

ment ignores that privacy rights can be protected by sources of law outside the Constitution: even if a hotel owner would not be violating the Fourth Amendment by allowing police to search a patron's room, he would be liable in contract if he had promised the patron privacy. The exclusionary rule would not be applicable, of course, but privacy rights can be vindicated in different ways, and limiting the scope of the exclusionary rule might not be such a negative result.⁸⁴

It is interesting to note that using the common law approach, Randolph probably should have lost. Tenants in common have equal rights to use shared land, and a co-tenant's licensee is shielded from trespass actions.⁸⁵ The search of the Randolph residence, therefore, likely did not constitute a common law trespass.⁸⁶ Some might scoff at the idea that nineteenth-century property law cases could have any relevance to a modern-day criminal procedure puzzle, preferring the unguided search for social expectations. But interpreting the Fourth Amendment as incorporating the evolving common law offers the best of both worlds — a historically rooted and judicially constraining methodology capable of adapting to the demands of modernity and the unique cultures of individual states. It illustrates that old adage about the beauty and brilliance of our legal system: the law is a seamless web. The Court and scoffers alike would be wise to recall it.

5. *Fourth Amendment — Exclusionary Rule — “Knock and Announce” Violations.* — The Supreme Court developed a unique remedy to make good on the protections offered by the Fourth Amendment by holding that evidence obtained through an illegal search or seizure cannot be used in a federal prosecution.¹ When the Court applied this rule to the states in *Mapp v. Ohio*,² it declared that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible.”³ The Court quickly began to move away

⁸⁴ Commentators have criticized the rule, condemning it for distorting the rest of the Court's criminal procedure jurisprudence. See, e.g., Amar, *supra* note 5, at 785–800; Guido Calabresi, Debate, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111 (2003). The Court itself has cut back on the rule in recent cases. See, e.g., *Hudson v. Michigan*, 126 S. Ct. 2159 (2006).

⁸⁵ Brief for the United States as Amicus Curiae Supporting Petitioner at 16 n.4, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL 1453877; see also *Buchanan v. Jencks*, 96 A. 307, 309 (R.I. 1916); 86 C.J.S. *Tenancy in Common* § 144 (2006). But see Brief of Amicus Curiae Nat'l Ass'n of Criminal Def. Lawyers Supporting Respondent at 23–25, *Randolph*, 126 S. Ct. 1515 (No. 04-1067), 2005 WL 2147326 (contending different rule). The harshest form of the common law mandated that any action for trespass to property held by tenants in common must be joined by all tenants; if even one settled with the trespasser, the plaintiff lost. See, e.g., *Bradley v. Boynton*, 22 Me. 287, 288 (1843); 20 AM. JUR. 2D *Cotenancy and Joint Ownership* § 113 (2005). A Georgia statute reversed this rule, however. See GA. CODE ANN. § 9-2-23 (1982).

⁸⁶ There are insufficient facts in the record to determine Mrs. Randolph's precise property interest and what tenancy arrangement was in effect, but this conclusion is a plausible one.

¹ *Weeks v. United States*, 232 U.S. 383, 392–93 (1914).

² 367 U.S. 643 (1961).

³ *Id.* at 655.

from the “reflexive application of the exclusionary rule”⁴ suggested by *Mapp*,⁵ and today the exclusionary rule has numerous limitations.⁶ Although some have warned that the Court was on the verge of abandoning the exclusionary rule altogether,⁷ its core persisted. Last Term, in *Hudson v. Michigan*,⁸ the Supreme Court held that the exclusionary rule is not an appropriate remedy for violations of the Fourth Amendment’s requirement that police officers executing a warrant at a dwelling knock and announce their presence before entering.⁹ Because the majority’s assertion that the costs of exclusion outweigh the benefits in this context is applicable to the exclusionary rule more broadly, the Court may rely on *Hudson* in the future to eliminate the rule altogether. Taking this step would risk leaving the Fourth Amendment underenforced, however, because the alternative remedies that the majority identified in *Hudson* are insufficient.

