suspect was denied his Sixth Amendment right to counsel when an officer elicited from him the location of the body without an attorney present. At the time of the interrogation, a large search party had stopped for the day, two and one-half miles from where the body

\begin{itemize}
\item \textsuperscript{64} Id. at 272-73.
\item \textsuperscript{65} Id. at 274.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} See id.
\item \textsuperscript{68} Id. at 279.
\item \textsuperscript{69} Id. at 279-80; see also Leon, 468 U.S. at 911 (noting that the flagrancy of police misconduct is a factor in the attenuation analysis).
\item \textsuperscript{70} 468 U.S. 897 (1984).
\item \textsuperscript{71} Id. at 911 (citing Dunaway v. New York, 442 U.S. 200, 217-18 (1979)).
\item \textsuperscript{72} Id. (citing Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring in part)).
\item \textsuperscript{73} Nix v. Williams, 467 U.S. 431, 440-41 (1984). Unlike the independent source exception, \textit{supra} note 56, there is no actual legal discovery for an inevitable discovery exception. Rather, the government must show that the same evidence "inevitably would have been discovered by lawful means." See Nix, 467 U.S. at 444.
\item \textsuperscript{74} 467 U.S. 431, 440-41 (1984).
\end{itemize}
was located. The Court held that evidence resulting from the interrogation was not excludable because the search party would inevitably have found the body upon resuming their search, despite the illegally elicited statement from the suspect. The inevitable discovery exception has since been applied by lower courts to Fourth Amendment violations.

F. The Exclusionary Rule and Knock-and-Announce Violations

Since Weeks v. United States, the Supreme Court has applied the exclusionary rule in a number of cases involving, mainly, warrantless searches; warrantless arrests and searches; invalid searches incident to arrest; and warrantless entry into homes without exigent circumstances. However, until Hudson v. Michigan, the Court had not directly addressed the rule's application to knock-and-announce violations, and lower courts were thus left to make their own unguided and varied decisions.

For example, in People v. Stevens, the Michigan Supreme Court used the inevitable discovery exception in holding that the exclusionary rule did not apply to a knock-and-announce violation. There, officers executing a search warrant knocked, announced, and waited eleven seconds before forcing entry into the defendant's home. Though the entry was deemed to violate the knock-and-announce requirement, the court held that the evidence would have been discovered if the officers

75. Id. at 435-36.
76. Id. at 449-50.
78. 232 U.S. 383 (1914).
85. 597 N.W.2d 53.
86. Id. at 55.
87. Id. at 56.
had entered legally, and therefore, the inevitable discovery exception was met.  

However, in United States v. Dice, the Sixth Circuit Court of Appeals held that the exclusionary rule did apply to a knock-and-announce violation. In Dice police waited only a few seconds after knocking and announcing their presence before entering a home where they discovered over one thousand marijuana plants. The court noted that the inevitable discovery exception requires a second independent, legal investigation that inevitably would have uncovered the evidence. The court held that a knock-and-announce violation is a part of one investigation and that same investigation cannot be used as an inevitable discovery in order to invoke an exception to the exclusionary rule.

Opposing decisions such as Stevens and Dice demonstrate the split of authority concerning the application of the exclusionary rule to knock-and-announce violations. Many commentators have claimed that Stevens was based on a misunderstanding of the inevitable discovery exception as defined in Nix. Others assert that Stevens was correctly decided and that the exclusionary rule is an inappropriate remedy for knock-and-announce violations. The Supreme Court has now sided with Stevens in its decision in Hudson v. Michigan.

