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## **Katz in the Age of *Hudson v. Michigan*: Some Thoughts on “Suppression as a Last Resort”**

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*In its landmark decision of Katz v. United States, the U.S. Supreme Court reconfigured the framework in which Fourth Amendment violations are defined and analyzed by rejecting the notion of constitutionally protected areas and adopting a new emphasis on the individual expectation of privacy. In doing so, the Court extended the Amendment’s previously circumscribed reach to protect “people, not places.” But the force of Katz’s protections was, and still is, ultimately predicated on the remedy of exclusion. Unquestioned at the time of Katz, the exclusion of evidence was once a near-certain consequence of unconstitutional searches. In the forty years since Katz, however, the Court has carved out numerous exceptions to the exclusionary rule, thereby limiting both its effectiveness and its protective reach. The Court’s most recent retraction of the exclusionary rule in the facially innocuous Hudson v. Michigan threatens to undermine the Katz remedy. This Article explains how Justice Antonin Scalia’s 5-4 majority opinion in Hudson misstates and diverges from traditional exclusionary rule jurisprudence, and it warns of the ramifications of such divergence.*

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*In Mapp, the Court thought it had ‘close[d] the only courtroom door remaining open to evidence secured by official lawlessness’ in violation of Fourth Amendment rights. The door is again ajar. As a consequence, I am left with the uneasy feeling that today’s decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases.*

—Justice William J. Brennan<sup>1</sup>

*Suppression of evidence . . . has always been our last resort, not our first impulse.*

—Justice Antonin Scalia<sup>2</sup>

#### INTRODUCTION

When the United States Supreme Court granted certiorari in *Katz v. United States*<sup>3</sup> to decide “whether . . . evidence obtained by attaching an electronic listening recording device to the top of a public telephone booth” violated the Fourth Amendment rights of acknowledged gambler Charles Katz,<sup>4</sup> the conventional wisdom was that Fourth Amendment search analysis hinged on whether the police had intruded into a “constitutionally protected area.”<sup>5</sup> The parties

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<sup>1</sup> *United States v. Calandra*, 414 U.S. 338, 365 (1974) (Brennan, J., dissenting) (citation omitted).

<sup>2</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

<sup>3</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>4</sup> *Id.* at 349-50.

<sup>5</sup> *Id.* at 350. Prior to the Court’s decision in *Katz*, Fourth Amendment “search” analysis was a function of the “trespass doctrine.” See generally *Goldman v. United States*, 316 U.S. 129, 134-35 (1942) (upholding *Olmstead* and applying it to placement of detectaphone outside wall of office); *Olmstead v. United States*, 277 U.S. 438 (1928) (stating that Fourth Amendment has never been found to have been violated absent “official search and seizure of [defendant’s] person, or such a seizure of [defendant’s] papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”); WAYNE LAFAVE, SEARCH AND SEIZURE § 2.1(b) (4th ed. 2004) (noting that *Katz* Court expressly held that “trespass” doctrine of *Olmstead* and *Goldman* “can no longer be regarded as controlling”). Under the trespass doctrine, a search would not be found to violate the Fourth Amendment absent a physical penetration into a “constitutionally protected area.” As advances in technology made the trespass doctrine increasingly less compatible with that purpose of the Fourth Amendment, the Court suggested absence of a physical trespass was not dispositive in Fourth Amendment cases. See *Silverman v. United States*, 365 U.S. 505, 508-12 (1961) (commenting on “recent and projected developments in the science of electronics” including “a parabolic microphone which can pick up a conversation three hundred yards away” and noting “decision here does

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framed the questions presented accordingly, asking the Court to consider: (1) whether a public telephone booth qualified as a constitutionally protected area, and if so (2) whether an actual physical trespass inside the booth by the government's bugging device was necessary to bring its search for and seizure of Katz's conversation within the Amendment's scope.<sup>6</sup> But the Court seemed irritated by the parties' solicitude for matters so mundanely physical. The parties had framed the issues in a "misleading" way,<sup>7</sup> complained Justice Potter Stewart for the majority, as if the phrase "constitutionally protected area" possessed some "talismanic" power to sweep police action inside or outside of the Fourth Amendment's reach.<sup>8</sup> To the contrary, "[t]he Fourth Amendment protects people, not places," wrote the Justice

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not turn upon the technicality of a trespass upon a party wall as a matter of local law").

<sup>6</sup> Brief of Petitioner-Appellant at 6-7, *Katz*, 389 U.S. 347 (No. 35), 1967 WL 113605. In its alternative argument, the government asked the Court to find that, even if the phone booth was a protected area and no physical penetration was required, the actions were reasonable under the Fourth Amendment. *Id.*

<sup>7</sup> *Katz*, 389 U.S. at 351. In its decision, the Court noted:

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case.

*Id.* Only in a footnote did the majority acknowledge that it was the Court's own decisions that had steered the parties toward such points. *See id.* at 352 n.9 (stating, "it is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas'").

<sup>8</sup> *Id.* As noted, the parties had reason to believe the phrase "constitutionally protected area" possessed such powers. In *Lanza v. New York*, the Court stated:

The petitioner's argument thus necessarily begins with [an assumption] that 'the visitors' room of a public jail is a *constitutionally protected area*. . . . A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house,' and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.

370 U.S. 139, 142-43 (1962) (emphasis added); *see also Silverman*, 365 U.S. at 512 (noting that its decision "is based upon the reality of an actual intrusion into a *constitutionally protected area*" (emphasis added)).

famously.<sup>9</sup> As such, privacy interests in some acts could be lost even if they occurred in an area traditionally thought to shelter the most private of acts or things. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>10</sup> Conversely, one’s efforts to protect the privacy of acts performed in public view might, by virtue of that effort alone, retain constitutional protection. “[That which] he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.”<sup>11</sup>

With these words, the *Katz* Court positioned itself to offer a different frame for the issues in the case, a frame captured most succinctly and enduringly by the concurrence of Justice John Marshall Harlan: whether the police had intruded without judicial sanction into an area in which the petitioner enjoyed a “reasonable expectation of privacy.”<sup>12</sup> The Court’s answer, as we know, was a resounding yes. For, although standing in plain view in a booth made of glass, by closing its door Charles Katz had attempted to preserve the privacy of his utterances, the very evidence seized and used against him at his later trial. Neither did the failure of the government’s listening device to actually penetrate the wall of the booth prevent the triggering of the Fourth Amendment’s protections, despite earlier contrary suggestions in *Olmstead v. United States*<sup>13</sup> and *Goldman v. United States*<sup>14</sup> that such a physical trespass was essential to finding police illegality. “[S]ubsequent decisions” had eroded that “trespass doctrine,” said the majority, although it seemed able to cite only one.<sup>15</sup> As a result, by

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<sup>9</sup> *Katz*, 389 U.S. at 351.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 360 (Harlan, J., concurring).

<sup>13</sup> 277 U.S. 438, 466 (1928). In *Olmstead*, federal prohibition officers intercepted telephone conversations by inserting small wires along the telephone wires outside the residences of the defendants. Finding there had been neither an official search and seizure of the defendants’ persons, papers, or effects, nor a physical invasion of their homes, the Court ruled the Fourth Amendment was not violated. *Id.*

<sup>14</sup> 316 U.S. 129, 134-35 (1942) (holding that placement of detectaphone against office wall for purpose of overhearing conversation taking place in next office did not violate Fourth Amendment where detectaphone did not penetrate wall to which it was attached).

<sup>15</sup> The case was *Silverman v. United States*, 365 U.S. 505 (1961), and it scarcely supported the suggestion made in *Katz* that the Court had taken large strides away from the trespass doctrine. *Silverman* held that evidence of a conversation overheard by federal agents through a common wall penetrated by a spike microphone violated the Fourth Amendment and should have been suppressed. Rather than focus on that penetration, which presumably would have satisfied the demands of the trespass

eavesdropping upon and confiscating Katz's telephonic wagers against his will, the agents' listening and recording device had conducted both a search and a seizure within the meaning of the Fourth Amendment.

This left the *Katz* Court only one question for resolution: whether the government agents acted reasonably when they searched for and seized Katz's words in that booth. They did not, the Court decided; although the agents acted both "with restraint" and with the reasonable expectation that they would discover evidence of Katz's criminal wagering, they also acted without a warrant, a constitutional prerequisite.<sup>16</sup> As Justice Stewart wrote, "[t]he mandate of the [Fourth] Amendment requires adherence to judicial processes,' and . . . searches 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."<sup>17</sup> To validate a search absent a warrant would be to "bypass the safeguards provided by an objective predetermination of probable cause, and substitute instead the far less reliable procedure of an after-the-event justification for the . . . search."<sup>18</sup> The Court, Justice Stewart noted, had "never sustained a search" solely because officers had probable cause to conduct it and had used the "least intrusive" means in carrying it out.<sup>19</sup> Consequently, the officer's care and restraint in placing the wiretap atop the telephone booth was not enough to safeguard Katz's reasonable expectation of privacy and satisfy the demands of the Fourth Amendment. Notwithstanding the Court's suggestions that it was breaking no new ground in *Katz*, criminal procedure scholars have roundly recognized the decision as a watershed.<sup>20</sup>

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doctrine of *Goldman*, the Court reasoned that the agents were able to overhear the conversation as it was transmitted through the building's heating system. *Id.* at 509-11.

<sup>16</sup> See *Katz*, 389 U.S. at 356.

<sup>17</sup> *Id.* at 357.

<sup>18</sup> *Id.* at 358 (quoting *Beck v. Ohio*, 379 U.S. 89, 96 (1964)).

<sup>19</sup> *Id.* at 356-57.

<sup>20</sup> See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 94 (3d ed. 2002) (noting that "Fourth Amendment 'search' analysis is divisible into two historical periods" — pre- and post-*Katz*); LAFAVE, *supra* note 5, at § 2.1(b) ("Thus, it is no overstatement to say, as the commentators have asserted, that *Katz* 'marks a watershed in fourth amendment jurisprudence' because the Court 'purported to clean house on outmoded fourth amendment principles' and moved 'toward a redefinition of the scope of the Fourth Amendment.'"); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 382 (1974); Edmund W. Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 135; Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 975 (1968).

If the Court's search analysis in *Katz* took observers by surprise, the remedy it ordered for the government's violation did not. Once the Court determined that the agents' conduct violated the Fourth Amendment, under earlier precedents, the path to the remedy for that constitutional error appeared clear and unobstructed. Katz's wagers were wrongfully seized and consequently should have played no part in his conviction. Because they had, his conviction was reversed.

In reaching this remedial result, the *Katz* Court did not pause to lament the loss of evidence so highly probative of Katz's guilt, nor the "social costs" of suppression. Not one sentence of Justice Stewart's twelve-page opinion plumbed the question of the appropriate remedy for police lawlessness. Neither did the government spend any time in its papers urging a different penalty. The operative assumption at the time of the *Katz* decision was that a finding of a Fourth Amendment violation would demand the suppression of the evidence wrongfully obtained. Thus, in stark contrast to the remedial questions that seem endlessly to intrigue the Court today, at the time of *Katz*, decided only a handful of years after the Court's historic decision in *Mapp v. Ohio*,<sup>21</sup> exclusion was a given.

Much has changed in forty years.

This Article explores the dramatic shifts in the Court's thinking about the penalty of exclusion since *Katz* and considers the future implications of the Court's newest contribution to its exclusion jurisprudence, *Hudson v. Michigan*.<sup>22</sup> Part I briefly reviews the evolution of the exclusionary rule from the early 1900s through the end of the century. This history illustrates how the Court's approach to orders of evidentiary exclusion has fundamentally shifted since *Katz*, beginning with an application of the remedy for the first half of the century in federal proceedings only, through its expansion to lawless state searches and seizures in 1962, before the Court's turn toward a more restrictive approach from roughly the 1970s on.

Part II considers the decision of the Court last term in *Hudson v. Michigan*,<sup>23</sup> in which Justice Scalia for a 5-4 majority announced boldly, if somewhat inaccurately, that suppression has "always been our last resort." Although the operative remedial assumption that existed at the time of *Katz* respecting unlawfully obtained evidence belies this statement, the implications of *Hudson* for future Fourth Amendment challenges are broad. Part II analyzes the language and

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<sup>21</sup> 367 U.S. 643 (1961).