On August 27, 1998, Detroit police officers arrived at the home of Booker Hudson with a search warrant.¹⁰ The officers announced their presence and, after a few seconds, opened the unlocked front door and entered the house.¹¹ After a search revealed cocaine and a loaded gun, Hudson was arrested and charged with unlawful drug and firearm possession.¹² Before trial, Hudson moved to suppress the drugs and the gun on the grounds that the police had violated the Fourth Amendment’s “knock and announce” rule.¹³ The trial court initially granted Hudson’s motion, but the Michigan Court of Appeals reversed on interlocutory appeal,¹⁴ and the Michigan Supreme Court denied leave to appeal.¹⁵ Hudson was then convicted and made the same ar-

⁴ *Arizona v. Evans*, 514 U.S. 1, 13 (1995).

⁵ *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (holding that the exclusionary rule is not applicable when the connection between a violation and evidence is too attenuated).

⁶ *See, e.g., United States v. Leon*, 468 U.S. 897, 926 (1984) (creating an exception to the exclusionary rule when police rely in good faith on a defective warrant); *United States v. Havens*, 446 U.S. 620, 627–28 (1980) (holding that the exclusionary rule does not bar evidence from being used to impeach a defendant’s testimony); *Rakas v. Illinois*, 439 U.S. 128, 131 (1978) (holding that a passenger does not have standing to object to the search of a vehicle); *United States v. Calandra*, 414 U.S. 338, 351 (1974) (holding that the exclusionary rule is not applicable in grand jury proceedings).

⁷ *See, e.g., Calandra*, 414 U.S. at 365 (Brennan, J., dissenting) (“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 . . .”).

⁸ 126 S. Ct. 2159 (2006).

⁹ *See id.* at 2168.

¹⁰ Petition for Writ of Certiorari at 2, *Hudson*, 126 S. Ct. 2159 (No. 04-1360), 2005 WL 856040.

¹¹ *Hudson*, 126 S. Ct. at 2162.

¹² *Id.*

¹³ *Id.* The Court first recognized the Fourth Amendment’s knock and announce rule in *Wilson v. Arkansas*, 514 U.S. 927, 931–32 & n.2 (1995).

¹⁴ *People v. Hudson*, No. 230594 (Mich. Ct. App. May 1, 2001) (unpublished order).

¹⁵ *People v. Hudson*, 639 N.W.2d 255 (Mich. 2001).

gument for suppression on appeal of his conviction. The Court of Appeals affirmed his conviction,¹⁶ and the Michigan Supreme Court again denied leave to appeal.¹⁷

The Supreme Court affirmed. Writing for the Court, Justice Scalia¹⁸ concluded that the Fourth Amendment's exclusionary rule is not an appropriate remedy for knock and announce violations. He observed that the exclusionary rule is not automatically triggered whenever evidence is obtained in a manner causally connected to a Fourth Amendment violation¹⁹ because the causal connection "can be too attenuated to justify exclusion."²⁰ Even a direct causal link can be too attenuated when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."²¹ Justice Scalia identified three interests protected by the knock and announce rule: protecting law enforcement officers from a potentially violent response from a surprised resident, preventing property damage that might result from a forcible entry, and preserving privacy by ensuring a resident "the opportunity to collect [him]self before answering the door."²² The interest suppression serves is the shielding of potential evidence from government scrutiny, an interest the knock and announce rule does not protect.²³

Justice Scalia also concluded that exclusion is not appropriate in the context of knock and announce violations because its social costs — excessive litigation and overdeterrence — would outweigh its deterrence benefits. Justice Scalia feared a "constant flood of alleged failures to observe the rule" because it would be relatively easy for defendants to assert violations and relatively difficult for courts to sort things out.²⁴ Because the Court has not indicated exactly how long police must wait before forcibly entering a home after announcing their presence,²⁵ law enforcement officers "would be inclined to wait longer than the law requires" to avoid any possibility of a violation that would render evidence inadmissible.²⁶ Weighing them against these costs, Justice Scalia found the benefits of exclusion lacking. He

¹⁶ *People v. Hudson*, No. 246403, 2004 WL 1366947, at *1 (Mich. Ct. App. Jun. 17, 2004).