III. COURT'S RATIONALE

In Hudson v. Michigan, the Supreme Court considered for the first time whether the exclusionary rule should be applied to knock-and-announce violations. In making its decision, the Court contemplated its rulings on the use of the exclusionary rule in other contexts, as

88. Id. at 62; see also United States v. Jones, 214 F.3d 836 (7th Cir. 2000); United States v. Jones, 149 F.3d 715 (7th Cir. 1998).
89. 200 F.3d 978 (2000).
90. Id. at 980.
91. Id. at 980-81.
92. Id. at 985-87.
93. Id.; see also State v. Lee, 821 A.2d 922 (Md. 2003).
96. 126 S. Ct. at 2162, 2170.
98. See id. at 2162.
99. See id. at 2168-70.
well as the rule’s deterrence benefits, specifically for knock-and-announce violations.100

A. The Majority Noted the Recent Restriction of the Exclusionary Rule’s Application

Justice Scalia, writing for the majority in parts I through III of the opinion, reasoned that the exclusionary rule was never meant to be reflexively applied to knock-and-announce violations.101 He noted only the history of the exclusionary rule’s application, starting with Weeks v. United States,102 Mapp v. Ohio,103 and Whiteley v. Warden,104 and the suggested broad application of the rule.105 However, Justice Scalia stressed the Court’s more recent restriction of the rule’s application in cases such as United States v. Calandra,106 United States v. Leon,107 Arizona v. Evans,108 and Pennsylvania Board of Probation & Parole v. Scott,109 and noted that the Court had “long since rejected” such a broad approach.110 Thus, according to the majority, the Court’s position at the time of Hudson was that exclusion of evidence does not occur just because a constitutional violation was a but-for cause of obtaining evidence.111

B. The Court’s Implication of the Inevitable Discovery Exception

The Court took this but-for analysis even further. It attempted to separate an illegal manner of entry from the related search as a whole.112 The Court claimed that a knock-and-announce violation was an illegal manner of entry separate from the search, and therefore, not a but-for cause of obtaining the evidence.113 The Court reasoned, like the Michigan Supreme Court in People v. Stevens,114 that even if the police had not entered illegally, they still would have executed the

100. See id. at 2165-68.
101. See id. at 2163-64.
102. 232 U.S. 383 (1914).
105. Id.
110. Hudson, 126 S. Ct. at 2163-64.
111. Id. at 2164; see Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
112. See Hudson, 126 S. Ct. at 2164.
113. Id.
warrant and discovered the evidence inside the house.\textsuperscript{116} Thus, the Court implied that the knock-and-announce violation satisfied the inevitable discovery exception.\textsuperscript{116} Justice Scalia admitted, however, that even if such an illegal manner of entry is considered a but-for cause of obtaining evidence, precedent shows that the evidence is not necessarily excluded.\textsuperscript{117}

C. The Supreme Court Held that Attenuation Exists

The Court, citing United States v. Ceccolini,\textsuperscript{118} noted that even where there is a direct causal connection between the illegal act and the discovery of evidence, attenuation can occur where the interests protected by the rule violated are not served by exclusion.\textsuperscript{119} The Court cited the three main interests commonly associated with the knock-and-announce requirement: (1) the protection of human life and limb,\textsuperscript{120} (2) the protection of property,\textsuperscript{121} and (3) the protection of residents' privacy and dignity that could be destroyed upon a sudden entrance,\textsuperscript{122} and noted that keeping evidence from the government is not one of those interests.\textsuperscript{123} Therefore, the Court held that since the interests violated in Hudson do not include the seizure of evidence, the exclusionary rule is inapplicable.\textsuperscript{124} This idea of attenuation was the central part of the Court's holding. Essentially, the Court held that knock-and-announce violations should not result in exclusion of evidence unless the interests violated by the government are those protected by the rule itself.\textsuperscript{125}

\begin{itemize}
\item[115.] Hudson, 126 S. Ct. at 2164.
\item[116.] Id.
\item[117.] Id. (citing Segura v. United States, 468 U.S. 796, 815 (1984)).
\item[118.] 435 U.S. 268 (1978).
\item[119.] Hudson, 126 S. Ct. at 2164 (citing Ceccolini, 435 U.S. at 279).
\item[120.] Id. at 2165. The Court noted that "an unannounced entry may provoke violence in supposed self-defense by the surprised resident." Id.
\item[121.] Id. The Court observed that "[t]he knock-and-announce rule gives individuals 'the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.'" Id. (quoting Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997)).
\item[122.] Id. The Court noted that the knock-and-announce requirement "gives residents the 'opportunity to prepare themselves for' the entry of the police," and to, for example, "pull on clothes or get out of bed." Id. (quoting Richards, 520 U.S. at 393 n.5).
\item[123.] Id.
\item[124.] Id.
\item[125.] See id.
\end{itemize}
D. Substantial Social Costs