<sup>22</sup> 126 S. Ct. 2159 (2006).

<sup>23</sup> *Id.* at 2163.

holding of *Hudson* in which the Court moved even further away from its prior commitment to exclusion for Fourth Amendment violations in three important ways: by expanding its conceptions of causation and of attenuation, and for the first time since *Mapp v. Ohio*, by holding that a violation of the Fourth Amendment can be deterred by remedial alternatives less costly than suppression.

Part III reviews the early signs from post-*Hudson* case law portending an ever-narrowing use of the exclusion remedy for Fourth Amendment violations. These cases reveal that Justice Scalia's broad rhetoric has already begun to encourage lower courts to cabin their application of the suppression remedy, and to put the "remedial cart" before the "substantive horse," leaving questions of the substantive reach of the Fourth Amendment unresolved by proceeding straight to the question of remedy. Even more worrisome are early returns on the decision which suggest that the reasoning of *Hudson* may eventually be applied to cases involving warrantless police actions that inflict a Fourth Amendment harm, a development that would threaten to eviscerate not only the remedy believed necessary by the majority in *Katz* to rectify the agents' misconduct, but its wisdom about the so-called warrant requirement as well.

#### I. THE EVOLUTION OF EXCLUSION

So much ink has spilled over the wisdom,<sup>24</sup> enlargement,<sup>25</sup> and

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<sup>24</sup> Although not an exhaustive account, the following scholars have taken sides on the question of the exclusion of criminal evidence. In the supportive column, see Albert W. Alschuler, "Close Enough for Government Work": *The Exclusionary Rule After Leon*, 1984 SUP. CT. REV. 309, 358; Amsterdam, *supra* note 20, at 429; John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 72 (1982); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 622-24 (1990); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1242-43; Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 665-67 (1983); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 306, 340-61 (1982); Wayne R. LaFave, "The Seductive Call of Expediency": *United States v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 895; Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 49-50 (1994); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule Reconsidered: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 372 (1981); Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 261-62 (1998); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations, Damage Remedies and Congressional Power*, 73 J. CRIM. L. & CRIMINOLOGY 875 (1982); Thomas S. Schrock &



contraction<sup>26</sup> of the exclusionary rule that it seems scarcely necessary to review the twists and turns of the penalty's evolution. But Justice Scalia's unadorned claim in *Hudson* that the Court has "always" applied the suppression remedy as a "last resort" so defies historical truth that a review of the controversial penalty's journey through time appears necessary to correct the record.<sup>27</sup> A sketch of that history follows.

#### A. Application of the Remedy in Federal Proceedings Only

The Supreme Court first introduced exclusion as the remedy for Fourth Amendment violations by federal agents in *Weeks v. United*

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Robert C. Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 254 (1974); William Schroeder, *Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device*, 51 GEO. WASH. L. REV. 633, 635-36 (1983); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 847-52 (1994); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 92 (1984).

In the column of views critical of the exclusion penalty, or expressing a willingness to retreat from or support for restrictions placed on it, see Akhil Reed Amar, *First Principles*, 107 HARV. L. REV. 757, 785-800 (1994); Randy E. Barnett, *Resolving the Dilemma for the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938-40 (1983); Craig M. Bradley, *The Good Faith Exception Cases: Reasonable Exercise in Futility*, 60 IND. L.J. 287, 287-88 (1985); Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects in the Courtroom*, 78 MARQ. L. REV. 45, 46 (1994); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1564-66 (1999); Carter LaPrade, *An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment*, 48 CONN. B. J. 100 (1974); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 WASH. L. REV. 635, 638-41 (1982); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49; James T. Ranney, *The Exclusionary Rule: The Illusion vs. the Reality*, 46 MONT. L. REV. 289, 289-90 (1985); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363; Malcomb R. Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 JUDICATURE 351, 352 (1979); Malcomb R. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. TEX. L.J. 531 (1982); Malcomb R. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 215 (1978).

<sup>25</sup> See, e.g., Thomas Y. Davies, *An Account of Mapp v. Ohio That Misses the Larger Exclusionary Rule Story*, 4 OHIO ST. J. CRIM. L. 619 (2007); 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 (1983).

<sup>26</sup> See Davies, *supra* note 25.

<sup>27</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

*States*<sup>28</sup> in 1914, holding that a “court in a criminal prosecution [could not] retain for the purposes of evidence letters and correspondence of the accused” unlawfully seized from his home.<sup>29</sup> The Court extended the remedy to the lawless conduct of state police actors in 1961 in its historic decision concerning the warrantless search of the home of Dollree Mapp.<sup>30</sup> Two years later it extended the exclusion remedy to reach the derivative or “poisonous fruits” of illegal evidence gathering as well.<sup>31</sup>

Unlike today, the purposes first cited for the exclusionary rule were the preservation of judicial integrity and the protection of citizens’ Fourth Amendment rights. In contrast to more contemporary explanations which emphasize that the rule excluding unlawfully obtained evidence serves as the principal means to discourage lawless police conduct, the Court in *Weeks* struck a different chord. It emphasized the need to shield the judiciary from the tainting effects of unlawfully gathered evidence, and to uphold the right against unreasonable searches and seizures which the amendment guaranteed. Justice Sandra Day O’Connor, speaking for a unanimous Court, stressed that “[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with support of the Constitution . . . .”<sup>32</sup> “[T]o sanction such proceedings,” wrote the Justice, “would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution.”<sup>33</sup> The protections afforded by the Fourth Amendment would be “of no value,” the Court held, and “might as well be stricken from the Constitution” if such unlawfully seized evidence could nonetheless be used against the accused.<sup>34</sup>

Despite this lofty language, for the next thirty-five years, only federal courts demanded the application of the exclusionary rule, and only as against evidence seized unlawfully by or with the participation of federal agents, for the Fourth Amendment was not “directed to”

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<sup>28</sup> 232 U.S. 383 (1914).

<sup>29</sup> *Id.* at 393.

<sup>30</sup> *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

<sup>31</sup> *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

<sup>32</sup> *Weeks*, 232 U.S. at 392.

<sup>33</sup> *Id.* at 393; see also Sharon L. Davies, *The Penalty of Exclusion — A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1300-01 (2000) (discussing Court’s reliance on this rationale and its movement away from it).

<sup>34</sup> *Weeks*, 232 U.S. at 393.

state or local police.<sup>35</sup> This meant that under the so-called “silver platter doctrine,” evidence seized in an unlawful search conducted solely by a state official could be walked over to a federal prosecutor’s office and accepted into evidence by a federal judge without constitutional moment.<sup>36</sup> Evidence seized unlawfully by federal agents could be used to support state criminal charges as well.<sup>37</sup>

### B. Lawless State Searches and Seizures

Leading criminal procedure scholars decried the double standard for federal and state illegality for decades, as proponents of a broader rule gathered volumes of examples of the illegal gathering and use of such evidence in both state and federal trials.<sup>38</sup> By 1949, the Court’s patience with the crack it had left open for the introduction of unconstitutionally gathered evidence was growing thin. In *Wolf v. Colorado*,<sup>39</sup> the Court held that “the security of one’s privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society” and “implicit in ‘the concept of ordered liberty’ and as such [is] enforceable against the States through the Due Process Clause.” The Court declined, however, to hold that the remedy for such police lawlessness in the states had to be the same as that required in federal court, as almost two-thirds of the states at the time freely admitted such evidence. “When we find that most of the English-speaking world does not regard as vital to such

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<sup>35</sup> This practice began in *Weeks* itself. See *id.* at 398 (holding that evidence seized by local police officers with no federal involvement could be admitted without doing violence to integrity of judiciary as “the Fourth Amendment is not directed to individual misconduct of such officials”); see also *Elkins v. United States*, 364 U.S. 206, 210 (1960) (noting “the right of the prosecutor in a federal criminal trial to avail himself of evidence unlawfully seized by state officers apparently went unquestioned for the next thirty-five years” (citing *Feldman v. United States*, 322 U.S. 487, 492 (1944); *Byars v. United States*, 273 U.S. 28, 33 (1927))).

<sup>36</sup> See *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (holding “it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter”).

<sup>37</sup> Cf. *Byars*, 273 U.S. at 33 (“We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.”).

<sup>38</sup> See Frances A. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 14-25 (1950); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959) (analyzing cases and rejecting various bases for evidence illegally obtained in state and federal search and seizure cases); Alan C. Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U. L.Q. 229.

<sup>39</sup> 338 U.S. 25, 27-28 (1949).

protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right,” Justice Felix Frankfurter wrote for the majority.<sup>40</sup> As long as the states put in place remedies “equally effective,” the particular remedy of exclusion was not constitutionally required.<sup>41</sup>

Critics responded that the Court had managed “the unusual, if not unprecedented, feat of simultaneously creating a constitutional right” while “denying the most effective remedy” for its violation,<sup>42</sup> and predicted that without the threat of exclusion, little would change in the evidence-gathering practices of state and local police forces.<sup>43</sup> This forecast proved true. Years after the *Wolf* decision, Professor Milton Loewenthal interviewed ninety police commanders in the New York City Police Department concerning their understanding of the *Wolf* holding and discovered that they believed *Wolf* required no changes in the department’s procedures with respect to the gathering of evidence of criminality. *Wolf* could not have meant that the police were obligated to abide by the mandates of the Fourth Amendment, they reasoned, as evidence seized in violation of its commands “would still be admissible.”<sup>44</sup> The New York City Deputy Police Commissioner, Leonard Reisman, explained that the police had no incentive to comply with the requirements of the Fourth Amendment before the exclusion remedy was applied to the states.<sup>45</sup> “[N]obody bothered to take out search warrants,” said Reisman. “[T]he U.S. Supreme Court had ruled that evidence obtained without a warrant — illegally if you will — was admissible in state courts. So the feeling was, why bother?”<sup>46</sup>

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<sup>40</sup> *Id.* at 29.

<sup>41</sup> *Id.* at 31.

<sup>42</sup> T.S.L. Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304, 1304 (1951).

<sup>43</sup> *Id.* at 1307.

<sup>44</sup> Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 U. MO. KAN. CITY L. REV. 24, 29 (1980) (“Prior to *Mapp v. Ohio*, the police were not aware that constitutional standards for search and seizure had been applied to them in *Wolf v. Colorado*; no sanctions had been imposed in *Wolf*, and the police continued to search with impunity.”).

<sup>45</sup> Yale Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than “An Empty Blessing.”* 62 JUDICATURE 337, 349-50 (1979). This sentiment did not change until the Court decided in *Mapp v. Ohio* that the only effective remedy for unconstitutional evidence gathering by state authorities was exclusion. The decision came as “a shock” to the police, according to Deputy Commissioner Reisman.

<sup>46</sup> *Id.*

Despite evidence that little had changed as a result of the Court's ruling in *Wolf*, it took another decade before the Court was convinced that the states' experimentation with other methods of remedying unconstitutional searches and seizures had failed. The California Supreme Court had come to that view on its own accord in the mid-1950s. It declared in *People v. Cahan*,<sup>47</sup> that its experiments with other remedies had "completely failed to secure compliance with the constitutional provisions on the part of police officers," whose lawless conduct the courts had "been constantly required . . . [to] condone."<sup>48</sup>

In 1960, in *Elkins v. United States*,<sup>49</sup> the Court called the California experience "illuminating" when it ruled that "considerations of reason and experience" and "the imperative of judicial integrity" demanded an abandonment of the silver platter doctrine.<sup>50</sup> Earlier case law had instructed the nation that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law," Justice Stewart wrote.<sup>51</sup> "Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold."<sup>52</sup>

One year after *Elkins*, after Cleveland police officers searched the home of Dollree Mapp over her objection and without a warrant, the Court decided the penalty of exclusion for lawless state investigative conduct was necessary to make the Fourth Amendment protections more than an "empty promise."<sup>53</sup> To continue to permit the introduction of evidence secured by state illegality in federal or state court, held the Court in *Mapp v. Ohio*, "would be to 'grant the right [to be free from unreasonable searches and seizures] but in reality to withhold its privilege and enjoyment."<sup>54</sup> "Nothing can destroy a

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<sup>47</sup> 282 P.2d 905 (Cal. 1955); see also Roger Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22 (writing that prior to *Mapp*, in states without exclusionary rule, illegal searches and seizures were routine and subject to "no effective deterrent").