¹⁷ *People v. Hudson*, 692 N.W.2d 385 (Mich. 2005).

¹⁸ Chief Justice Roberts and Justices Thomas and Alito joined Justice Scalia's opinion in full; Justice Kennedy joined all but Part IV of the opinion.

¹⁹ *See Hudson*, 126 S. Ct. at 2164.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 2165.

²³ *See id.*

²⁴ *Id.* at 2165–66.

²⁵ In *United States v. Banks*, 540 U.S. 31 (2003), the Court approved a forcible entry after police waited fifteen to twenty seconds, but the Court indicated that the appropriate amount of time would vary depending on the circumstances. *See id.* at 38, 41.

²⁶ *Hudson*, 126 S. Ct. at 2166.

explained that “the value of deterrence depends upon the strength of the incentive to commit the forbidden act.”²⁷ Because violating the knock and announce rule will generally not lead to the discovery of any evidence that the police would not have found while obeying the rule, there is little incentive to violate it.²⁸

Justice Scalia also found the deterrence benefits of exclusion to be minimal because two other mechanisms serve as adequate deterrents of knock and announce violations. First, there are civil suits for damages brought under 42 U.S.C. § 1983. Justice Scalia observed that the Court brought § 1983 out from obscurity and revived it as a remedy for constitutional violations in a series of decisions beginning in the same Term in which *Mapp* was decided.²⁹ To assuage any concerns that damages from knock and announce violations would be too small to justify the expense of a civil suit, Justice Scalia noted that successful plaintiffs may recover attorney’s fees under 42 U.S.C. § 1988(b).³⁰ Justice Scalia also observed that lower courts had allowed knock and announce suits to go forward over qualified immunity claims³¹ and concluded that “[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”³² Second, Justice Scalia pointed to “the increasing professionalism of police forces, including a new emphasis on internal police discipline” as a deterrent of civil rights violations.³³

Justice Scalia concluded, in a portion of the opinion that only three other Justices joined, by tying the Court’s holding to three previous cases — *Segura v. United States*,³⁴ *New York v. Harris*,³⁵ and *United*

²⁷ *Id.*

²⁸ *Id.* Any incentive that the police might have to violate the rule to prevent a suspect from destroying evidence while the police are waiting outside has been eliminated by the Court’s development of an exception to the knock and announce rule. This exception applies in situations in which the police have a “reasonable suspicion” that evidence may be destroyed if they delay entry. See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

²⁹ See *Hudson*, 126 S. Ct. at 2167 (discussing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Monroe v. Pape*, 365 U.S. 167 (1961)). *Monroe*, decided during the same Term as *Mapp*, “resurrected section 1983 from ninety years of obscurity” by interpreting the statute to allow for a damages action against government officials for violations of constitutional rights. *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169–70 (1977). *Monell* held that local governments can be held liable under § 1983, 436 U.S. at 663, and *Bivens* held that victims of Fourth Amendment violations by federal officers may recover damages, 403 U.S. at 397.

³⁰ *Hudson*, 126 S. Ct. at 2167.

³¹ *Id.* (compiling cases).

³² *Id.* at 2167–68.

³³ *Id.* at 2168.

³⁴ 468 U.S. 796 (1984). In *Segura*, police had illegally entered an apartment and, after securing it, obtained a search warrant and only then executed a full search. *Id.* at 800–01. The Court held that the evidence discovered during the search was admissible because the police had sufficient information to obtain a warrant before the illegal entry. See *id.* at 813–14.