The Court devoted much of its opinion to balancing the concept of "substantial social costs" with the "deterrence benefits" of the exclusionary rule. The majority observed that the highest and most obvious cost of the exclusionary rule is the cost of allowing the guilty to go free. Another cost, the Court noted, would be the flood of litigation that would result from defendants seeking a "get-out-of-jail-free card." Knock-and-announce litigation is more complicated than disputes over, for example, the warrant requirement or the Miranda requirement. With knock-and-announce disputes, courts must deal with determining, for example, what is a reasonable wait time. These determinations, the Court explained, are more difficult to make than determining simply whether there was a warrant or whether a Miranda warning was given, and these determinations would thus be more costly to courts.

Another cost of the exclusionary rule, noted the Court, is that if the consequences of a violation of the knock-and-announce rule are so great that evidence would be excluded, and a reasonable wait time is uncertain, then officers would be inclined to wait longer than is required by law. According to the Court, this inclination to wait could result in "preventable violence" to officers in some cases and destroyed evidence in many others.

E. Deterrence Benefits

The Court recognized that deterrence of police misconduct is a "necessary condition" for excluding evidence, but it is not alone a sufficient condition. The Court observed that the value of deterrence depends upon the government's incentive towards violation, and in support of this, the Court again made an analogy to the violation of the warrant requirement. The Court further observed that the incen-
tive there—to obtain evidence otherwise unobtainable—is different from a violation of the knock-and-announce requirement, which "can realistically be expected to achieve absolutely nothing" except the prevention of destruction of evidence and the avoidance of resistance by occupants.\footnote{136}

The Court suggested two alternative methods of deterrence. The first was civil suit.\footnote{137} In 1976 Congress passed 42 U.S.C. § 1988(b),\footnote{138} which authorized attorney fees for civil-rights plaintiffs at the court's discretion.\footnote{139} The Court noted that the reason for 42 U.S.C. § 1988(b) was that some civil-rights violations would result in damages too small to justify the expense of bringing suit.\footnote{140} The Court also noted that the "heydays" of exclusionary rule jurisprudence took place before this statute was enacted.\footnote{141} Therefore, the Court claimed that after Mapp but before this statute, attorneys were very reluctant to take on civil rights claims against the police.\footnote{142} However, according to the Court, "Citizens and lawyers [today] are much more willing to seek relief in the courts for police misconduct."\footnote{143} The Court stated that the number of public interest attorneys and law firms has greatly expanded,\footnote{144} thus allowing for better access to civil remedies for knock-and-announce violations.\footnote{145}

The Court acknowledged, however, that few decisions announced large awards for knock-and-announce violations.\footnote{146} The Court asserted that this statistic is unhelpful because it first assumes that only large damages would deter police misconduct, and further, the statistic does not include settlements or violations producing "anything more than nominal injury."\footnote{147} Then with little further explanation, the Court concluded, "As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."\footnote{148}

\begin{footnotes}
\item[136] Id.
\item[137] Id. at 2166-67.
\item[139] Id.
\item[140] Hudson, 126 S. Ct. at 2167.
\item[141] Id.
\item[142] Id. (citing MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION vii (3d ed. 2001)).
\item[143] Id. (quoting AVERY, supra note 142, at vii).
\item[144] Id.
\item[145] See id.
\item[146] Id.
\item[147] Id.
\item[148] Id. at 2167-68.
\end{footnotes}
The second alternative deterrent was more of a development than an actual method of deterrence.\textsuperscript{149} The Court noted that police forces have seen an increase in professionalism and a new focus on internal police discipline.\textsuperscript{150} According to the Court, “There have been ‘wide-ranging reforms in the education, training, and supervision of police officers.’”\textsuperscript{151} The Court claimed to “have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously.”\textsuperscript{152} Thus, according to the Court, one deterrent against police misconduct is the police themselves.