<sup>48</sup> *Cahan*, 282 P.2d at 911-12.

<sup>49</sup> 364 U.S. 206 (1960).

<sup>50</sup> *Id.* at 222.

<sup>51</sup> *Id.* at 223.

<sup>52</sup> *Id.*; see also *Cahan*, 282 P.2d at 913 (Traynor, C.J.) (writing that "[e]xperience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures").

<sup>53</sup> *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

<sup>54</sup> *Id.* at 656; see also DRESSLER, *supra* note 20, at 381 (quoting *Mapp*, 367 U.S. at 656).

government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”<sup>55</sup>

Accordingly, by the time the Supreme Court decided *Katz* in 1967, far from being a “last resort,” exclusion had become the Court’s answer to Fourth Amendment violations by federal and state authorities. And the Court’s thinking about the penalty had evolved from that of non-constitutional policy to a remedy which derived its authority from the Constitution itself.<sup>56</sup>

C. *Rethinking the Value of Exclusion — The Rise of Deterrence and Cost-Benefit Analysis*

Beginning in the 1970s, with the addition of four new Justices and a growing perception that the exclusionary rule conferred a “windfall” on criminals, the Court began to recharacterize the policy concerns upon which the exclusionary rule was based, and to cabin, if not clip, its reach. During this period of rearticulation and retrenchment, illustrated by the Court’s decision in *United States v. Calandra*,<sup>57</sup> those wary of or hostile to the suppression of probative evidence began to characterize the suppression rule as “judicially created” rather than constitutionally derived,<sup>58</sup> and the Court increasingly stressed that the remedy was based primarily, if not exclusively, on deterrence rather than judicial integrity.<sup>59</sup> In *Calandra*, Justice Lewis Powell wrote for a 6-3 majority of the newly configured Burger Court that illegally obtained evidence could be presented to a federal grand jury, even if the “judicially created remedy” of exclusion demanded its suppression

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<sup>55</sup> *Mapp*, 367 U.S. at 659.

<sup>56</sup> See generally Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974) (explaining it was not until *Mapp* that exclusionary rule was elevated to constitutionally derived policy).

<sup>57</sup> 414 U.S. 338, 348 (1974).

<sup>58</sup> Cf. *id.* at 348 n.5 (noting disagreement with effectiveness of exclusionary rule).

<sup>59</sup> DRESSLER, *supra* note 20, at 383 (stating, “In *Calandra*, Justice Lewis Powell, speaking for six members of the Court, described the exclusionary rule as ‘a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved’” (citations omitted)). Justice Brennan lamented this departure in his *Leon* dissent. *United States v. Leon*, 468 U.S. 897, 938 (1984) (Brennan, J., dissenting) (stating, among other things, “if the Amendment is to have any meaning, police and courts cannot be regarded as constitutional strangers to each other; because the evidence-gathering role of the police is directly linked to the evidence-admitting function of the courts, an individual’s *Fourth Amendment* rights may be undermined as completely by one as by the other”).

at a criminal trial. “The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one’s person, house, papers or effects, but the presentation of evidence gathered in violation of that command to the grand jury “work[ed] no new Fourth Amendment wrong.”<sup>60</sup> To extend the rule threatened to inflict injury on the historically unfettered functioning of the grand jury, Justice Powell worried, a cost outweighed by “the benefits to be derived from th[e] proposed extension” — an “incremental” and “uncertain” additional deterrent effect on police illegality.<sup>61</sup> In reaching its conclusion, the *Calandra* Court declined entirely to mention the rationale that had provided the underpinnings of the exclusion rule since its birth in *Weeks* — judicial integrity — insisting instead that “the rule’s prime purpose is to deter future unlawful police conduct,”<sup>62</sup> a theme the Court would continue to sound loudly in the decades to come.

The recharacterization of the rule of exclusion as “judicially created,” naturally undercut the legitimacy of the remedy and raised questions about the constitutional basis for requiring its application to state illegality.<sup>63</sup> In addition, as shown by the result in *Calandra*, the shift in the Court’s focus from preserving judicial integrity to deterrence alone, ultimately reduced the number and types of police transgressions that appeared to warrant suppression, paving the way for the creation of the multiplicity of exceptions to the exclusionary rule that exist today.

After *Calandra*, there was a “widespread expectation that the new Court had set the rule up for extinction.”<sup>64</sup> The *Calandra* Court’s cost-benefit language certainly invited recalculation of the need for exclusion on a case-by-case basis; and because the available empirical

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<sup>60</sup> *Calandra*, 414 U.S. at 354.

<sup>61</sup> *Id.* at 350-52.

<sup>62</sup> *Id.* at 347.

<sup>63</sup> Justice Brennan suggested the idea that the rule was judicially created rather than constitutionally derived had its origins in the overruled *Wolf v. Colorado* decision. See *Leon*, 468 U.S. at 938 (Brennan, J., dissenting) (“[T]he proposition that the exclusionary rule is merely a ‘judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect’ was a ‘germ of [an] idea . . . found in *Wolf v. Colorado*’ (citations omitted)). The charge that the exclusionary rule was simply a creation of the judiciary paralleled criticism of the Warren Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Opponents argued the famous *Miranda* warnings mandated by the decision were also “judicially created,” an argument not resolved by the Court until *United States v. Dickerson*, 530 U.S. 428, 437-39 (2000).

<sup>64</sup> Davies, *supra* note 25, at 633.

data concerning the rule's deterrent value was both limited and subject to attack, the risk seemed real that the Court would continue to declare the costs of excluding probative evidence outweighed by the deterrent benefits gained. But predictions of the rule's demise in the 1970s proved premature. According to Professor Thomas Davies, the Court had four of the five votes it needed to abolish the rule in 1976, but "Justice Powell balked at going that far."<sup>65</sup> Instead, the Court settled upon an approach that assumed the exclusionary rule deterred police misconduct when courts applied it during criminal trials, but also assumed that little more deterrent value was gained when courts applied the rule in other contexts.

Accordingly, for the next three decades, the Supreme Court declined to extend or apply the penalty to suppress illegally seized evidence offered outside of a prosecutor's case-in-chief. This necessarily meant that unlawfully seized evidence retained considerable legal utility as it could be accepted into evidence in a broad array of other legal proceedings, such as civil tax hearings,<sup>66</sup> parole revocation or probation hearings,<sup>67</sup> grand jury proceedings,<sup>68</sup> habeas corpus proceedings,<sup>69</sup> civil deportation proceedings,<sup>70</sup> and so on. In each of these non-criminal trial settings, the Court concluded that whatever marginal deterrent effects might be achieved by excluding the wrongfully obtained evidence outside of the prosecutor's case-in-chief were outweighed by the "substantial social costs" of rendering probative evidence unavailable to the litigants, courts, and finders of fact.<sup>71</sup>

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<sup>65</sup> *Id.* (citations omitted).

<sup>66</sup> The Court declined to extend the exclusionary rule to federal civil tax proceedings, finding "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion." *United States v. Janis*, 428 U.S. 433, 454 (1976). In an opinion issued on the same day, Justice Powell wrote, "Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. . . . We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions." *Stone v. Powell*, 428 U.S. 465, 492-93 (1976).

<sup>67</sup> *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 359 (1998); *United States v. Rea*, 678 F.2d 382, 388 (2d Cir. 1982).

<sup>68</sup> *United States v. Calandra*, 414 U.S. 338, 350 (1974).

<sup>69</sup> *Stone*, 428 U.S. at 482.

<sup>70</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-53 (1984) (White, J., dissenting).

<sup>71</sup> *Id.* at 1053 ("[I]n all of these cases it was unquestioned that the illegally seized evidence would not be admissible in the case-in-chief of the proceeding for which the



It bears emphasis that although the Court declined to demand exclusion in a wide array of contexts, it left unaltered during this period the fundamental presumption that exclusion of evidence from the criminal trial deterred police misconduct.<sup>72</sup> Although a disappointment to those who would have had the Court apply the remedy more broadly, this reasoning erected a core of protection against police illegality around which future cost-benefit analysis would revolve, and preserved arguably the most important application of the exclusionary rule. The Court was prepared to assume that the exclusionary rule's ban on the introduction of the direct and derivative fruits of police illegality in a criminal proceeding provided an effective deterrent for police misconduct. But the case for excluding the use of the same evidence in other contexts, it said again and again, had simply not been made.

The driving engine underlying this relatively restricted view of the power of exclusion was, of course, the Court's myopic focus on deterrence as the sole reason for exclusion. Retention of the other rationales for the penalty would undoubtedly have yielded a far more robust set of arguments for its application. Justice Brennan thus objected in his dissent in *United States v. Calandra* that by elevating deterrence over other plausible explanations for the exclusionary rule, the Court had "downgraded" the suppression remedy:

This downgrading of the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule. The

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evidence was gathered; only its collateral use was permitted.").

<sup>72</sup> One of the clearest examples of this presumption in operation appears in *Janis* when Justice Blackmun, writing for the majority, lamented the lack of conclusive empirical evidence of the exclusionary rule's deterrent impact. *United States v. Janis*, 428 U.S. 433, 446 (1974) (stating debate about exclusionary rule "has been unaided, unhappily, by any convincing empirical evidence on the effects of the rule"). "We find ourselves in no better position than the Court was in 1960," wrote Justice Blackmun, when the court decided to apply the penalty to the states in the absence of empirical proof definitively showing the exclusionary rule was an effective deterrent, for the gathering of such empirical data was a difficult, if not impossible, task. *Id.* Given the great number of variables, the lack of effective controls, and the absence of pre-*Mapp* records to which post-*Mapp* police misconduct might be compared, such empirical proof might never be available, such that whatever deterrence the exclusionary rule achieved could only be "assumed." *Id.* at 451-53. But the validity of that assumption "surely does not weigh the cost of extending the rule" to other situations, such as a civil tax proceeding, wrote the Justice. *Id.* at 453-54.

commands of the Fourth Amendment are, of course, directed solely to public officials . . . . But curtailment of the evil, if a consideration at all, was at best only a hoped-for effect of the exclusionary rule, not its ultimate objective. Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees . . . . Since, however, those judges were without power to direct or control the law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.<sup>73</sup>

This same concentration on deterrence later began to impact challenges to the use of illegally seized evidence within the criminal trial as well. Thus, the Court developed a number of additional doctrines from the 1970s onward which permitted the introduction of evidence that had been obtained by a violation of an accused's Fourth Amendment rights where the deterrence interest served by excluding the evidence was thought minimal, already sufficiently achieved, or otherwise outweighed by the social costs of its exclusion. Such was the case, the Court subsequently held, where the government offered the evidence only for impeachment purposes and not in its case-in-chief;<sup>74</sup> where the officers had acted unconstitutionally but in reasonable "good faith" reliance on a judicially defective warrant;<sup>75</sup> where the officers' violation of the accused's constitutional rights was

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<sup>73</sup> 414 U.S. at 356 (Brennan, J., dissenting).

<sup>74</sup> *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (permitting prosecutor to use items seized in violation of Fourth Amendment to contradict testimony of accused, on reasoning that sufficient deterrence is achieved by banning use of evidence in prosecutor's case-in-chief); *Harris v. New York*, 401 U.S. 222, 225-26 (1971); see *James v. Illinois*, 493 U.S. 307, 319-30 (1990).

<sup>75</sup> See generally *United States v. Leon*, 468 U.S. 897 (1984) (holding no exclusion necessary, even in prosecution's case-in-chief, where officers acted in such good faith reliance, on reasoning that police cannot be deterred from engaging in conduct they reasonably fail to realize is constitutionally banned).

sufficiently “attenuated” from the evidence upon which the government wished to rely;<sup>76</sup> where government authorities had acted unconstitutionally in some way but had ultimately seized the evidence it wished to introduce through some source “independent” of that illegality;<sup>77</sup> or where the government would “inevitably” have obtained the evidence lawfully “but for” some precipitous misconduct which prevented that lawful discovery.<sup>78</sup>

Collectively, these doctrines and categorical exceptions, bolstered by the Court’s increasing calls for convincing evidence that police misconduct would be deterred by the exclusion of unlawfully obtained proof, ensure that unlawfully obtained proof of criminality will retain considerable legal utility outside, and under some circumstances, inside the criminal trial. The Court’s decision last term in *Hudson v. Michigan*, however, threatens a much broader attack on the suppression remedy federal and state courts have applied to Fourth Amendment violations since *Mapp*.