*States v. Ramirez*³⁶ — to support the broad “proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule.”³⁷

Justice Kennedy concurred in part and concurred in the judgment. He wrote separately to emphasize the importance and continued force of both the knock and announce rule and the broader exclusionary rule.³⁸ For Justice Kennedy, the Court’s decision established simply that the two do not go together.³⁹ He gave only a brief explanation for his decision not to join the portion of Justice Scalia’s opinion discussing *Segura*, *Harris*, and *Ramirez* by noting that he did not think those cases “have as much relevance here as Justice Scalia appears to conclude.”⁴⁰

Justice Breyer dissented.⁴¹ He began by reviewing the Court’s major decisions establishing both the knock and announce rule and the exclusionary rule.⁴² From these two lines of cases, Justice Breyer concluded as a matter of “elementary logic” that the exclusionary rule should apply to knock and announce violations.⁴³ He argued that exclusion is necessary to deter these kinds of violations and disagreed with Justice Scalia regarding whether there are any viable deterrents other than exclusion.⁴⁴ Justice Breyer observed that “[t]he cases reporting knock and announce violations are legion,” yet there have been no reported cases in which a civil plaintiff has recovered more than nominal damages for such a violation.⁴⁵

Justice Breyer challenged the majority’s causation analysis by asserting that the manner of entry is inseparable from the lawfulness of

³⁵ 495 U.S. 14 (1990). In *Harris*, the police illegally arrested the defendant at his home without a warrant. *Id.* at 17. The Court held that the exclusionary rule did not apply to the defendant’s statements made later at the police station because the prohibition of warrantless arrests in the home was “designed to protect the physical integrity of the home,” not to protect suspects from statements made later while legally in custody. *Id.*

³⁶ 523 U.S. 65 (1998). In *Ramirez*, the Court held that law enforcement officers did not violate the Fourth Amendment by breaking a window during a search because the property destruction was reasonable under the circumstances. *Id.* at 71–72. In dicta, the Court said that had there been a Fourth Amendment violation, exclusion would be justified only if there had been a sufficient causal relationship between the property destruction and the discovery of the evidence. *See id.* at 72 n.3.

³⁷ *Hudson*, 126 S. Ct. at 2170 (plurality opinion).

³⁸ *See id.* (Kennedy, J., concurring in part and concurring in the judgment).

³⁹ *See id.* (“Today’s decision determines only that in the specific context of the knock and announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”).

⁴⁰ *Id.* at 2171.

⁴¹ Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.

⁴² *See Hudson*, 126 S. Ct. at 2171–73 (Breyer, J., dissenting).

⁴³ *Id.* at 2173.

⁴⁴ *See id.* at 2173–74.

⁴⁵ *Id.* at 2174.

the search itself, and thus the discovery of evidence subsequent to a knock and announce violation is causally related to the violation.⁴⁶ He also took issue with the majority's definition of attenuation, which included instances in which the interests protected by a rule are not served by exclusion. He argued that the majority had defined the interests served by the knock and announce rule too narrowly and that this attenuation theory was "beside the point" given that the purpose of the exclusionary rule is to deter.⁴⁷

The majority's reasoning in *Hudson* represents a significant step toward eliminating the exclusionary rule.⁴⁸ Although *Hudson*'s holding only addresses knock and announce violations, and although the majority may have been motivated by the fact that the knock and announce requirement arguably protects lesser privacy interests than other Fourth Amendment requirements, the majority's basis for rejecting the exclusionary rule has broad implications. The majority's conclusion that the social costs of exclusion outweigh the deterrence benefits for knock and announce violations easily can be applied to other Fourth Amendment protections. Whether doing away with exclusion is a good idea remains an open question, but the alternative remedies the majority identified would not solve the problems it associated with exclusion, and they would instead create new problems.

The majority could have held more narrowly that there was no causal link between the violation and the discovery of evidence. The Court has previously used causation as a way to limit the exclusionary rule by declining to apply the rule when the causal link was too attenuated⁴⁹ or when evidence would have been discovered even without a constitutional violation.⁵⁰ Indeed, Michigan's only argument in its brief was a causation argument.⁵¹ By instead going beyond causation to an analysis of the costs and benefits of exclusion that is generally applicable to all Fourth Amendment violations, the Court laid the groundwork for scaling back or eliminating the exclusionary rule.