\textbf{F. Concurrence}

Justice Kennedy concurred in parts I through III of the opinion and concurred in the judgment.\textsuperscript{153} His concurrence served, for the most part, as emotional reinforcement to Scalia’s opinion.\textsuperscript{154} At the very beginning, Justice Kennedy highlighted two points: First, “The Court’s decision should not be interpreted as suggesting that violations of the [knock-and-announce] requirement are trivial or beyond the law’s concern,” and second, “the continued operation of the exclusionary rule, as settled and defined by [the Court’s] precedents, is not in doubt.”\textsuperscript{155} In the next paragraph, Justice Kennedy continued: “It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry.”\textsuperscript{156} His language implies that Justice Kennedy anticipated an outcry against the majority’s decision.\textsuperscript{157}

He went on to support Justice Scalia’s proposed alternative deterrents to knock-and-announce violations while, again, anticipating disagreement.\textsuperscript{158} In support of the claim that law enforcement interdisciplin-

\begin{itemize}
  \item \textsuperscript{149} See id. at 2168.
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id. (quoting SAMUEL E. WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 51 (1993)).
  \item \textsuperscript{152} Id. The Court noted that “[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court’s cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline.” Id.; see, e.g., DAVID J. WAKSMAN & DEBBIE J. GOODMAN, THE SEARCH AND SEIZURE HANDBOOK (2d ed. 2006); ALFRED R. STONE & STUART M. DELUCA, POLICE ADMINISTRATION: AN INTRODUCTION (2d ed. 1994); EDWARD A. THIBAULT ET AL., PROACTIVE POLICE MANAGEMENT (4th ed. 1998).
  \item \textsuperscript{153} Hudson, 126 S. Ct. at 2170 (Kennedy, J., concurring).
  \item \textsuperscript{154} See id. at 2170-71.
  \item \textsuperscript{155} Id. at 2170.
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} See id. at 2170-71.
  \item \textsuperscript{158} See id. at 2170.
\end{itemize}
ary procedures and training have improved, Justice Kennedy added that “[i]f those measures prove ineffective, they can be fortified with more detailed regulations or legislation.”\(^{159}\) Also, for civil suits against knock-and-announce violations, he noted that even “exceptional cases in which unannounced entries cause severe fright and humiliation” are subject to suit under 42 U.S.C. § 1983.\(^{160}\)

Justice Kennedy did note, however, that the majority decision does not address a pattern of knock-and-announce violations.\(^{161}\) According to Justice Kennedy, if such a “widespread pattern” of violations were shown, and especially if the violations were against those of limited means or voice to effectively protest a violation, “there would be reason for grave concern.”\(^{162}\) However, he continued, if this were the case, then the possibility of extending the exclusionary rule to all knock-and-announce violations would still come into conflict with the Court’s requirement of a “‘sufficient causal relationship’”\(^{163}\) between the violation and discovery of evidence, which limits suppression of evidence.\(^{164}\)

G. Dissent

According to the dissent, written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg, the Court’s opinion “destroys the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement. And [it] does so without significant support in precedent.”\(^{165}\)

1. The Majority Misunderstood the Inevitable Discovery Exception. The majority’s interpretation that absent the illegal entry, the police would have executed the warrant and discovered the evidence anyway is, according to the dissent, a misunderstanding of the inevitable discovery exception.\(^{166}\) The question, according to the dissent, is not

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\(^{159}\) Id.


\(^{161}\) *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring).

\(^{162}\) Id.


\(^{164}\) *Hudson*, 126 S. Ct. at 2171 (Kennedy, J., concurring).

\(^{165}\) Id. (Breyer, J., dissenting).