In summary, the foregoing explains that the exclusionary rule as originally introduced in *Weeks v. United States*<sup>79</sup> applied only to federal wrongdoing, and that for a time, the Court applied it only to evidence gathered unconstitutionally by federal agents, permitting such evidence to be used to support state criminal prosecutions, and permitting the introduction of evidence obtained unconstitutionally by state and local police in federal criminal trials. The Court fully closed the doors of federal courtrooms to the use of such evidence in the *Wolf* case in 1949, but it took another twelve years before it applied the same standard to the state courts.

After the Court’s decision in *Mapp* in 1961, however, at least for a time, the “identification of a Fourth Amendment violation was

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<sup>76</sup> The theory underlying the “attenuation doctrine” is that at some point exclusion of probative evidence becomes too costly to justify its deterrence returns. See *id.* at 911 (“[T]he dissipation of taint concept . . . attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost.” (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring))); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

<sup>77</sup> *Murray v. United States*, 487 U.S. 533, 536-37 (1988) (approving admission of evidence seized pursuant to lawful search warrant because it was independent of earlier warrantless entry and search for same evidence as police had not exploited earlier illegality); *Segura v. United States*, 468 U.S. 796, 815-16 (1984) (approving admission of evidence taken pursuant to warrant despite fact that police had entered apartment before warrant was issued as warrant was based on information unconnected to what was learned after warrantless entry).

<sup>78</sup> *Nix v. Williams*, 467 U.S. 431, 444 (1984).

<sup>79</sup> 232 U.S. 383, 393-94 (1914).

synonymous with application of the exclusionary rule to evidence secured incident to that violation.”<sup>80</sup> This is the situation that existed when the Court decided *Katz*. And it is the reason that the majority and the parties in the case spent no time arguing over the penalty that would be imposed if the government agents were found to have violated the Fourth Amendment when they, without a warrant, bugged the telephone booth in which Katz placed his bets.

## II. THE NEW REMEDIAL WORLD OF *HUDSON V. MICHIGAN*

With the passage of forty years since *Katz*, the Court’s thinking about the exclusionary rule has undergone significant metamorphosis. Over the years, by emphasizing deterrence over the rule’s origin rationale, the courts have curbed the reach of the penalty and reduced the circumstances in which it is currently deemed necessary. This means that while the courts today may preclude the government from offering the evidence its agents gathered about Katz’s gambling in that phone booth in its case-in-chief, the government could use the recordings it made in violation of Katz’s Fourth Amendment rights for a number of other purposes. It could use them to convince the grand jury to indict him or to impeach Katz’s credibility at the trial in the event that he decided to testify in some way that denied his bet-making activities.<sup>81</sup> A court could use the wrongfully obtained evidence to consider whether the best interests of Katz’s children were served by being left in the care of a felon with a gambling problem, should his wife care to push the issue. Or the government could use the recording in a tax proceeding seeking an order that he pay taxes on his gambling winnings. Furthermore, as explored in Part II, after the Court’s decision last term in *Hudson v. Michigan*, it is possible that the recordings found so offensive by the *Katz* Court in 1967 might hold greater utility for the prosecutor in 2007.

### A. *Hudson v. Michigan’s Retreat from Exclusion*

On August 27, 1998, two officers of the Detroit Police Department arrived at the home of Booker T. Hudson to execute a search warrant for guns and drugs. For reasons not entirely made clear by the record, the officers failed to knock, though they announced their presence,

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<sup>80</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (discussing Court’s application of rule in *Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-69 (1971)).

<sup>81</sup> More probably, the threat of using the evidence against him would keep him off the stand entirely.

and waited three to five seconds before opening the unlocked door. Once inside, the officers conducted a search and found drugs on Hudson's person and a loaded weapon hidden in the chair in which he was sitting. The state prosecutor later offered those items into evidence at Hudson's trial.<sup>82</sup>

On Hudson's motion to suppress, the trial court refused to accept the evidence, ruling that the officers had violated the Fourth Amendment's knock-and-announce requirements upheld in *Wilson v. Arkansas*<sup>83</sup> and *Richards v. Wisconsin*.<sup>84</sup> On interlocutory appeal, the state conceded the violation, but nevertheless argued against exclusion of its evidence on the ground that, in light of their warrant, the officers would "inevitably" have found the evidence lawfully had their entry into the apartment not violated the rule first. Because the officers had obtained a valid warrant which authorized them to search Hudson's home, the state argued, the officers had acted within their rights to search for and seize the evidence they took from the premises; and under the inevitable discovery doctrine, the evidence should not have been suppressed.<sup>85</sup>

The Michigan Appellate Court agreed with the state, finding the evidence usable.<sup>86</sup> When the Michigan Supreme Court denied leave to appeal,<sup>87</sup> Hudson was subsequently tried on that evidence and convicted.<sup>88</sup> On a later petition of certiorari to the U.S. Supreme Court, Hudson argued that the Michigan courts had misapplied the inevitable discovery doctrine in such a way as to make the exception swallow the rule.<sup>89</sup> The state's logic, petitioner argued, amounted to no more than a claim that "if we hadn't done it wrong, we would have done it right."<sup>90</sup> This was a distortion of the inevitable discovery doctrine, Hudson argued, which applied only where the illegally seized evidence would inevitably have been found "through means

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<sup>82</sup> *Hudson*, 126 S. Ct. at 2162.

<sup>83</sup> 514 U.S. 927, 931-32 (1995).

<sup>84</sup> 520 U.S. 385, 387 (1997).

<sup>85</sup> *Hudson*, 126 S. Ct. at 2177-78.

<sup>86</sup> *Id.* at 2164.

<sup>87</sup> *People v. Hudson*, 639 N.W.2d 255, 255 (Mich. 2001).

<sup>88</sup> Hudson appealed the conviction, but lost, and the Michigan Supreme Court denied review a second time. See generally *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005) (denying leave again); *People v. Hudson*, 639 N.W.2d 255 (Mich. 2001) (denying leave).

<sup>89</sup> Brief for Petitioner at 6, *Hudson*, 126 S. Ct. 2159 (No. 04-1360).

<sup>90</sup> *Id.* at 28 (quoting *United States v. Thomas*, 955 F.2d 207, 209-10 (4th Cir. 1992)); Petition for Writ of Certiorari at 8, *Hudson*, 126 S. Ct. 2159 (No. 04-1360) (quoting LAFAVE, *supra* note 5, § 11.4(a)).

independent of the tainted police activity.”<sup>91</sup> This was not the case where the same officers who “violated the knock-and-announce requirement immediately barged into his home and seized the evidence.”<sup>92</sup>

It is somewhat perplexing that the state of Michigan so readily conceded the knock-and-announce violation in the first place. Knock-and-announce principles have never been considered absolute; officers are frequently able to demonstrate circumstances which warrant “no-knock” entries despite the general rule.<sup>93</sup> Accordingly, when the Court reaffirmed in *Richards* in 1997 that knock-and-announce violations implicate the Fourth Amendment while simultaneously rejecting a blanket exception for search warrants for drugs and guns, it also made clear that the constitutionally based pre-entry requirements give way when officers face a “threat of physical violence” or had “reason to believe that evidence would likely be destroyed if advance notice were given.”<sup>94</sup> In light of the nature of the *Hudson* search, Michigan could simply have argued that the officers who entered Hudson’s home were lawfully authorized to forego a knock-and-announcement based on a reasonable suspicion that providing its occupant with such notice of their presence and intention to enter would have been dangerous to the officers’ safety, compromised their ability to secure the drug evidence they sought, or both. The officers plainly had probable cause to believe that Hudson kept a gun inside the premises — the warrant authorized them to look for it, and the officers had made some effort to comply

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<sup>91</sup> Brief for the Petitioner, *supra* note 89, at 17.

<sup>92</sup> *Id.* at 6; *see also* *United States v. Marts*, 986 F.2d 1216, 1220 (8th Cir. 1994); *Mazepink v. State*, 987 S.W.2d 648, 657 (Ark. 1999); *State v. Lee*, 821 A.2d 922, 931-46 (Md. 2003); *Petition for Writ of Certiorari*, *supra* note 90, at 6 (citing *United States v. Dice*, 200 F.3d 978, 984-85 (6th Cir. 2000)). Only the Seventh Circuit and the state courts of Michigan had ruled otherwise. *See* *United States v. Langford*, 314 F.3d 892, 894-95 (7th Cir. 2002); *People v. Stevens*, 597 N.W.2d 53, 59-62 (Mich. 1999).

<sup>93</sup> *DRESSLER*, *supra* note 20, at 183.

<sup>94</sup> *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997) (quoting *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995)). The determination of whether such circumstances exist in a particular case is a question for the court issuing the warrant, a question to be evaluated under the Fourth Amendment’s reasonableness clause. If officers executing a search warrant “have a reasonable suspicion that knocking and announcing their presences, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by . . . allowing the destruction of evidence,” a “no-knock” entry may be justified. *Id.* at 394. Although the Court rejected a per se exception to the knock and announce requirement for certain types of warrants in *Richards*, nothing prohibits an issuing court from deciding in advance that such circumstances exist and authorizing a no-knock warrant entry. Indeed, some states have enacted explicit “no-knock” warrant provisions, which expressly authorize officers to obtain warrants permitting no-knock entries. *Id.*

with the knock-and-announce rule by verbally announcing their presence and waiting three to five seconds before entering.<sup>95</sup> Although the Court in *Richards* rejected the blanket per se rule argued for by the state, which would have lifted the knock-and-announce requirement in all cases involving drugs and guns, it also remanded the case for further examination of the individual circumstances that existed at the time of the officers' entry which might have warranted a "no-knock" entry. It seems evident that not all prosecutors faced with the facts of the *Hudson* search would have been so willing to concede error on these facts.

In any event, the state's concession ensured that, once it granted certiorari, the Court would reach the question it had not reached in *Wilson* or *Richards* — whether a violation of the Fourth Amendment's knock-and-announce rule had to be remedied by exclusion. That was likely the point of the state's concession of the officers' violation, which Justice Scalia took note of in a strangely satisfied way: "Happily," he wrote, "the issues which so often confound knock-and-announce challenges — Did the officers wait enough seconds? Was the 'reasonable wait time' determined by how long it would take the occupant to reach the door, or by how long it would take her to reach the toilet to flush the drugs? — do not confront us here. From the trial level onward, Michigan has conceded that the entry was a knock-and-announce violation."<sup>96</sup> "The issue," wrote the Justice pointedly, "is remedy."<sup>97</sup>

Almost immediately the parties before the Court began to disagree about the main issue of the case. Based on the foregoing, the petitioner asked the Court to decide whether the inevitable discovery doctrine created a per se exception which made the exclusion of evidence seized after a knock-and-announce violation unnecessary.<sup>98</sup> But the respondent's brief, and that filed by the Solicitor General on behalf of the United States, put the question differently. They emphasized the concept of "causation" and the fact that the officers possessed a valid search warrant when they entered, and deemphasized the significance of the inevitable discovery doctrine. Where the police seized contraband pursuant to a valid warrant but in

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<sup>95</sup> Officer Jamal Good testified at the evidentiary hearing that he did not hear or see any activity inside the premises as he approached. Joint Appendix at 7-9, *Hudson*, 126 S. Ct. 2159 (No. 04-1360).

<sup>96</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

<sup>97</sup> *Id.*

<sup>98</sup> Brief for Petitioner, *supra* note 89, at i ("Does the inevitable discovery doctrine create a per se exception to the exclusionary rule for evidence seized after a Fourth Amendment 'knock and announce' violation?").