The alternative deterrence mechanisms that the majority identified for knock and announce violations are just as viable for other types of Fourth Amendment violations. Justice Scalia correctly pointed out that the Court decided *Mapp* at a time when civil suits for damages

⁴⁶ See *id.* at 2177 ("[S]eparating the 'manner of entry' from the related search slices the violation too finely.").

⁴⁷ See *id.* at 2180–81.

⁴⁸ Indeed, according to Justice Breyer, the majority's reasoning suggests that *Wolf v. Colorado*, 338 U.S. 25 (1949), the case *Mapp* overruled, is now the law. See *Hudson*, 126 S. Ct. at 2175 (Breyer, J., dissenting).

⁴⁹ See *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

⁵⁰ See *Nix v. Williams*, 467 U.S. 431, 443–44 (1984).

⁵¹ See Brief for Respondent at 2–3, *Hudson*, 126 S. Ct. 2159 (No. 04-1360), 2005 WL 2600989.

were not a cognizable remedy for Fourth Amendment violations,⁵² and that internal police discipline has increased since *Mapp*.⁵³ If these developments render the marginal deterrence benefits of exclusion insignificant in the context of knock and announce violations, however, then exclusion should *never* be used as a remedy, because these mechanisms are equally available for other Fourth Amendment violations. The majority virtually acknowledged this by hinting that *Mapp* would have (or should have) been decided differently if § 1983 had been as viable then as it is now.⁵⁴ The majority left the next logical step — that, because of the viability of § 1983 and internal police discipline today, *Mapp* ought to be overruled — to a future decision.

Similarly, the social costs of applying the exclusionary rule to knock and announce violations are equally applicable in other Fourth Amendment contexts. The majority first warned of litigation costs, noting that defendants could easily dispute that the knock and announce rule had been violated and that courts would have difficulty sorting out these claims.⁵⁵ In most instances, determining whether to grant a motion to suppress will depend on fact-intensive inquiries⁵⁶ such as whether the defendant voluntarily consented to the search,⁵⁷ whether there were exigent circumstances,⁵⁸ or whether the police had a reasonable suspicion that “criminal activity [was] afoot.”⁵⁹ Even if there is greater potential for factual dispute and legal uncertainty in knock and announce cases, the difference is not so large as to distinguish those scenarios.⁶⁰ It would not take much imagination for a future Court to identify these same litigation costs as a reason to elimi-

⁵² *Hudson*, 126 S. Ct. at 2167.

⁵³ *Id.* at 2168.

⁵⁴ *See id.* (“We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost half a century ago.”).

⁵⁵ *See id.* at 2166.

⁵⁶ Although the legality of a search pursuant to a warrant may be relatively easy to determine, *see id.*, few motions to suppress will turn on the existence of a warrant because the vast majority of searches are warrantless, *see* RICHARD VAN DUIZEND ET AL., *THE SEARCH WARRANT PROCESS* 19 (1985); Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 *TULSA L.J.* 465, 488 (1999).

⁵⁷ *See, e.g.*, *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (holding that valid consent must be voluntary under a “totality of all the circumstances” test). Consent is the most common predicate that police assert to support the validity of a search. *See* VAN DUIZEND ET AL., *supra* note 56, at 19.

⁵⁸ *See, e.g.*, *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (upholding warrantless search of a home because police officers were in hot pursuit of an armed robbery suspect).

⁵⁹ *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

⁶⁰ In many cases, any dispute regarding whether the knock and announce rule was satisfied will be easy to settle because the police in several states may obtain special no-knock warrants. *See Hudson*, 126 S. Ct. at 2182 (Breyer, J., dissenting).

nate the exclusionary rule for all but the clearest violations of the warrant requirement.

