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Introduction

POLICE, SEARCH WARRANT . . .[2]

The voices echo through the cracks of the door. Seconds later the door booms open.[3] Seven police officers rush through. Booker Hudson jolts up from his chair in the living room. Momentary chaos reins free as everyone in the house is rounded-up and the police undertake a search of the premises.[4]

It is mid-afternoon on a hot August day.[5] Seven Detroit police officers are on their way to Booker Hudson's home.[6] In their possession, they carry with them a valid search warrant for narcotics.[7] The officers arrive and walk up the path towards this modest single family home. A few of the officers shout "police, search warrant" as they arrive.[8] After waiting only a few

1. J.D. candidate 2007, Pace University School of Law; B.A. 2004, *cum laude*, San Francisco State University. I would like to thank all the people that have made a difference in my life, especially, my Father, Mother, and four Sisters, and Willie who used to play blues harmonica in the alley off of Grant Street and Columbus Avenue. Additionally, I would like to thank Professor Leslie Garfield for her insightful comments on the article and her invaluable guidance throughout my law school career. All mistakes and opinions are my own.

2. Brief of Petitioner-Appellant at *2, Hudson v. Michigan, No. 04-1360, 126 S. Ct. 2159 (U.S. Aug. 25, 2005), 2004 U.S. Briefs 1360 (LexisNexis). For a similar statement of the facts, see Brief of Respondent, Hudson v. Michigan, No. 04-1360, 126 S. Ct. 2159 (Oct. 11, 2005).

3. Brief of Petitioner-Appellant at *2, Hudson v. Michigan, No. 04-1360, 126 S. Ct. 2159 (U.S. Aug. 25, 2005), 2004 U.S. Briefs 1360 (LexisNexis).

4. *Id.*

5. *Id.* at *1.

6. *Id.*

7. *Id.*

8. *Id.* at *2.

seconds the officers burst through Mr. Hudson's front door, finding him sitting up, frightened in his easy chair.[9] During the subsequent search, the officers found twenty-three individual baggies of "rock" (otherwise known as crack cocaine) and five individual "rocks," weighing about twenty-five grams on Mr. Hudson.[10]

Police officers have a constitutional duty to knock and announce their presence before executing a valid search warrant.[11] Of course, if the officers have reason to believe that evidence for which they are searching will be destroyed or their lives will be in danger, it is not unreasonable for them to bypass such knock and announce requirements.[12] However, it is undisputed that in the above circumstance, the police were in violation of the knock and announce rule.[13] At trial, Mr. Hudson's attorney moved to suppress the "rock" obtained as a result of the illegal entry.[14] The trial court granted this motion to suppress.[15] On appeal this decision was reversed and remanded.[16] After a bench trial, Mr. Hudson was convicted of possession with intent to sell.[17]

The facts outlined above are those of *Hudson v. Michigan*.[18] *Hudson* encapsulates the dance that our criminal justice system partakes in daily, struggling to find balance between deterring unconstitutional police behavior and convicting the guilty for

9. *Id.* at *1-2 (testimony characterized the entry as "real fast," the officers did not wait to see if anyone was going to answer the door).

10. Brief for United States Attorney General as Amici Curiae Supporting Respondent at *1-2, Hudson v. Michigan, No. 04-1360, 126 S. Ct. 2159 (U.S. Oct. 19, 2005), 2004 U.S. Briefs 1360 (LexisNexis).

11. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

12. United States v. Banks, 540 U.S. 31, 36 (2003).

13. The prosecution conceded that the police were in violation of the knock and announce violation. *See* Brief for United States Attorney General, *supra* note 10, at *2-3.

14. *Id.*

15. *Id.*

16. *Id.* On December 18, 2001 the Michigan Supreme Court denied a leave for appeal on the grounds that the exclusion is not the proper remedy for violations of the "knock and announce" requirement. People v. Hudson, 639 N.W.2d 255 (Mich. 2001). The Michigan Supreme Court held that the inevitable discovery dontrine applied as an exception to the exlcusionary rule in the case of knock and announce violations. *Id.*