“violation of principles of announcement,” asked the respondent, did the Fourth Amendment require exclusion, “despite a lack of a causal connection between any police error and the discovery of the contraband?”<sup>99</sup>

The petitioner objected to this reframing of the issue in his Reply Brief to no avail, and by the time of oral argument, it was apparent that the Court was plainly more engaged with the causation argument than the inevitable discovery claim.<sup>100</sup> On June 15, 2006, by 5-4 vote, the Court held that the Fourth Amendment does not insist on the exclusion of evidence seized when police fail properly to knock-and-announce their presence before entering a home to conduct a search pursuant to warrant.<sup>101</sup> In sweeping language, the *Hudson* Court declared that “suppression has always been our last resort, not our first impulse.”<sup>102</sup> “We have rejected its [i]ndiscriminate application,” wrote Justice Scalia for the majority, and long since abandoned the “[e]xpansive dicta in *Mapp*” that treated as inadmissible any evidence seized in violation of the Constitution.<sup>103</sup> Referring to the decade of *Mapp* and *Katz* as “the heydays of our exclusionary-rule jurisprudence,” the Court made clear that the days of its “reflexive application of the exclusionary rule” were over, and suggested that the balance struck when weighing the costs and benefits of exclusion now tilted decidedly against suppression.<sup>104</sup> The exclusionary rule’s “costly

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<sup>99</sup> Brief for the United States as Amicus Curiae Supporting Respondent at i, *Hudson*, 126 S. Ct. 2159 (No. 04-1360) (“Whether evidence seized *pursuant to a valid search warrant* must be suppressed because the officers who executed the warrant violated the Fourth Amendment’s knock-and-announce requirement.” (emphasis added)); Brief for Respondent at i, *Hudson*, 126 S. Ct. 2159 (No. 04-1360).

<sup>100</sup> Almost all of the questions put to the attorneys who argued the case on January 9, 2006 related to the causation point. See Transcript of Oral Argument at 27-28, *Hudson*, 126 S. Ct. 2159 (Jan. 9, 2006) (No. 04-1360).

<sup>101</sup> The knock-and-announce rule governs the manner of entry into a residence during the execution of either a search or arrest warrant. In short, the rule requires law enforcement officers executing a warrant inside a residence to: (1) knock; (2) announce their presence and purpose; and (3) wait a reasonable amount of time for the occupants of the dwelling to open the door. See *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995). The principle of knock-and-announce dates back to English common law, and the laws of many states from the start incorporated the rule. *Id.* at 933. However, it was less than a decade ago that the Supreme Court declared violations of the rule implicates the Fourth Amendment’s reasonableness requirement in 1995. See *id.*

<sup>102</sup> *Hudson*, 126 S. Ct. at 2163.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*



toll' upon truth-seeking and law enforcement objectives," wrote the Court, "presents a high obstacle for those urging [its] application."<sup>105</sup>

B. *The Hudson Expansions of the Concepts of Causation and Attenuation*

Beyond this broad language, the *Hudson* majority took three large steps away from its earlier exclusionary rule jurisprudence. It expanded its conception of causation and its conception of attenuation. In addition, the *Hudson* majority suggested remedial alternatives less costly than suppression can deter Fourth Amendment violations.

1. Expansion of the Concept of Causation

First, it accepted the causation argument pressed by lawyers for Michigan and the United States, and consequently moved away from earlier decisions which had suggested that an item seized immediately after a Fourth Amendment violation would normally be considered inextricably linked to, or the product of, that violation.<sup>106</sup> In a profound retreat from this doctrine, the *Hudson* majority stressed that the error made at the threshold of Booker T. Hudson's home was not the "but-for" cause of the police's seizure of the drugs and gun inside it, despite the fact that the two events occurred within seconds of each other and by virtue of the actions of the same pair of officers.<sup>107</sup> It was simply not true, wrote Justice Scalia, that the police would not have obtained the evidence "but-for" their knock-and-announce violation, for the officers would have executed their warrant in either event, whether they had made that "preliminary misstep" or not.<sup>108</sup> This reasoning implied that if there was a "but for" cause of the search and seizure of Hudson's home, the cause was the *warrant* that authorized the search, not the *entry* that immediately preceded it. This analysis

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<sup>105</sup> *Id.* at 2163.

<sup>106</sup> *United States v. Crews*, 445 U.S. 463, 471 (1980); DRESSLER, *supra* note 20, § 20.08. Evidence seized closely on the heels of a constitutional error has generally been suppressed as either the product or unattenuated fruit of the error, while evidence more attenuated has not. See generally *Harris v. New York*, 401 U.S. 222 (1971) (suppressing statement and physical evidence found in home which officers entered unlawfully without search warrant to make arrest, but refusing to suppress attenuated fruit of unlawful arrest, to wit, statement from prisoner taken at stationhouse later same day).

<sup>107</sup> *Hudson*, 126 S. Ct. at 2164.

<sup>108</sup> *Id.*

enabled the Court to unhitch the error the police had made at the threshold of the home from the search and seizures they conducted inside it just seconds later.<sup>109</sup>

## 2. Expansion of the Concept of Attenuation

The Court then turned its attention to the so-called attenuation doctrine and held that even if the officers' illegal entry could be thought of as the "but-for" cause of the search, suppression of the drugs and gun taken from Hudson's home would still not be required. "But-for causality" was a necessary condition for suppression, not a sufficient one, wrote the Court, for a search or seizure could in some circumstances also be "too attenuated to justify exclusion."<sup>110</sup>

This statement portended a new use of the word "attenuated." Prior to *Hudson*, the attenuation doctrine had always probed the strength of the connection between the police illegality and the evidence the prosecutor wished to introduce by examining the circumstances under which the evidence came into the hands of the police.<sup>111</sup> Thus, under the attenuation doctrine, the Court has sometimes found suppression unnecessary where the causal chain between a wrongful police act and the discovery of evidence had effectively been severed by some significant intervening event, or the police illegality was so far removed from the evidence it ultimately obtained, such as to question the deterrent value achieved by the suppression of the evidence.<sup>112</sup> The inquiry was into whether the evidence in question had "been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."<sup>113</sup> Until *Hudson*, the analysis had only saved *derivative* evidence, presumably because excluding evidence obtained as a direct result of some illegality did not appear to satisfy the attenuation test.

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> The factors typically contributing to this attenuation inquiry include: the temporal and geographical proximity of the act of wrongdoing to the evidence (whether the officers obtained the challenged evidence immediately or well after their unlawful conduct; in the same or at a different location than the error), the presence or absence of some intervening act of free will sufficient to dissipate the taint of the wrongdoing, or the flagrancy or inadvertence of the officer's wrongdoing. See *United States v. Ceccolini*, 435 U.S. 268, 286 (1978) (Marshall, J., dissenting); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Wong Sun v. United States*, 371 U.S. 471, 457 (1963).

<sup>112</sup> *Hudson*, 126 S. Ct. at 2164

<sup>113</sup> *Id.* (citing *Wong Sun*, 371 U.S. at 487-88).

But the majority in *Hudson* employed the term attenuation in a new, and more far-reaching way, by asking whether the interests protected by the constitutional knock-and-announce rule that the police had violated would be served by application of the exclusionary penalty. “Attenuation can occur . . . when the causal connection is remote,” acknowledged Justice Scalia, but it also occurs when “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”<sup>114</sup> This expanded conception of the term allowed the Court to sidestep the kinds of questions to which it had devoted significant time in prior attenuation cases, such as how much time had lapsed between the officers’ error and the discovery of the wanted evidence (in *Hudson*, only seconds), or whether some significant intervening event had occurred between the illegality and the discovery of evidence which severed the chain or dissipated the taint of the officers’ lawless entry (in *Hudson*, no). In lieu of such inquiries, the Court explored an entirely different question, whether the interests served by the knock-and-announce rule — protection against avoidable violence, protection against the needless destruction of property, and protection of “those elements of privacy and dignity that can be destroyed by a sudden entrance” — matched the interest vindicated by the penalty of exclusion — “the shielding of potential evidence from the government’s eyes.”<sup>115</sup> “What 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,” wrote Justice Scalia.<sup>116</sup> “Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”<sup>117</sup>

Beyond the fundamentally different inquiry this new conception of attenuation promotes, the *Hudson* Court also deviated from its earlier attenuation analysis by taking a per se approach to all lawless knock-and-announce entries effected pursuant to warrant. Before *Hudson*, conventional attenuation analysis had always emphasized the need for a reviewing court to consider all of the circumstances by which officers came to obtain evidence following a Fourth Amendment violation before ruling on a motion to suppress. The facts of each case were to be evaluated individually, and weighed in their totality. Even

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2165.

<sup>116</sup> *Id.* at 2161.

<sup>117</sup> *Id.* at 2164 (emphasis added).

in *Ceccolini*,<sup>118</sup> where the Court distinguished live witness testimony from inanimate objects and refused to suppress the evidence, it declined to adopt a per se rule. Rather, the Court based its decision on facts specific to the case, including the passage of a year's time between the unlawful search and the witness's testimony, indications that the witness testified of her own free will and without knowledge of the illegality, and the lack of evidence showing that the officer who obtained her statement was aware of or trying to exploit the initial violation.<sup>119</sup> By contrast, in *Hudson*, the majority decided that any knock-and-announce violation would satisfy the test for attenuation provided the officers who committed it had obtained a warrant authorizing their entry into the premises first.<sup>120</sup>

This per se rule approach means prosecutors will no longer be required to offer evidence showing that some lapse of time or intervening event broke the link between the police's unannounced entry and their seizure of evidence. The decision effectively declares that a search warrant by itself breaks that link, or perhaps more precisely, prevents the formation of a causal chain to begin with. Alternatively, even if such a chain can be thought to exist, the authority granted by a search warrant — conferring upon the government a right to look for and seize particularly described items in a particularly described place — makes the interests protected by the violation of a separate constitutional rule which does not seek to prevent the police from seeing or gathering evidence, an inapt basis for exclusion.

### 3. Remedial Alternatives Less Costly Than Suppression

Finally, and more fundamentally, the Court suggested in *Hudson* that even if the exclusionary rule has won some measure of deterrence of police illegality in the past, a different calculus of the competing costs and benefits of exclusion might appropriately be drawn today. More specifically, the majority questioned whether exclusion remained the only effective remedy for lawless evidence gathering, for it could imagine a bevy of alternative deterrent remedies that might be equally capable of doing the job. “We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago,” wrote

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<sup>118</sup> *United States v. Ceccolini*, 435 U.S. 268, 274-75 (1978).

<sup>119</sup> *Id.* at 280.

<sup>120</sup> *Hudson*, 126 S. Ct. at 2164-65.

Justice Scalia.<sup>121</sup> “That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago.”<sup>122</sup> This statement left it unclear whether the Court would have sanctioned the suppression of the evidence in the case even had the police obtained that evidence in a manner that was not “attenuated” under its new definition of that term.<sup>123</sup> Justice Scalia’s remarks could be read to mean that a majority of the Court now considers the exclusion penalty of *Mapp* to be an outdated relic of an unhappier time; an overly punitive response to constitutional concerns that might be defended by the application of other, less costly, remedial means.

The *Hudson* majority introduced this “times have changed” theme in the part of its opinion that pitted the costs of excluding evidence obtained after a knock-and-announce violation against the benefits of doing so.<sup>124</sup> Employing the cost-benefit analysis that has characterized its exclusion decisions now for decades, the majority detected many costs redounding from the rule’s application, but paltry few benefits. In combination these costs were “substantial,” the Court thought, and it deigned to list them: the guilty go free; dangerous criminals are released to prey upon the law-abiding; the legal system’s interest in establishing the “truth” is jeopardized; and the courts are swamped with time-consuming and complex motions to suppress.<sup>125</sup> Worse, “[t]he cost of entering this lottery was small,” wrote Justice Scalia, “but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card.”<sup>126</sup>

By comparison, the benefits side of the ledger struck the *Hudson* majority as rather meager. The petitioner had argued that only by excluding evidence seized after a knock-and-announce violation would the police learn to comply with the rule. But the majority was skeptical. The police had no reason to commit knock-and-announce violations in the first place, wrote Justice Scalia, at least none beyond wanting to prevent the destruction of evidence or avoid life-threatening resistance, either one of which would give the police valid

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<sup>121</sup> *Id.* at 2167.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 2165 (“Quite apart from the requirement of unattenuated causation, the exclusionary has never been applied except ‘where its deterrence benefits outweigh its substantial social costs.’” (emphasis added)).

<sup>124</sup> *Id.* at 2174-77.

<sup>125</sup> *Id.* at 2165-66.