\(^{166}\) Id. at 2178-79. Justice Breyer alleged that trying to separate the manner of entry from the related search goes too far. The Court noted that *Wilson v. Arkansas*, 514 U.S. 927 (1995), was the case that first set out that the knock-and-announce requirement was to be a factor in the reasonableness inquiry of a search and not an “independently unlawful event.” *Hudson*, 126 S. Ct. at 2177 (citing *Wilson*, 514 U.S. at 936). According to Justice Breyer, the two appear inseparable. See id.
what police might have done if they behaved lawfully, but rather, what
they actually did do.167 If what they did was illegal, then the question
is whether there was a search independent of the illegal action that
would have inevitably discovered the evidence.168 According to Justice
Breyer, there was no such independent search here, and therefore, no
inevitable discovery exception.169

2. There Was an Interest Violated. The dissent claimed that the
majority's interest-based definition of attenuation, as cited from United
States v. Ceccolini,170 gave "new meaning" to the word as opposed to
how it had been commonly understood in prior case law.171 According
to Justice Breyer, there were three serious problems with this "new
meaning."

First, Justice Breyer claimed that the interests protected by the knock-
and-announce rule as laid out by the majority are incomplete.172 He
agreed that protection of human life, property, and those elements of
privacy and dignity destroyable upon sudden entry are protected
interests.173 However, Justice Breyer noted that the majority over-
looked the major interest of protecting "the occupants' privacy by
assuring them that government agents will not enter their home without
complying" with legal procedures.174 This was the principle articulated
in Boyd v. United States175 over one hundred years ago; according to
Breyer, that principle deserved more than to be reduced to an inconse-
quential interest, as he felt the majority had done in the case.176

Second, Justice Breyer posited that whether the interests of the rule
are implicated, in a sense, does not matter.177 Justice Breyer noted
that according to Wilson, failure to comply with the knock-and-announce
rule deems a search unreasonable.178 Unreasonable searches, he

167. 126 S. Ct. at 2179.
168. Id.
169. Id.
171. Hudson, 126 S. Ct. at 2180 (Breyer, J., dissenting). Attenuation, claimed the
dissent, was commonly understood as being a remote connection between the illegal act
and the discovery of evidence, either by time in between the two, or means sufficiently
independent. Id.
172. Id.
173. Id.
174. Id.
175. 116 U.S. 616, 630 (1886).
176. Hudson, 126 S. Ct. at 2181 (Breyer, J., dissenting).
177. Id.
178. Id. at 2173.
continued, are unlawful searches according to the Constitution. Further, since Weeks v. United States and Mapp v. Ohio, evidence seized from unlawful searches has been barred. Thus, according to Justice Breyer, because the search is illegal, the interests of the rule need not be considered for the purposes of the exclusionary rule.

Third, Justice Breyer claimed that the majority's interest-based attenuation approach departs from prior law. According to Justice Breyer, the majority did not point to any relevant cases that support such a detailed requirement of causal relation for exclusion. He argued that instead, a court will usually only look to see if the unconstitutional search produced the evidence. A more detailed causal connection requirement would, according to the dissent, "complicate Fourth Amendment suppression law, threatening its workability."

3. The Dissent Attacked the Majority's Alternative Deterrents. Justice Breyer also attacked the majority's proposed alternative deterrents to knock-and-announce violations. He noted that alternative remedies were addressed in Mapp. The Court there, based on the experiences of over half of the states, found all other remedies to have completely failed. "What reason is there to believe," Breyer asked, "that those remedies... found inadequate in Mapp, can adequately deter unconstitutional police behavior here?"