17. Brief for United States Attorney General, *supra* note 10, at *2-3.

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

crimes actually committed.[19] There is constant tension between admittance of relevant evidence obtained illegally and the constitutional protections enumerated in the Bill of Rights against such illegal searches and seizures.[20] Particularly, the Fourth Amendment is intended to protect us against unreasonable searches and seizures.[21] The criminal justice system is intended to prosecute and convict the guilty. The exclusionary rule is injected into this system in order to prevent the wheels of "justice" from supporting violations of the Constitution.[22]

The progession of the *Hudson* case culminated with a recent decision by the United States Supreme Court, holding that the officers' violation of Mr. Hudson's Fourth Amendment right to knock and announce did not require exclusion of the evidence seized as a result.[23] This is the first time that the Court has ever found that the exclusionary rule does not apply to protect an essential ingredient of the Fourth Amendment in the context of a fully protected criminal trial.[24] The question certified by the Supreme Court was on the narrow issue of whether knock and announce violations require exclusion under the Fourth Amendment or may be admitted under the inevitable discovery

19. *See, e.g.*, Partricia Manson, *Court Upholds Search That Followed 'No-Knock' Entry*, CHI. DAILY LAW BULL., July 15, 2003, at 1.

20. *See, e.g.*, Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 IND. L.J. 907 (Fall 1989).

21. The Fourth Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.CONST. amend. IV.

22. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (Oct. 1983); *see also* Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("[t]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution."); Bradley, *supra* note 20, at 917.

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

24. The requirement of knock and announce is an integral part of the Fourth Amendment's reasonableness prong. The Court has held that in some cases the exclusionary rule does not apply: Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (exception for parole revocation proceedings); INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (exception for deportation proceedings).

doctrine.[25] In coming to its decision the Court was sharply divided, with a powerful four-justice dissent, written by Justice Breyer.[26] The majority opinion, written by Justice Scalia, conveniently avoided the issue of inevitable discovery, instead focusing its reasoning on the exclusionary rule and attenuated causation.[27] However, beneath the surface of the Court's reasoning, there were important and potentially long-ranging implications concerning the future application of the inevitable discovery doctrine.

The inevitable discovery doctrine has been applied to a wide range of circumstances since the Supreme Court gave it legitimacy in 1988.[28] This expansion poses a serious threat to the continued viability of the Fourth Amendment's warrant requirement. Unfortunately, the Supreme Court's decision in *Hudson* has only furthered this trend. The Court's revision of the attenuation principles connected to the exclusionary rule and its application of those principles to the knock and an-

25. Specifically, the question certified by the Court is:

> 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, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

Question Certified, Hudson v. Michigan, No. 04-1360 (U.S. June 22, 2005), *available at* http://www.supremecourtus.gov/qp/04-01360qp.pdf (last visited Mar. 31, 2007); Transcript of Oral Argument, Hudson v. Michigan, No. 04-1360 (Jan. 9, 2006), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html (last visited Mar. 31, 2007). *See also* Steve Lash, *Drug Suspect Knocks Police Search Before High Court*, CHI. DAILY LAW BULL., Jan. 9, 2006, p.1.

26. *Hudson*, 126 U.S. at 2171. Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg.

27. *Id.* at 2163-65.

28. The Supreme Court first recognized the inevitable discovery doctrine in *Nix v. Williams*, 467 U.S. 431 (1984). The doctrine has since been applied in a variety of circumstances. *See, e.g.*, United States v. Glenn, 152 F.3d 1047 (8th Cir. 1998) (illegal "Terry" pat-down justified by inevitable arrest for driving without a license); United States v. Brown, 328 F.3d 353, 357 (7th Cir. 2003) (warrant-less search justified by eventual warrant); United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995) (inventory search of person); United States v. Zapata, 18 F.3d 971, 971 (1st Cir. 1994) (illegal vehicle search justified by eventual inventory search); United States v. Mancera-Londono, 912 F.2d 373 (9th Cir. 1990) (finding that oral policy requiring search of rental vehicles before return to owners was sufficient to satisfy burden of inevitable discovery).

nounce requirement lay the groundwork for a revolutionary new view of the Fourth Amendment where warrant-less searches are upheld under the guise of inevitable discovery.