<sup>126</sup> *Id.* at 2166.

legal reason not to comply with the rule.<sup>127</sup> “[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act,”<sup>128</sup> wrote the Justice. Thus, “[d]eterrence of knock-and-announce violations is not worth a lot” if the police have no invalid reason to commit them. If anything, the Court wrote, applying the threat of exclusion to such violations might cause the police to over comply by waiting outside a door “longer than the law requires,” a hesitancy that could result in more violence and less evidence.<sup>129</sup>

More fundamentally, the *Hudson* Court rejected the petitioner’s suggestion that officers would not be deterred from engaging in knock-and-announcement violations by the application of remedial means less drastic than the “incongruent remedy” of exclusion.<sup>130</sup> The

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<sup>127</sup> *Id.* (“[I]gnoring knock-and-announce can realistically be expected to achieve *absolutely nothing* except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants . . . .” (emphasis added)).

<sup>128</sup> *Id.* at 2160.

<sup>129</sup> It is not our plan here to critique the manner in which the Court has calculated the costs and benefits of exclusion for knock-and-announce violations. Our primary purpose in this Article is to explore the implications of the holding for future applications of the remedy. It should suffice to say that most of the Court’s lists of “costs” are not new, and a number of thoughtful jurists and scholars have undertaken over the past half century or so the task of responding to them. For example, the first cost mentioned by the Court — release of the guilty — was stressed famously by Justice (then Judge) Cardozo in *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926): “The criminal is to go free because the constable has blundered.” Justice Brennan challenged this claim, stressing that “criminals will not go free because the constable has blundered, but rather because official compliance with the Fourth Amendment requirements makes it more difficult to catch criminals. Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government, therefore, it is not the exclusionary rule, but the Amendment itself that has imposed the cost.” *United States v. Leon*, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting). For other leading responses to the purported costs listed by the Court, see, for example, Kamisar, *supra* note 24. The Court’s remaining justifications for declining to order exclusion in the specific context of knock-and-announce violations — trial courts will be flooded with motions to suppress that are difficult to resolve and officers in fear of losing such motions will begin to wait longer than the knock-and-announce rule requires — have received less scholarly attention, so a brief answer to them seems appropriate. It is not an unusual event for courts to grapple with complex questions. The same courts resolve questions pertaining to the existence of probable cause, reasonable suspicion, exigent circumstances, and many more fact-intensive inquiries every day. There is little reason to consider questions about an officers’ compliance with the knock-and-announce rule more difficult than those. Also, the Court offers no support for its fear that officers will, or are being frightened into, a practice of following the rule too well. If anything, the steady stream of knock-and-announce claims pending before the courts at the time of the *Hudson* decision suggests otherwise. See *infra* Part III.A.

<sup>130</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006) (“It seems to us not even

majority could think of several reasons that the police either could be deterred, or were already being deterred, by other means, including: the threat of being sued under 42 U.S.C. § 1983, or subjected to a *Bivens* action for the violation of constitutional rights.<sup>131</sup> Neither of these litigation strategies were meaningfully available over a half century ago, wrote Justice Scalia.<sup>132</sup> Additional deterrence was achieved, the Court thought, from the “increasing professionalism of police forces,” the development of internal departmental disciplinary mechanisms, and the advent of citizen review boards, which together could significantly discourage lawless policing and promote accountability.<sup>133</sup> “[I]t is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect,” the Court wrote.<sup>134</sup> A more robust system of educating, training, and supervising the rank and file than that which existed at the time of *Mapp* promoted a police force far more respectful of citizens’ constitutional rights.

The Court shrugged off the government’s inability to cite even one knock-and-announce case resulting in the award of anything more than nominal damages. Neither was it concerned by the petitioner’s argument that attorneys would be reluctant to bring such suits in light of their dismal success rates and the obstacles to victory created by the qualified immunity doctrine.<sup>135</sup> “As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts,”<sup>136</sup> the Court answered. Certainly the pool of public interest and civil rights attorneys had “greatly expanded” since *Mapp*, a development stimulated by legislation authorizing the award of attorney’s fees.<sup>137</sup> It was possible that the lack of documentary evidence of large damage awards was simply due to the fact that suits of that nature have been settled, wrote Justice Scalia, or because the damage inflicted by the

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true, as Hudson contends, that without suppression there will be no deterrence of knock-and-announce violations at all.”).

<sup>131</sup> *Id.* at 2167.

<sup>132</sup> Justice Scalia was unconvinced by Hudson’s argument that lawyers will not take knock-and-announce cases because the damages are too small and that there are few published decisions of large damage awards for such cases. *Id.*

<sup>133</sup> *Id.* at 2168.

<sup>134</sup> *Id.*

<sup>135</sup> Neither Michigan nor the Solicitor General was able to provide any affirmative evidence of cases for damages or injunctive relief. See Brief of Petitioner, *supra* note 89, at 36; Transcript of Oral Argument, *supra* note 100, at 5, 31-32.

<sup>136</sup> *Hudson*, 126 S. Ct. at 2167-68.

<sup>137</sup> *Id.* at 2167.

violations were in fact nominal.<sup>138</sup> On these grounds the Court concluded that the means of deterring a violation of the knock-and-announce violation today “are substantial — incomparably greater than the factors deterring warrantless entries when *Mapp* was decided,” making “[r]esort to the massive remedy of suppressing evidence of guilt . . . unjustified.”<sup>139</sup>

### C. *The Kennedy Concurrence*

Given his pivotal place as the swing vote in *Hudson*, it is important to understand Justice Anthony Kennedy’s concurring opinion as best as one can. This turns out to be a challenge. A number of legal scholars and commentators have found the opinion “confusing (or confused),”<sup>140</sup> “puzzling,”<sup>141</sup> bordering on schizophrenic,<sup>142</sup> or “a mystery,”<sup>143</sup> and the assurances it extends “[n]onsense!”<sup>144</sup> Justice Kennedy concurred in the judgment of the Court and all but one part of Justice Scalia’s opinion; he seemed only to disagree with his brethren’s claim that two earlier decisions (*Segura*<sup>145</sup> and *Harris*<sup>146</sup>)

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<sup>138</sup> *Id.* at 2168. It should be noted that conspicuously absent in his assessment is any discussion of the effect of the exclusionary rule on the present-day professionalism of police forces and the requirement of training on what the Court requires. The deterrent effect of exclusion has long been considered by many proponents of the rule to be a general one that affects change on an institutional level over time. Accordingly, this constitutes a significant omission.

<sup>139</sup> *Id.* The facts of *Hudson* involved a narrow knock and announce violation pursuant to warrant, and so it is unclear whether Justice Scalia’s reference to “warrantless entries” was simply a shorthand way of referring to the facts of *Mapp*, or a sign that the Court could be convinced to abandon the exclusion remedy in warrantless scenarios as well.

<sup>140</sup> Craig M. Bradley, *Mixed Messages on the Exclusionary Rule*, 42 TRIAL 56, 56 (2006).

<sup>141</sup> Linda Greenhouse, *Court Limits Protection Against Improper Entry*, N.Y. TIMES, June 16, 2006, at A28.

<sup>142</sup> David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 308 (2006) (“[I]f a challenge is brought now, which Justice Kennedy will be there? The Justice Kennedy who signed on to Justice Scalia’s opinion denigrating the exclusionary rule, or the Justice Kennedy who tried (but failed) to take it all back in his concurrence?”).

<sup>143</sup> *Id.* at 307-08.

<sup>144</sup> Bradley, *supra* note 140, at 57; Moran, *supra* note 142, at 308 (“If he really believes in the continuing vitality of the exclusionary rule, it is an absolute mystery to me why he would cast the crucial fifth vote for an opinion that openly declared war on the exclusionary rule.”).

<sup>145</sup> *Segura v. United States*, 468 U.S. 796 (1984).

<sup>146</sup> *Harris v. New York*, 401 U.S. 222 (1977).



provided relevant support for the outcome. Yet he wrote separately, he said, to stress two points. First, that the decision did not mean that knock-and-announce violations are “trivial or beyond the law’s concern.”<sup>147</sup> And second, that the decision in *Hudson* did not place the continued operation of the exclusionary rule in doubt.<sup>148</sup>

On the first point, Justice Kennedy seemed interested in reassuring readers that the decision in the case did not signal a retreat from the view that a violation of the sanctity of the home by a defective entry was “a serious matter.”<sup>149</sup> “If a widespread pattern of violations” developed as a result of the Court’s decision “there would be reason for grave concern,” he wrote.<sup>150</sup> But the concurring justice stopped conspicuously short of saying that such a development would warrant exclusion. If anything, he seemed to reach the opposite conclusion. “Even then,” he wrote, the Court would have to consider that an application of the exclusion penalty to such violations would constitute an *extension* of the suppression rule, and a *revision* of the “requirement of causation” that has restricted application of the rule, and would complicate the resolution of knock-and-announce inquiries.<sup>151</sup> Justice Kennedy thus seemed inclined to agree with Justices Scalia, Thomas, Alito, and the Chief Justice that better-trained police forces and stronger internal discipline mechanisms, fortified by the possibility of civil remedies, would provide sufficient deterrence for such violations, even were such a pattern of lawlessness to develop in response to the Court’s decision.<sup>152</sup> And “[i]f those measures prove[d] ineffective, they could be fortified with more detailed regulations or legislation,” he wrote.<sup>153</sup>

Turning to his second reason for writing separately, Justice Kennedy emphasized that the “continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt,” and that the decision determined only “in the specific context of the knock-and-announce requirement” that exclusion of evidence insufficiently

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<sup>147</sup> *Hudson v. Michigan*, 126 S. Ct. 2159, 2170 (2006) (Kennedy, J., concurring).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 2171.

<sup>151</sup> *Id.* at 2171 (“If a widespread pattern of violations were shown . . . the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of the exclusionary rule.”).

<sup>152</sup> *Id.* at 2170-71 (“Suppression is another matter.”).

<sup>153</sup> *Id.* at 2170.

related to a violation was unjustified.<sup>154</sup> This cautionary language may mean that Justice Kennedy will be unwilling to provide that last-needed vote to withhold application of the exclusion remedy for Fourth Amendment violations outside of the knock-and-announce context. On the other hand, Justice Kennedy's willingness to align himself with the most wide-reaching points in Justice Scalia's opinion, including the majority's conclusions about causation, attenuation, and the post-*Mapp* development of effective non-exclusionary remedies, leaves this unclear. Moreover, despite his words of reassurance, proponents of the exclusionary remedy are entitled to worry about how Justice Kennedy interprets exclusionary rule precedents as "settled and defined."<sup>155</sup> Certainly many jurists and criminal procedure scholars would have characterized the attenuation doctrine differently than did Justice Kennedy and the other members of the majority in *Hudson*. Accordingly, after *Hudson*, far from being "settled and defined," the circumstances under which exclusion will be ordered in the future are murkier than ever.

### III. KATZ IN THE AGE OF HUDSON

It is still too early to know how the suppression remedy of *Katz* will weather the *Hudson* storm, but a collection of the earliest cases citing the latter decision provide a glimpse into what the future may hold for the remedy. We review below some of the highlights of that group of cases, before coming back to discuss their implications for the case celebrated in this Symposium.

#### A. *One Hundred and One and Counting: Hudson in the Lower Courts*

The lower courts cited *Hudson v. Michigan* over 100 times in the seven months after the Supreme Court handed down the decision. Not surprisingly, a large number of these citations involved alleged knock-and-announce violations.<sup>156</sup> More than a third of the cases citing *Hudson* were not knock-and-announce cases, however, and yet

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<sup>154</sup> *Id.* at 2170 (stating that "the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt").

<sup>155</sup> *Id.*

<sup>156</sup> In light of *Hudson*, the courts approached these cases in a variety of ways: by deciding that they were moot, deciding whether *Hudson* controlled where a separate statutory or state constitutional knock-and-announce requirement existed, and deciding whether particular facts about the police conduct sufficiently distinguished it from the *Hudson* ruling.

the courts employed some of its broad language to help reach their decisions.