Referring to the alternative remedy of civil suit, Justice Breyer pointed out, like the majority, that few knock-and-announce violations have resulted in large civil remedies. He added, however, that in contrast

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179. Id.
182. Hudson, 126 S. Ct. at 2173 (Breyer, J., dissenting).
183. Id. at 2181.
184. Id.
185. Id.
186. Id.
187. Id.
188. See id. at 2174-75.
189. Id. at 2174.
190. Mapp, 367 U.S. at 651-52.
191. Hudson, 126 S. Ct. at 2174 (Breyer, J., dissenting). Justice Breyer suggested that "[t]o argue, as the majority does, that new remedies... make suppression unnecessary is to argue that Wolf, not Mapp, is now the law." Id. at 2175.
192. Id. at 2174. According to the dissent, "[T]he majority... has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation." Id.
to the number of civil remedies, there are a significant number of cases reporting knock-and-announce violations—indicating that the "wide-spread pattern" that Justice Kennedy feared might develop does, in fact, already exist.\textsuperscript{193} Furthermore, the majority's accounting for few civil suits because violations produce nothing "more than nominal injury," actually supports the argument that civil suits are an insufficient deterrent to police misconduct, according to Justice Breyer.\textsuperscript{194} He added further that the idea that the statistic is low because suits may "have been settled" is, perhaps, to search in desperation for an argument.\textsuperscript{195} Finally, Breyer claimed that the majority simply "assumed" that, "as far as [it] know[s], civil liability is an effective deterrent."\textsuperscript{196} This contention, according to the dissent, is a "support-free assumption" that \textit{Mapp} and recent case history clearly does not embody.\textsuperscript{197} Thus, Justice Breyer concluded, the need for deterrence by exclusion of evidence is great.\textsuperscript{198}

In reference to the majority's reliance on the concept of "substantial social costs," Justice Breyer stated simply, that these costs are the same costs typically associated with any use of the exclusionary rule.\textsuperscript{199} Therefore, the substantial social costs argument "is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected."\textsuperscript{200}

\section*{IV. IMPLICATIONS}

The decision in \textit{Hudson v. Michigan}\textsuperscript{201} results in two main implications. First, more people will likely be sent to prison because evidence will not be excluded in court. However, this comes at the cost of the peoples' constitutional right against illegal entry by police. Police now know that they can ignore the knock-and-announce rule completely and still keep the discovered evidence. The only possible consequence now is a civil suit, a remedy found previously to have completely failed,\textsuperscript{202} yet "assumed" to exist by the majority in \textit{Hudson}.\textsuperscript{203} If this remedy once again proves deficient, will the police adopt a policy of not

\begin{enumerate}
\item \textit{Id.} (quoting \textit{Hudson}, 126 S. Ct. at 2171 (Kennedy, J., concurring)).
\item \textit{Id.} at 2175 (quoting \textit{Hudson}, 126 S. Ct. at 2167).
\item \textit{Id.} (quoting \textit{Hudson}, 126 S. Ct. at 2167).
\item \textit{Id.} (quoting \textit{Hudson}, 126 S. Ct. at 2167).
\item \textit{Id.}
\item \textit{See id.}
\item \textit{Id.} at 2177.
\item \textit{Id.}
\item \textit{Id.} at 2159 (2006).
\item \textit{Hudson}, 126 S. Ct. at 2168.
\end{enumerate}
knocking? This would be Justice Kennedy's "reason for grave concern," and perhaps a step towards changing his fifth vote in a later case. More importantly, a policy against knocking would increase the instances of violence associated with surprise, no-knock entries.

The Court's holding also suggests that under a conservative court, more limitations of the exclusionary rule are likely to happen. Justice Scalia was joined by Chief Justice Roberts and Justices Thomas and Alito, while Justice Breyer was joined in the dissent by Justices Stevens, Souter, and Ginsburg. Justice Kennedy was in the middle with the concurrence. The two most recently added Justices, Chief Justice Roberts and Justice Alito, sided with the conservative, pro-government argument and furthered their reputation as conservative judges. Justice Kennedy furthered his reputation as Justice O'Connor's replacement in the middle, and sided reservedly with the conservatives. As the fifth vote, however, Justice Kennedy's concurrence shows the closeness of this decision and foreshadows an uncertain future of Supreme Court jurisprudence for the exclusionary rule. The decision in Hudson v. Michigan implies that the Court is in the beginnings of yet another polarized era of jurisprudence, which forces the ninth judge to make the difference.

DAVID CARN

204. Id. at 2171 (Kennedy, J., concurring).