This article will argue that the Court's decision in *Hudson*, coupled with the current expansion of the inevitable discovery doctrine, all but guarantee's a "show-down" in the Supreme Court over warrant-less searches. Part I of this article will examine the historical development of the inevitable discovery doctrine. Part II will detail the reasoning set forth by the Supreme Court in *Hudson v. Michigan*. Part III will discuss the general problems associated with the inevitable discovery doctrine, including warrant-less searches, and the potential exacerbation of those problems by the court's posturing of the exclusionary rule in *Hudson*. Lastly, Part IV will look at ways to limit the inevitable discovery doctrine, while still achieving the appropriate balance between deterring unconstitutional police behavior and the harm to society in excluding relevant evidence. Specifically, it will be suggested that limiting application of the inevitable discovery doctrine to only derivative evidence, not primary, is a proper means to achieving a desired balance, especially in the context of warrant-less searches.[29]

I. The Inevitable Discovery Doctrine

If probable cause alone—without putting in train the process of applying for a warrant—were enough to invoke the inevitable-discovery doctrine, that would have the same effect as limiting the exclusionary rule to searches conducted without probable cause. Perhaps that would be a good development; . . .[30]

A. *Limiting Exclusion: The Rise of the Inevitable Discovery Doctrine*

The inevitable discovery doctrine gained legal lifeblood in the Supreme Court decision of *Nix v. Williams*.[31] The doctrine

29. Primary evidence is loosely defined as "tangible materials obtained either during or as a direct result of an unlawful invasion." Wong Sun v. United States, 371 U.S. 471, 485 (1963). For evidence discovered after the primary illegality—derivative evidence—the question to be considered is the degree of taint.

30. United States v. Elder, 466 F.3d 1090 (7th Cir. 2006) (Easterbrook, J.).

31. 467 U.S. 431 (1988).

acts as an exception to the exclusionary rule on the basis that the illegally seized evidence should not be excluded because it *would* have been discovered inevitably by legal means.[32] Although the doctrine had been utilized in the past by circuit and state court decisions,[33] the Supreme Court decision in *Nix* legitimized its use as a valid exception to the exclusion of illegally obtained evidence. In *Nix*, the police obtained the location of the body of ten-year old Pamela Powers through an illegal confession spurred by a "Christian burial speech" by one of the officers.[34] Prior to Williams' confession a search team was only two and one-half miles from where the body was found.[35] The Court was faced with the difficult decision of excluding the body from evidence even though a search team would have found the body anyway. The Court held that the body was admissible in trial since it would have inevitably been discovered without any casual connection to the illegal confession.[36]

The inevitable discovery doctrine has developed as a legitimate exception to the exclusionary rule,[37] which requires that evidence obtained as a result of an illegal search or unlawful entry is the fruit of the illegality and should be suppressed.[38]

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32. *Id.* at 444.

33. *See, e.g.*, United States v. Satterfield, 743 F.2d 827, 846 (11th Cir. 1984); United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980).

34. Nix v. Williams, 467 U.S. 431, 435 (1984). Specifically, the officer's conversation was as follows:

> I want to give you something to think about while we're traveling down the road . . . . They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is . . . and if you get a snow on top of it you yourself may be unable to find it. And since we will be going right past the area [where the body is] on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [Eve] and murdered . . . . [After] a snow storm [we may not be] able to find it at all.

Id. The Supreme Court in a prior decision dealing with this same case held that the Defendant's incriminating statements were an interrogation in violation of his right to counsel. Brewer v. Williams, 430 U.S. 387 (1977).

35. *Nix*, 467 U.S. at 436.

36. *Id.* at 449-50.

37. 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.4(a) (West, 4th ed. 2004).

38. Silverthorne Lumber Co. v. United States, 252 U.S. 383, 390-91 (1920); Wong Sung v. United States, 371 U.S. 471, 485 (1963); Colorado v. Connelly, 479 U.S. 157, 166 (1986) ("[t]he purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution.").