The majority's concern that applying the exclusionary rule to knock and announce violations would overdeter police⁶¹ is more compelling in the context of other Fourth Amendment violations. The Court has already narrowed the scope of the knock and announce rule significantly in order to address overdeterrence. The rule includes broad exceptions for any instance in which police officers have a "reasonable suspicion" that knocking and announcing their presence would be futile or would result in destruction of evidence or harm to the officers.⁶² The Court double-counted its concerns about overdeterrence by first narrowing the scope of the rule⁶³ and then narrowing the scope of the remedy. Furthermore, police in many states can insulate no-knock entries from successful challenge by obtaining special no-knock warrants.⁶⁴ Overdeterrence might more easily occur in other Fourth Amendment contexts in which the scope of the rule has not already been narrowed and advance insulation is not available.⁶⁵ Thus, the Court could easily draw on *Hudson's* discussion of overdeterrence to narrow the exclusionary rule further in the future.

Although the majority's analysis set the stage for eliminating the exclusionary rule, it failed to offer a satisfactory basis for doing so. The alternative remedial schemes it identified — civil suits and internal police discipline — raise the same concerns of litigation costs and overdeterrence that the majority associated with exclusion. Litigation costs might actually be higher if the remedy were damages rather than ex-

⁶¹ See *id.* at 2166 (majority opinion) ("If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires . . .").

⁶² See *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). The requisite reasonable suspicion would seem to be satisfied in virtually every instance in which the police have probable cause to search for drugs, which can be easily flushed down the toilet, or a gun, which could be used against the police. But see *id.* (declining to adopt a blanket exception to the knock and announce requirement in the context of felony drug investigations).

⁶³ *Richards* itself may be characterized as an instance of what Professor Daryl Levinson calls "remedial deterrence," whereby a "right may be shaped by the nature of the remedy that will follow if the right is violated." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–85 (1999). Although the *Richards* Court never addressed the issue of the proper remedy for knock and announce violations, the posture of the case required the Court to determine whether the defendant's motion to suppress should have been granted, and the Court's opinion never questioned whether suppression of the evidence would have been the proper remedy. See *Richards*, 520 U.S. at 389–92.

⁶⁴ See *Hudson*, 126 S. Ct. at 2182 (Breyer, J., dissenting). Even if a judge were to determine *ex post* that a no-knock entry was not appropriate, the *Leon* exception would apply.

⁶⁵ One example is *Terry* stops. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968). A police officer might not intervene to prevent a potential crime because he is unsure whether he has the requisite reasonable suspicion to perform a *Terry* stop. Furthermore, in contrast to a no-knock entry, there is by definition no such thing as a warrant for a *Terry* stop.

clusion.⁶⁶ Exclusion requires “only a brief hearing” during a criminal case “that the state would wish to prosecute regardless of the existence of the exclusionary rule itself,” whereas a damages remedy requires an entire civil action on top of any criminal trial.⁶⁷ Similarly, both damages and internal police discipline might lead to greater overdeterrence than exclusion does. Police officers internalize only a fraction of the social benefits of law enforcement, so making them personally liable for the full costs of their actions would result in overdeterrence.⁶⁸ In contrast, exclusion balances the costs and benefits as an individual police officer is likely to view them: the officer internalizes only a fraction of the benefits of law enforcement and only a fraction of the costs of exclusion.⁶⁹

In addition to these concerns, the alternative remedies the majority identified raise new concerns that it did not address. Damages are a problematic remedy for constitutional violations by police for a variety of reasons, two of which are especially notable.⁷⁰ First, valuing damages from Fourth Amendment violations is unusually difficult, and damages will be an effective deterrent only if they are valued correctly in the aggregate.⁷¹ The exclusionary rule does not present this same valuation problem.⁷² Second, the economics of litigation may bar

⁶⁶ Currently, a victim of a Fourth Amendment violation (though not a knock and announce violation) can generally seek both damages and exclusion as remedies for the same violation. Eliminating the exclusionary remedy could lead to more civil suits if civil rights organizations were to pursue them more frequently in order to compensate for the loss of exclusion.