Before we explore some of the most significant ways in which the courts have utilized *Hudson* to date, it may be helpful to provide a snapshot of the *Hudson* tenets that the courts have found most enticing and quoted most often. *Hudson* has been relied upon in a number of knock-and-announce and non-knock-and-announce cases for the following of its propositions: courts must find as a threshold matter that the challenged evidence was in some sense the product of, or caused by, the illegal government action;<sup>157</sup> suppression based on constitutional violations might not be warranted where the remedy is “incongruent” with the harm caused,<sup>158</sup> even if a constitutional violation occurred, the exclusionary rule would not automatically apply;<sup>159</sup> the exclusionary rule generates “substantial social costs”,<sup>160</sup> suppression of evidence “has always been a last resort, not a first impulse”,<sup>161</sup> suppression is not an appropriate remedy for a constitutional violation that was not the “un-attenuated but-for cause” of obtaining the disputed evidence;<sup>162</sup> suppression is only appropriate where its remedial objectives are thought most efficaciously served;<sup>163</sup> “but-for” causality is only a necessary, not a sufficient, condition for suppression;<sup>164</sup> evidence is not excludable “fruit of the poisonous tree” simply because it would not have come to light but for the illegal conduct of the police;<sup>165</sup> the burden is on the defendant to demonstrate a nexus between the illegality and the challenged evidence;<sup>166</sup> applying the exclusionary rule beyond those situations

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<sup>157</sup> See *Mosby v. Senkowski*, 470 F.3d 515, 523-24 (2d Cir. 2006).

<sup>158</sup> See *United States v. Mahaffy*, 446 F. Supp. 2d 115, 129 (E.D.N.Y. 2006).

<sup>159</sup> See *United States v. Atwell*, 470 F. Supp. 2d 554, 578 n.39 (D. Md. 2007); *United States v. Covarrubias*, No. 06-CR-116-BR, 2007 WL 30275, at \*12 (D. Or. Jan. 4, 2007); *United States v. Marzook*, 435 F. Supp. 2d 778, 788 (N.D. Ill. 2006).

<sup>160</sup> See *United States v. Olivares-Rangel*, 458 F.3d 1104, 1107 n.3 (10th Cir. 2006) (Baldock, J., dissenting); *United States v. Srivastava*, 444 F. Supp. 2d 385, 401 (D. Md. 2006); *In re Jamie P.*, 146 P.3d 965, 978 (Cal. Ct. App. 2006) (Baxter, J., dissenting); *People v. Anstey*, 719 N.W.2d 579, 588 n.12 (Mich. 2006); Brief of Plaintiff-Appellee at 40, *United States v. Lara-Garcia*, 478 F.3d 1231 (10th Cir. 2006) (No. 06-4155).

<sup>161</sup> See *United States v. Sells*, 463 F.3d 1148, 1154 (10th Cir. 2006); *United States v. Hill*, 459 F.3d 966, 977 (9th Cir. 2006); *Marzook*, 435 F. Supp. 2d at 788.

<sup>162</sup> See *United States v. Hector*, 474 F.3d 1150, 1152 (9th Cir. 2007).

<sup>163</sup> See *Hill*, 459 F.3d at 977; *United States v. Diaz*, No. CR. 05-0167 WHA, 2006 WL 3193770, at \*3 (N.D. Cal. Nov. 2, 2006).

<sup>164</sup> See *United States v. Torres-Castro*, 470 F.3d 992, 999 (10th Cir. 2006); *State v. Lane*, 726 N.W.2d 371, 391 (Iowa 2007).

<sup>165</sup> See *Olivares-Rangel*, 458 F.3d at 1123 (Baldock, J., dissenting).

<sup>166</sup> See Brief for Plaintiff-Appellee at \*18, *United States v. Salas*, 2006 WL 3099093.

where the search *actually* intrudes on a person's reasonable privacy expectations amounts to an "indiscriminate application" of the exclusionary rule and violates the cardinal principle that suppression of evidence should always be our "last resort";<sup>167</sup> suppression is only warranted where the interests protected by the constitutional guarantee are served;<sup>168</sup> and the exclusionary rule only applies where the deterrent benefits outweigh the substantial social costs.<sup>169</sup>

Based on the foregoing summary, there can be little doubt that *Hudson* possesses great potential to ratchet back the use of the suppression remedy. Further, as a closer look at some of these decisions will show, *Hudson* also threatens non-remedial effects by encouraging courts to refrain from developing the substantive limits imposed by the Fourth Amendment on police investigative conduct. In addition, pressure to expand the Hudsonian aversion to suppression outside the search warrant context has already begun to build.

1. Remedial Inversion — "Do Not Stop at Go," Go Directly to Remedy

*Hudson's* suggestion that suppression orders should be granted only as a last resort has led a number of courts to alter their traditional approach to resolving suppression challenges. Some courts invert their analysis to decide the question of remedy *before* the question of whether a substantive violation of the Fourth Amendment has even occurred. Normally, when a reviewing court is asked to respond to an alleged Fourth Amendment violation, the court's first step would be to examine the officers' conduct to determine if that conduct had in fact violated some Fourth Amendment rule. The court in such a case would proceed to the question of remedy only after determining that a violation had in fact occurred. After *Hudson*, however, a large number of courts have skipped this threshold question. In more than thirty cases, the courts have ruled that it was unnecessary to decide the substantive violation question in light of the fact that, after *Hudson*, the remedy sought by the defendants — suppression — was unavailable. Perhaps understandably this has occurred most often in the context of knock-and-announce cases. But at least one court outside of the knock-and-announce context has followed a similar

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<sup>167</sup> See *In re Jamie P.*, 146 P.3d 965, 978 (Cal. Ct. App. 2006) (Baxter, J., dissenting).

<sup>168</sup> See *Royce v. State*, No. KX-03-350, 2006 WL 2347786, at \*3 (Minn. Ct. App. Aug. 15, 2006).

<sup>169</sup> See *Adams v. Commonwealth*, 635 S.E.2d 20, 24 (Va. Ct. App. 2006).

approach, deciding simply to skip the first step, and to proceed directly to the question of remedy.

In *United States v. Hector*,<sup>170</sup> a defendant challenged his conviction on the ground that one of the officers who searched his home failed to serve him with a copy of the search warrant. Hector argued this act of neglect violated the demands of the Fourth Amendment and required the evidence taken from his home be suppressed.<sup>171</sup> The challenge thus presented the novel suggestion that a citizen enjoys a constitutional right to be presented with a copy of the search warrant that authorizes the invasion of his home before being searched, and that a violation of that demand merits suppression of any evidence seized.<sup>172</sup> Rather than examine that claim on its merits, citing *Hudson*, the Ninth Circuit hurdled the issue and cantered directly to the question of remedy, writing:

After the district court's ruling [suppressing the evidence], the Supreme Court decided *Hudson v. Michigan*, holding that suppression of evidence is not an appropriate remedy for a constitutional violation that was not the 'unattenuated but-for cause' of obtaining the disputed evidence. The rationale of that decision applies with equal force in this case. *Without deciding whether the failure to provide a copy of the warrant was a constitutional violation, we conclude that even if it were, it was not a 'but-for' cause of seizure of evidence . . . .* But we need not resolve this issue here, as we rely on *Hudson* to hold that *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.<sup>173</sup>

As reflected by the foregoing passage, the temptation provided by *Hudson* to engage in this type of analytic methodology is arguably great. Courts pressed for time or faced with complex Fourth Amendment challenges could easily prefer to dodge the resolution of important constitutional questions on the reasoning that even if the defendant's complaint were valid, suppression would not be warranted. At first glance this might seem the more efficient approach, but the net result would be an under-interpretation of

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<sup>170</sup> 474 F.3d 1150, 1152-53 (9th Cir. 2007).

<sup>171</sup> *Id.* at 1155.

<sup>172</sup> *Id.* at 1154.

<sup>173</sup> *Id.* at 1154-55 (emphasis added) (citation omitted).

Fourth Amendment requirements, and a failure to provide officers with useful guideposts for future investigative conduct.

Moreover, this danger exists even in the context of knock-and-announce violations where the cases reveal that the temptation to skip to the remedial question is at its greatest. To date, the vast majority of the courts that have taken this shortcut have done so when faced with claims that the officers' conduct violated the requirements of the knock-and-announce rule. Because *Hudson* made clear that knock-and-announce failures no longer require suppression (at least in the context of a search pursuant to warrant), many of these courts have decided to spend no time inspecting the merits of the police behavior said to have violated the knock-and-announce demands. Again, although arguably efficient, this is a mistake for several reasons.

First, *Hudson* made a big point of arguing that officers had reasons independent of the threat of suppression to comply with the knock-and-announce rule. Even if this is true, it is not apparent that it will remain so if the courts no longer press officers to articulate and defend those reasons. Second, the *Hudson* Court complimented today's police forces for being far more professional than their predecessors in the days of *Mapp*, and thus far more likely to abide by the demands of the knock-and-announce rule. A consequence of the courts' failure to examine the question of whether an officer's entry violated the rule, however, will leave police academies with less instruction about the parameters of the rule. Finally, officers themselves might rightly desire judicial vindication of their decision not to pause longer at a suspect's door before entering. As *Hudson* itself emphasized, there are a number of valid reasons that can excuse an officer's decision not to knock and announce his presence and intention to enter a suspect's home. The circumstances under which such a decision is *properly* made become clearer only when the courts take the time to discuss them.

## 2. Rethinking the Remedy of *Katz* — Will the *Hudson* Genie Escape the "Search-Pursuant-to-Warrant" Bottle?

In addition to the foregoing, at least one of the cases decided since *Hudson* raises the possibility of a vastly more profound movement away from *Katz* than an abandonment of its preferred remedy for Fourth Amendment violations. Writing for the majority in *Katz*, Justice Stewart stressed the importance of the involvement of a detached magistrate in an officer's decision to conduct a search, and strongly cautioned against sanctioning an officer's choice to proceed without that judicial oversight based on a hindsight evaluation of probable cause. Thus, despite being impressed by the care taken by

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the agents in *Katz* not to intrude upon the privacy of other users of the phone booth beside the gambler himself, and despite being convinced that the agents correctly surmised that there was probable cause to think Katz was up to no good, Justice Stewart explained why the evidence of *Katz*'s conversations in that phone booth had to be suppressed nonetheless:

It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized . . . . Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," for the Constitution requires "that the deliberate impartial judgment of a judicial officer . . . be interposed between the citizen and the police" . . . . the mandate of the Fourth Amendment requires adherence to judicial processes, and . . . searches conducted outside the judicial process, without prior approval are per se unreasonable under the Fourth Amendment . . . .

. . . .

Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police.<sup>174</sup>

Since *Katz*, it has become clear that the view favored by Justice Stewart respecting the so-called warrant requirement is far from universal, and two dramatically divergent views on the Fourth

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<sup>174</sup> *Katz v. United States*, 389 U.S. 347, 359 (1967).

Amendment's presumptive demand for a warrant preceding a search have developed. As all students of criminal procedure know, the Fourth Amendment has two clauses — the reasonableness clause and the warrant clause — separated by an infamous and unhappily uninformative comma.<sup>175</sup> Since *Katz*, the relationship between the clauses has become the subject of much debate. The *Katz* view is that the “Warrant Clause defines and interprets the Reasonableness Clause,”<sup>176</sup> requiring a warrant for every search or seizure “where it is practicable to obtain one.”<sup>177</sup> In other words, a warrantless search is “per se unreasonable” and will only be deemed reasonable where the circumstances surrounding the search made obtaining a warrant infeasible. By contrast, opponents of this position contend that the two clauses are wholly independent of each other, and that the Warrant Clause only specifies the requirements for a valid warrant when one is obtained.<sup>178</sup> Under this view, the police need not seek a warrant when conducting a search or seizure as long as their actions are “reasonable.”

The debate about the need for a warrant was seemingly settled in *Katz*, as Justice Stewart's language made it unmistakably clear that a warrant is required for every search subject only to a “few specifically established and well-delineated exceptions.”<sup>179</sup> But since the decision, *Katz*'s so-called warrant requirement has taken a similar trajectory to *Mapp*'s “requirement” of exclusion. In the same way that exceptions have dramatically limited the application of the exclusionary rule since its inception, the exceptions to the warrant requirement have significantly reduced the types of searches or seizures requiring a warrant.<sup>180</sup> Increasingly, the Court's past emphasis on the need for a warrant has given way to an emphasis on the reasonableness of a search.<sup>181</sup> Although *Katz*'s warrant requirement remains good law, its force has been greatly diminished by the development of these

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<sup>175</sup> The reasonableness clause states, “[T]he right of the people to be secure . . . against unreasonable searches and seizures shall not be violated” and is followed by the warrant clause prescribing that “no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be search, and the persons or things to be seized.” U.S. CONST. amend. IV.