The rationale behind the rule is that exclusion is the only way to deter illegal police behavior and achieve compliance with Fourth Amendment protections.[39] However, evidence obtained through an illegal search or unlawful entry is not always inadmissible. A few important exceptions to the rule of exclusion have developed through common law.[40] Exceptions such as attenuation,[41] good faith,[42] and the independent source doctrine[43] have developed where exclusion does not serve the deterrent purposes so as to outweigh the harm to society in excluding relevant and incriminating evidence.[44]

Outside of the general limitations of the exclusionary rule, a number of elements have developed to burden extensive and potentially abusive use of the inevitable discovery doctrine.[45] The prosecution must establish by a preponderance of evidence that the evidence would have been inevitably obtained through lawful means.[46] There should be a showing that there is no causal nexus between the evidence sought to be admitted and the taint of the illegal search or entry.[47] Essential to admissibil-

39. *Connelly*, 479 U.S. at 166; Stewart, *supra* note 22, at 1389; *Nix*, 467 U.S. at 442-43 (reasoning that the "prosecution is not to be put in a better position than it would have been in if no illegality as occurred."); Stone v. Powell, 428 U.S. 465, 486 (1976).

40. *See generally* LAFAVE, *supra* note 37, § 11.4(a).

41. *Wong Sung*, 371 U.S. at 487-88 (reasoning that "[w]e need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for illegal actions of the police. Rather, the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.").

42. United States v. Leon, 468 U.S. 897 (1984).

43. Murray v. United States, 487 U.S. 533 (1988).

44. Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring) (reasoning that "[t]he notion of the "dissipation of the taint" attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.").

45. For example the First Circuit Court of Appeals has developed a three prong test requiring (1) that the legal means by which the evidence would have been discovered was truly independent; (2) that the use of the legal means would have inevitably led to the discovery of the evidence; (3) that applying the inevitable discovery rule would not provide an incentive for police misconduct or significantly weaken constitutional protections. United States v. Almeida, 434 F.3d 25, 28 (1st Cir. 2006).

46. *Nix*, 467 U.S. at 444 (1984). The prosecution bears the burden proving "demonstrated historical facts capable of ready verification." *Id.* at 444 n.5.

47. *Id.* at 448.

ity is the determination of whether exclusion would place the police in a worse position or in the same position, had the illegality never occurred.[48] The purpose of the exclusionary rule is not to punish the police by putting them in a worse position—it is to deter future police misconduct by placing the police in the same position.[49] The analysis must begin at the point where the violation occurred and ask the question of what would have happened had the unlawful search never occurred.[50]

There is much disagreement among courts as to further requirements and scope of the inevitable discovery doctrine. Some courts have held that the doctrine does not apply to primary evidence obtained as a direct result of the illegal search, limiting the doctrine to derivative evidence.[51] Other courts have found that the deterrent rationale behind the exclusionary rule should guide application of the inevitable discovery doctrine regardless of any distinctions between primary and derivative evidence.[52] Some courts require the government to show that it was actively pursuing a substantial, alternative line of investigation at the time of the constitutional violations.[53] The inevitable discovery doctrine has been limited to cases where it can be shown that an independent search is underway or would occur as a matter of routine practice.[54] The basic rationale is that "[i]f the inevitable discovery doctrine exception can be ap-

48. *Id.* at 444-45.

49. *Id.* at 445-46. The Court rejected a requirement of good faith by officers, reasoning that when an officer contemplates inevitable discovery "there will be little to gain from taking any dubious shortcuts to obtain the evidence." *Id.* This rationale has been called into question by situations like in *United States v. Griffin*, 502 F.2d 959 (6th Cir. 1974), where the police performed an illegal search while in the process of obtaining a search warrant and later tried to argue that the inevitable discovery doctrine should be used to allow in the evidence discovered during the warrant-less search. In such a situation, exclusion of the evidence would put the police in a worse position, but exclusion is essential to prevent police from taking the shortcut of searching without authority of a warrant.

50. United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992).

51. United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 719-20 (D.C. Cir. 1992); People v. Stith, 506 N.E.2d 911 (N.Y. 1987); State v. Crossen, 536 P.2d 1263 (Or. Ct. App. 1975); Reed v. State, 809 S.W.2d 940, 944 (Tex. Ct. App. 1991).

52. United States v. Zapata, 18 F.3d 971 (1st Cir. 1994) (refusing to draw distinctions between primary and derivative evidence. *Id.* at 979 n.7).

53. United States v. Brookins, 614 F.2d 1037, 1037 (5th Cir. 1980).

54. United States v. Boatwright, 822 F.2d 862, 865 (9th Cir. 1987).

plied only on the basis of the [government's] mere intention to use legal means subsequently, the inquiry would hardly be on historical facts."[55] Most courts have rejected the rationale of "if we hadn't done it wrong, we would have done it right."[56] In sum, most courts generally require that the hypothetical means be independent (not causally related) of the initial taint; that there be a strong probability that those means would have been pursued; and that the government's hypothetical pursuit be based upon a documented and historical policy or procedure.