⁶⁷ Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 491.

⁶⁸ See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 351–52 (2000). Personal liability might result in either monetary damages in a civil suit or a loss of salary, rank, or vacation time resulting from internal police discipline.

⁶⁹ See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910–11 (1991). Realistically, however, underdeterrence is more likely to result from reliance on civil damages as a remedy for constitutional violations by police. Governments, though under no legal obligation to do so, routinely provide legal defense and indemnify officers for any monetary judgments against them. See Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 686 (1987); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49–50 (1998). Governments themselves may be quite willing to pay these damages if the benefits of law enforcement exceed the costs, and governments would thus be underdeterred. See Levinson, *supra* note 68, at 369–70. A counterintuitive possibility is that paying damages might actually *increase* governments’ incentives to violate the Fourth Amendment because they are effectively buying off groups that would otherwise politically oppose aggressive policing while gaining political support from groups that favor it. See *id.* at 379.

⁷⁰ For a full discussion, see Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284–86 (1988).

⁷¹ See Stuntz, *supra* note 69, at 902 & n.42.

⁷² *Id.* at 910. Critics might say that exclusion always overvalues the Fourth Amendment because allowing a guilty person to go free is too drastic a remedy for mistakes made by police. The

many civil suits alleging Fourth Amendment violations. Although successful plaintiffs asserting § 1983 claims may recover attorney's fees,⁷³ the Prison Litigation Reform Act (PLRA) limits the recovery of such fees to 150% of actual damages in any suit brought by a prisoner.⁷⁴ Because damages for Fourth Amendment violations are often small or nominal,⁷⁵ the limit on attorney's fees will prevent many suits from going forward.

Internal police discipline is also a problematic remedy because the increasing professionalism of police departments that has resulted in more effective internal discipline was itself a result of the exclusionary rule. Law enforcement agencies responded to *Mapp* by prescribing rules and procedures for law enforcement officers that followed the Court's criminal procedure decisions.⁷⁶ If the threat of exclusion were to disappear, internal police discipline would weaken due to the loss of this important external check.⁷⁷

The question remains whether, having laid the groundwork, the Court will actually get rid of the exclusionary rule. Claims that the Court has all but eliminated the rule⁷⁸ have a "boy who cried wolf" quality to them. There are reasons to believe, however, that *Hudson*

reality is that the exclusionary rule almost never results in a guilty person's going free. See Thomas Y. Davies, *A Hard Look at What We Know (and Still Need To Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 680 (reviewing numerous empirical studies and concluding that between 0.6% and 2.35% of arrests result in nonprosecution or nonconviction due to the exclusionary rule and that most of those cases involved suspects who would not have received prison sentences). This is largely because prosecutors are still able to obtain convictions in the majority of cases in which defendants win motions to suppress. See VAN DUIZEND ET AL., *supra* note 56, at 42.

⁷³ See 42 U.S.C. § 1988(b) (2000).

⁷⁴ 42 U.S.C. § 1997e(d) (2000); see also, e.g., *Robbins v. Chronister*, 435 F.3d 1238, 1244 (10th Cir. 2006) (applying the PLRA to limit an award of attorney's fees to \$1.50 based on an award of \$1.00 in nominal damages in a suit brought by a prisoner alleging a Fourth Amendment violation). The PLRA does not affect suits brought by nonprisoners, and because most searches do not lead to convictions, see VAN DUIZEND ET AL., *supra* note 56, at 41 tbl.24, 43 tbl.26, there would still be many potential plaintiffs who would be able to recover significant attorney's fees.

⁷⁵ Meltzer, *supra* note 70, at 284.

⁷⁶ See Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 448 (1990); John Van de Kamp, *The Good Faith Exception to the Exclusionary Rule — A Warning Letter to Prosecutors*, 26 S. TEX. L.J. 167, 172–73 (1985).