<sup>176</sup> DRESSLER, *supra* note 20, at 167-68 (citing Maclin, *supra* note 24, at 20).

<sup>177</sup> *Id.* at 167-68 (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985)).

<sup>178</sup> *Id.*

<sup>179</sup> *Katz*, 389 U.S. at 358.

<sup>180</sup> See DRESSLER, *supra* note 20, at 173.

<sup>181</sup> See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) (emphasizing that “touchstone of the Fourth Amendment is reasonableness”).



exceptions and the tug of war between the pro- and anti-warrant requirement forces. As the Court has deemphasized the *Katz* view and stressed reasonableness as the linchpin of a valid search, some scholars have suggested that the Court is “headed toward” the conclusion that the “warrant rule is unsound or that it has no application outside the home.”<sup>182</sup>

Somewhat paradoxically, *Hudson*’s view that the suppression remedy is often an excessive response to police misbehavior may galvanize arguments against this second, central tenet of *Katz* as well, notwithstanding the fact that the officers in *Hudson* obtained a warrant. Indeed, one federal judge has already cited the *Hudson* reasoning while lobbying an argument, in dicta, that the remedy of suppression might be overkill not only where an error is committed in the context of a search pursuant to warrant, but in the context of a warrantless search as well. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit suggested as much in *United States v. Elder*,<sup>183</sup> when musing that the Supreme Court might in the future consider limiting the penalty of exclusion to cases where the police acted *unreasonably*, i.e., without probable cause, whether armed with a warrant or not.

The question in *Elder* was whether the district court had correctly declined to suppress evidence found in a shed used to make methamphetamine. The Court of Appeals concluded that the search and seizure were not unreasonable, although the officers had acted without a warrant, due to the fact that an anonymous 911 caller had informed the police dispatcher that there were drugs in the shed and people darting about, just before the caller abruptly hung up. The dispatcher’s inability to reconnect with the caller created a fear that he might have been injured, the police said. The Court of Appeals agreed with the trial judge that the officers’ concern for the caller’s safety provided them with sufficient reason to enter the shed without a warrant. Going further, the district court also held that the inevitable discovery doctrine provided an independent basis for denying the defendant’s motion to suppress, as the caller’s information provided the police probable cause to obtain a warrant, which, if obtained, inevitably would have led to the seizure of the same evidence. The appellate panel declined to consider this separate proffered reason for denying the motion to suppress, but Judge Easterbrook was not so

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<sup>182</sup> DRESSLER, *supra* note 20, at 191 (quoting James J. Tomkovicz, *California v. Acevedo: The Walls Close in on The Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1176-77 (1992)).

<sup>183</sup> 466 F.3d 1090 (2006).

reserved. Easterbrook acknowledged, without criticism, that the trial judge's view was a break from "the usual understanding" of the inevitable discovery doctrine — if the trial court was right, the doctrine would require exclusion only in cases where probable cause was lacking.<sup>184</sup> "Perhaps that would be a good development," Judge Easterbrook wrote, as "the main requirement of the fourth amendment, after all, is that the search be reasonable."<sup>185</sup> Then taking head-on the question of where a suppression/non-suppression line might be drawn, the judge invoked the example of *Hudson* as a guide:

The exclusionary rule comes at such high cost to the administration of the criminal justice system that its application might sensibly be confined to violations of the reasonableness requirement. When 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, but is instead a substantial punishment of the general public. (Unlike an award of damages, exclusion does not punish the wrongdoer.) Allowing the criminal to go free because of an administrative gaffe that does not affect substantial rights seems excessive. But whether to trim the exclusionary rule in this fashion is a decision for the Supreme Court rather than a court of appeals.<sup>186</sup>

If the Supreme Court were to take up this invitation and adopt Judge Easterbrook's approach, the debate over the so-called warrant "requirement" would go largely the same way as the so-called knock-and-announce "requirement." The Court in *Hudson* declined to reverse its prior holdings that the Fourth Amendment imposes an obligation to comply with the knock-and-announce rule. It was content simply to conclude that the remedy for violating that rule was not suppression. Judge Easterbrook's suggestion that suppression might not be necessary in cases involving a purposeful failure to obtain a warrant is arguably of the same ilk — it would leave the presumption favoring a warrant in place, but punish failures to satisfy that presumption by means other than exclusion (e.g., damages, etc.).

Clearly the Easterbrook position would take a giant step away from the strong conviction in *Katz* that police searches and seizures must

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<sup>184</sup> See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 852 (2001) (arguing probable cause should be enough to justify house searches without need for warrant).

<sup>185</sup> *Elder*, 466 F.3d at 1091.

<sup>186</sup> *Id.* (citing *Hudson v. Michigan*, 126 S.Ct. 2159 (2006)).

proceed under the watchful eye of a detached jurist to pass constitutional muster. Under his view, courts could continue to accept Katz's rule that warrantless searches are per se unreasonable and simultaneously admit evidence obtained without a warrant on the basis of probable cause alone. This means that advocates of the warrant requirement could win the battle over the meaning of the Fourth Amendment — a warrantless search not falling within one of the well-delineated exceptions would still technically violate the Fourth Amendment — but it would be a Pyrrhic victory, as violations of the requirement would not demand exclusion of evidence seized. Similar to the remedy for knock-and-announce violations after *Hudson*, the remedy for warrantless searches (based on probable cause) would be confined to the civil side of the courthouse where some fear a Fourth Amendment claim is much less likely to be asserted.

It is too early to know whether the Supreme Court will actually move in the direction advocated by Judge Easterbrook. When considering the likelihood of such a counter-Katz development, the reader might recall that the lawyer for the State of Michigan in *Hudson* made an argument remarkably similar to the trial court's reasoning in *Elder* — that “inevitably” a magistrate would have authorized the officers to search the same shed and seize the same evidence had they bothered to present to her their probable cause proof. Justice Scalia chose not to rely on those arguments in *Hudson* and instead offered reasons of his own for admitting the evidence.<sup>187</sup> In part, as discussed earlier, the *Hudson* majority found that the knock-and-announce violation was not the “but-for” cause of the discovery of the evidence, rather, the warrant was the “but-for” cause.<sup>188</sup> This emphasis on the officers' possession of a warrant is arguably consistent with Justice Stewart's emphasis in *Katz*, and could lean against the Easterbrook position. But it is not clear that *Hudson*-like arguments would be foreclosed in warrantless search cases, as Judge Easterbrook's own casual invocation of *Hudson* should make clear. Indeed, prosecutors should have little difficulty constructing an argument based on the broad language of *Hudson* that the cost of suppression is simply too high, even where officers act without a warrant but on probable cause, in line with the Easterbrook view that in such cases “the exclusionary ‘remedy’ is not a remedy” at all, but a punishment of the law-abiding.<sup>189</sup>

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<sup>187</sup> See *supra* text accompanying notes 85-88.

<sup>188</sup> See also Sharon L. Davies, *Some Reflections On The Implications of Hudson v. Michigan For the Law of Confessions*, 39 TEX. TECH. L. REV. 1207, 1211-13 (2007).

<sup>189</sup> With the groundwork already laid, it is not hard to imagine a court finding that the but-for cause of a search conducted without a warrant are the facts that give the

B. *A New Calculus — Will Lower Courts Start Balancing the Costs and Benefits on a Case-by-Case Basis?*

Finally, the Supreme Court's denigration of the benefits redounding from suppression orders in *Hudson* and its exaltation of the costs suffered thereby seems to have spurred on new willingness to weigh costs and benefits of suppression in a far more individualized, less categorical way than in years past. Deterrence analysis was not new to *Hudson*. For years the Court has carved out exceptions to the exclusionary rule based on the claim that insufficient deterrence (the benefit) was achieved by the suppression of evidence in certain types of settings. But those conclusions tended to be categorical in nature, divorced from the individual menace posed by particular defendants; cases thus fell into specific categories of proceedings or conduct to which the Court has declared the exclusionary rule inapplicable. Thus, the Court concluded categorically that the costs of suppression exceeded its benefits when applied: (1) in parole revocation hearings;<sup>190</sup> (2) in grand jury proceedings;<sup>191</sup> (3) in civil proceedings;<sup>192</sup> (4) in cases where the government offered the evidence for impeachment purposes;<sup>193</sup> (5) in habeas corpus proceedings "where the state has provided an opportunity for full and fair litigation" of the claim;<sup>194</sup> (6) to the conduct of an officer who reasonably relied in good faith on a judicially created warrant;<sup>195</sup> or, after *Hudson* (7) to the conduct of an officer who violated the knock-and-announce rule while executing a search warrant.<sup>196</sup>

By contrast, in the aftermath of *Hudson*, some lower courts appear willing to undertake a far more individualized cost-benefit analysis in ruling on the admissibility of evidence. For example, when applying the cost-benefit analysis promoted in *Hudson* and the Court's warning that suppression must always be the "last resort," at least one court has found the question of the severity of the criminal harm or injury threatened by a particular defendant's behavior relevant to its remedial equation. This view seeped into the reasoning of the U.S. Court of

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officers probable cause to believe they will find evidence of wrongdoing, making suppression inapt.

<sup>190</sup> Pa. Bd. of Probation & Parole v. Scott, 524 U.S. 357, 367-68 (1998).

<sup>191</sup> United States v. Calandra, 414 U.S. 338, 351-52 (1974).

<sup>192</sup> United States v. Janis, 428 U.S. 433, 454 (1976).

<sup>193</sup> DRESSLER, *supra* note 20, at 401.

<sup>194</sup> Stone v. Powell, 428 U.S. 465, 482 (1976).

<sup>195</sup> United States v. Leon, 468 U.S. 897, 922-23 (1984).

<sup>196</sup> Hudson v. Michigan, 126 S. Ct. 2159, 2168 (2006).

Appeals for the Second Circuit in *Mosby v. Senkowski*,<sup>197</sup> where the court invoked language from *Hudson* to support the conclusion that the nature of the criminal offense charged is a factor to be weighed in deciding whether or not to exclude evidence. The court wrote, “the social costs of suppressing Mosby’s voluntary confession to *two homicides* would have been considerable,” implicitly suggesting that the dimensions of one’s remedial rights might appropriately be linked to the heinousness of one’s suspected offense.<sup>198</sup> It is not hard to see how the cost of suppression might appear greater where the defendant’s behavior is more calamitous. Simultaneously, when faced with extreme dangers, a reviewing court may struggle to identify the benefits that would accrue from suppression to anyone but the guilty defendant himself. But a highly individualized, non-categorical cost-benefit approach to suppression questions represents a significant departure from cost-benefit inquiries of the past. There is also the danger (which concerned the dissenting Justices in *Hudson*) that such a particularized approach will lull courts into a myopic consideration of the benefits inuring to an undeserving wrongdoer and away from a broader, more categorical recognition of the societal benefits reaped from constitutionally respectful behavior by the police.

#### IV. CONCLUSION

Forty years after the Court’s landmark decision in *Katz*, the steps that appeared so necessary to protect against and to remedy the agent’s warrantless seizure of *Katz*’s words in that telephone booth have undergone tremendous metamorphosis. The Supreme Court’s decision in *Hudson v. Michigan*<sup>199</sup> last term portends an even greater retreat from the centerpieces of that landmark case. This Article has contrasted the central tenets of *Katz* with the holding and implications of *Hudson* in an effort to demonstrate the Court’s deteriorating commitment to the suppression penalty. Our examination of *Hudson*’s progeny shows that the new anti-suppression analysis will not be confined to the knock-and-announce context, but will be applied to other constitutional missteps by the police as well. It is also clear that the courts have begun to under-theorize the substantive limits of the Fourth Amendment in cases where suppression appears too costly.

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<sup>197</sup> 470 F.3d 515, 523 (2006).

<sup>198</sup> *Id.* (“Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial costs.” (citing *Hudson*, 126 S. Ct. at 2165)).

<sup>199</sup> 126 S. Ct. 2159.

More dangerous still is the possibility that the reasoning of *Hudson* will seep outside the search warrant context — that the courts will find suppression too costly even in cases where the police fail to seek a search warrant — a full frontal challenge to Justice Stewart’s view in *Katz* about the importance of the involvement of a detached magistrate in search decisions.

Much has changed in forty years.