B. *Widespread Application of the Inevitable Discovery Doctrine*

Since the Supreme Court's decision in *Nix v. Williams*, circuit courts across the country have liberally applied the inevitable discovery doctrine to prevent exclusion of illegally obtained evidence.[57] The circumstances of application range from inventory searches to evidence obtained without a search warrant. Most commentators have urged restraint, cautioning against further erosion of Fourth Amendment protections.[58] In the context of America's ongoing push for further crime control,[59] it is unsurprising that the inevitable discovery doctrine has been given a warm welcome among the varying Circuit Courts across the country.

55. United States v. Eng, 971 F.2d 854, 861 (2d Cir. 1992).

56. United States v. Thomas, 955 F.2d 207, 209-10 (4th Cir. 1992) (rejecting this line of reasoning on the basis that it would swallow the exclusionary rule).

57. *See, e.g.*, United States v. Brown, 328 F.3d 353, 357 (7th Cir. 2003) (warrant-less search justified by eventual warrant); United States v. Glenn, 152 F.3d 1047 (8th Cir. 1998) (illegal "Terry" pat-down justified by inevitable arrest for driving without a license); United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995) (inventory search of person); United States v. Zapata, 18 F.3d 971, 971 (1st Cir. 1994) (illegal vehicle search justified by eventual inventory search); United States v. Mancera-Londono, 912 F.2d 373 (9th Cir. 1990) (finding that oral policy requiring search of rental vehicles before return to owners was sufficient to satisfy burden of inevitable discovery).

58. See LAFAVE, *supra* note 37, § 11.4(a) at 269; *see also* Brian S. Conneely & Edmond P. Murphy, Note and Comment, *Inevitable Discovery: The Hypothetical Independent Source Exception to the Exclusionary Rule*, 5 HOFSTRA L. REV. 137, 159 (1976-1977) (arguing that a mechanical application will encourage constitutional shortcuts).

59. David Burnham, *Putting the Legal System in the Dock*, WASH. POST, Feb. 18, 1996, at X05.

Perhaps the most prevalent application has come in the guise of vehicle inventory searches.[60] Generally, an inventory search takes place after impoundment of a vehicle in order to itemize and secure the contents.[61] An inventory search is only valid when the police legally impound the vehicle.[62] Vehicles are impounded or taken into custody for a variety of reasons including arrest, an expired license,[63] or even a lack of automobile insurance.[64] The Supreme Court has granted police wide latitude to arrest for minor traffic offenses where the relevant state law grants such authority.[65] Once an inventory search is under way, the police search must be conducted according to standardized police procedures.[66] The scope of the search may not be entirely within the discretion of the police.[67] However, the police may conduct a broad and detailed search of the vehicle, including the opening of containers, when authorized by local standardized procedures.[68]

Given the wide latitude for both impounding vehicles and searching them, it comes as no surprise that prosecutors have vigorously attempted to utilize inventory searches as a means to inevitably discovering evidence that was initially obtained through unconstitutional means.[69] For example, in *United*

60. 5 WAYNE R. LAFAVE, SEARCH & SEIZURE, § 11.4, 243-44 (West, 3rd ed. 1996).

61. South Dakota v. Opperman, 428 U.S. 364, 369 (1976).

62. *Id.* at 373.

63. *See, e.g.*, United States v. Glenn, 152 F.3d 1047 (8th Cir. 1998) (during traffic stop, driver was subjected to illegal search because he could not produce license, gun found was admitted because officer would have inevitably discovered gun upon running search of defendant and then arresting prior to finding lack of license).

64. *See* Brent A. Rogers, Comment, *Florida v. Wells: The Supreme Court Bypasses Opportunity to Protect Motorists Abuses of Police Discretion*, 77 IOWA L. REV. 347, n.3 (Oct. 1991); *Opperman*, 428 U.S. at 368-69 (sanctioning police as part of their caretaking authority to take vehicles into custody for as little as impeding the flow of traffic); United States v. Cherry, 436 F.3d 769 (7th Cir. 2006).