⁷⁷ It is possible that a reduction in judicial enforcement of the Fourth Amendment would simply lead to an increase in legislative enforcement of it. Professor William Stuntz argues that this is so and that it would be a good thing because it would provide more privacy protection to the poor, focus criminal litigation on the determination of guilt or innocence, and cause legislators to increase police funding, given that they will spend more where they can regulate. See William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 832–33 (2006).

⁷⁸ See, e.g., *United States v. Leon*, 468 U.S. 897, 928–29 (1984) (Brennan, J., dissenting) ("[I]n case after case, I have witnessed the Court's gradual but determined strangulation of the rule. It now appears that the Court's victory over the Fourth Amendment is complete." (footnote omitted)).

poses a greater threat to the exclusionary rule than the past decisions that limited its application. First, the Court's two newest Justices joined the majority opinion in full.⁷⁹ Second, the majority was willing to bar the application of the exclusionary rule without regard to its deterrent effect.⁸⁰ Finally, the majority's emphasis on changed circumstances — the expansion of § 1983 and internal police discipline — could justify overruling *Mapp*.⁸¹ It remains to be seen how far the Court will go, but *Hudson* is a strong signal that the exclusionary rule is in trouble.

6. *Fourth Amendment — Suspicionless Search of Parolees.* — In 1787, Jeremy Bentham argued that the ideal prison would consist of cellblocks encircling an interior opaque column from which wardens and guards could monitor prisoners without themselves being seen.¹ Because the prisoners would not know when the wardens were watching them from inside the column, Bentham surmised that the prisoners would attempt to conform their behavior to acceptable standards at all times.² Although Bentham's Panopticon has met with considerable criticism,³ his core idea — that supervision, real or imagined, can deter

⁷⁹ In another case from last Term, the new Chief Justice noted that “the exclusionary rule is not a remedy we apply lightly” in view of its social costs and declined to apply the rule to violations of the right of foreign nationals under the Vienna Convention of Consular Relations to consular notification of their arrest or detention. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2680 (2006); see also *infra* pp. 303–12.

⁸⁰ See *Hudson*, 126 S. Ct. at 2166 (“[E]ven if this assertion [that without suppression there would be no deterrence] were accurate, it would not necessarily justify suppression.”). All the pre-*Hudson* limits on the exclusionary rule apply in situations in which there is little reason to believe that exclusion would have a deterrent effect. See *id.* at 2175–76 (Breyer, J., dissenting). For example, the Court established an exception to the exclusionary rule when police officers rely in good faith on a warrant that turned out to be defective. See *Leon*, 468 U.S. at 919–20. The basis for this exception is that an officer who subjectively believes she is acting lawfully would not be deterred by the threat of exclusion. See *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

⁸¹ Justice Kennedy's concurrence casts some doubt on whether the Court, at least as it is currently constituted, has five votes to eliminate the exclusionary rule. Justice Kennedy saw the *Hudson* decision as a narrow one, applicable only “in the specific context of the knock and announce requirement,” and declared that “the continued operation of the exclusionary rule . . . is not in doubt.” *Hudson*, 126 S. Ct. at 2170 (Kennedy, J., concurring in part and concurring in the judgment). His decision not to join the last part of Justice Scalia's opinion, discussing *Segura*, *Harris*, and *Ramirez*, also suggests he took a narrower view of the case.

¹ See Jeremy Bentham, *Panopticon; or, the Inspection-House* (1787), reprinted in 4 THE WORKS OF JEREMY BENTHAM 37 (John Bowring ed., Russell & Russell, Inc. 1962) (1843).

² See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 495 (describing the panoptic “chilling effect [on behavior] when people are generally aware of the possibility of surveillance, but are never sure if they are being watched at any particular moment”).

³ See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 205–06 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (observing that modern-day panopticism creates a “cruel, ingenious cage” that “makes it possible to perfect the exercise of power” by the all-seeing totalitarian state). John Bowring addresses the concerns regarding panopticism in a way that is particularly relevant to the discussion of parolee supervision: “Some individuals . . . have considered the *continual inspection* . . . as objectionable. It has appeared to them as a restraint more terrible than