65. *See* Atwater v. Lago Vista, 532 U.S. 318, 321 (2001) (upholding constitutionality of arrest of woman for seat-belt violation and subsequent search of vehicle).

66. Colorado v. Bertine, 479 U.S. 367, 374 (1987).

67. *See* Florida v. Wells, 495 U.S. 1 (1990).

68. *See Bertine*, 479 U.S. at 368-69 (opening a closed backpack within the car); *Wells*, 495 U.S. at 2 (opening locked briefcase located in the trunk of the car).

69. *See, e.g.*, United States v. Mendez, 315 F.3d 132, 138 (2d Cir. 2002); United States v. Blaze, 143 F.3d 585 (10th Cir. 1998); United States v. Griffiths, 47 F.3d 74, 78 (2d Cir. 1995) (inventory search of person); United States v. Woody, 55

States v. Zapata, federal agents had an ongoing investigation and surveillance of Zapata, based upon a reliable source implicating he was involved in narcotics-related activity.[70] While following Zapata for some time, agents observed erratic driving, discovering that the car he was driving was both unregistered and uninsured.[71] Once Zapata had stopped at a rest stop, the officers made their move, approaching Zapata in a fast food line and asking him to accompany them into the parking lot.[72] Eventually, the police asked Zapata for permission to search the car.[73] Zapata apparently agreed and officers found within the trunk two duffel bags containing packages of cocaine.[74] The Court questioned the validity of the consent and brief detention, but decided to admit the seized evidence anyway on the grounds that the police would have inevitably conducted an inventory search once they impounded the vehicle for lack of insurance or registration.[75] In so deciding, the Court refused to bar application of the inevitable discovery doctrine on the basis that the cocaine was primary evidence, reasoning that the primary/derivative distinction is inapplicable because exclusion of primary evidence would place the prosecution in a worse position had the illegality never occurred.[76]

Zapata represents the ability of police to forego the requirement of consent or a warrant before initiating the search of a

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F.3d 1257, 1270 (7th Cir. 1995); United States v. Mancera-Londono, 912 F.2d 373 (9th Cir. 1990) (finding that oral policy requiring search of rental vehicles before return to owners was sufficient to satisfy burden of inevitable discovery); State v. Moreau, 918 So. 2d 598 (La. App. 3 Cir. 2005); Camacho v. State, 75 P.3d 370, 376 (Nev. 2003); Ettipio v. State, 794 S.W.2d 871, 873 (Tex. App. 1990); *but see* United States v. Kennedy, 2004 U.S. Dist. LEXIS 29235, *17 (D. Minn. Apr. 26, 2004) (reasoning that the inevitable discovery doctrine was inapplicable because there was no evidence that an inventory search would have actually discovered the hidden narcotics).

70. United States v. Zapata, 18 F.3d 971, 973 (1st Cir. 1994).

71. *Id.* at 973. In Massachusetts it was also unlawful to drive without a license or registration. *Id.* at n.2.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 978.

76. *Id.* at 979 n.7. In addition, the Court found that the legal means of discovery need not be underway at the time an unlawful search transpires, only that the authorities had the necessary information to undergo such legal means. *Id.* at 979 n.6.

vehicle.[77] The inevitable discovery doctrine has also been applied to illegal "Terry" pat downs. In *United States v. Glenn*,[78] the Eighth Circuit found that although the police lacked a reasonable suspicion to perform a search of Glenn's person, the evidence obtained would have been inevitably discovered pursuant to a search incident to arrest.[79] The Court reasoned that the police had the authority to arrest Glenn for driving without a license and that they probably would have done so had they never performed the illegal search.[80]

The most shocking application of the inevitable discovery doctrine is where evidence obtained illegally without a search warrant is admissible on the basis that the police would have inevitably obtained a warrant, had they sought one.[81] Those courts allowing such application, have required the prosecution to show the following: (1) the police had a high level of probable cause to obtain a warrant; (2) the police were in the process of obtaining a warrant; and (3) the same evidence would have been obtained pursuant to the eventual warrant.[82] Other courts have rejected the inevitable discovery doctrine's application to eventual warrants.[83] These courts have reasoned that an appli-

77. Interestingly, the police had been pursuing an investigation of Zapata for sometime and had not obtained a search warrant. One cannot help but ask whether the police had acted in bad faith by pre-textually following *Zapata*, running his plates and then engaging in an illegal search knowing full well that it would be admissible later on.

78. United States v. Glenn, 152 F.3d 1047 (8th Cir. 1998).

79. *Id.* at 1049.

80. *Id.* at 1049-50 (finding that because the stop occurred on an interstate highway and that Glenn had no other means of leaving that the officers would have arrested him to prevent furthering the offense of driving without a license).

81. United States v. Brown, 328 F.3d 353, 357 (7th Cir. 2003); Unites States v. Souza, 223 F.3d 1197, 1203-05 (10th Cir. 2000); United States v. Buchanan, 910 F.2d 1571, 1573 (7th Cir. 2000); United States v. Ford, 22. F.3d 374 (1st Cir. 1994); United States v. Whitehorn, 829 F.2d 1225 (2d Cir. 1987); United States v. Castillo, 2006 U.S. Dist. LEXIS 8248, *42-43 (D. Me. Mar. 1, 2006); United States v. Rodriguez-Solis, 2006 U.S. Dist. LEXIS 6164, *51-52 (D. Neb. Jan. 27, 2006); United States v. Castillo, Crim. No. 05-81-P-H, 2006 U.S. Dist. Lexis 8248, *42-43 (D. Me. Mar. 1, 2006).

82. *Souza*, 223 F.3d at 1203-05; United States v. Cabassa, 62 F.3d 470, 473-74 (2d Cir. 1995) (supporting similar test, but holding that in the situation where the government failed to eventually obtain a warrant and where lacking a high level of probable cause application of the inevitable discovery doctrine is inappropriate).

83. *See* United States v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994); United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984) (holding inevitable discovery rule inap-

cation to eventual warrants would be a "radical departure from the Fourth Amendment warrant requirement precedent."[84] As the *Echegoyen* court noted, "[t]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have obtained a warrant would completely obviate the warrant requirement of the fourth amendment."[85] In response, courts applying the doctrine have argued that admitting the evidence would not impair the deterrent value of the exclusionary rule, granting much deference to the good intentions of the police.[86] The fact that some courts regularly apply the inevitable discovery doctrine to legitimize warrant-less searches, makes clear that doctrine has been greatly expanded since *Nix*, and most importantly must be addressed by the Supreme Court.

C. *Underlying Problems with the Inevitable Discovery Doctrine*

For there is but one alternative to the rule of exclusion. That is no sanction at all.[87]

The biggest problem with widespread application of the inevitable discovery doctrine is that by admitting otherwise excludable evidence, any deterrent rationale for unconstitutional police activity is stymied by reducing the constitutional rule sought to be protected to a "paper tiger."[88] Justice Murphy's assertion that the alternative to exclusion is no sanction at all proves just as pertinent today, as the exclusionary rule is slowly being eroded for violations occurring in our homes, cars and streets. This is painfully visible in the application of the inevitable discovery doctrine to knock and announce violations and

plicable where there were no alternative legal means nor were any being actively pursued at the time of the illegal search); Commonwealth v. Benoit, 415 N.E.2d 818, 823 (Mass. 1981).

84. *Johnson*, 22 F.3d at 684.

85. *Echegoyen*, 799 F.2d at 1280 n.7.

86. *See* United States v. Silvestri, 787 F.2d 736, 739-41 (1st Cir. 1986).

87. Wolf v. Colorado, 338 U.S 25, 41 (1945) (Murphy, J., dissenting) (emphasis added).

88. *See* Mattias Luukkonen, *Knock, Knock. What's Inevitable There? An Analysis of the Applicability of the Doctrine of Inevitable Discovery to Knock and Announce Violations*, 35 McGEORGE L. REV. 153, 177 (2004) (essentially, arguing that an automatic application of the inevitable discovery doctrine to knock and announce violations would make the rule meaningless).

was the main impetus for a majority of courts rejecting such application.[89]

However, this problem is more difficult to see in the context of unconstitutional searches justified by discovery pursuant to hypothetically eventual inventory searches. The inevitable discovery doctrine has the potential to make obsolete the constitutional jurisprudence concerning vehicular searches, whenever there is reason to arrest or impound during a traffic stop. There is little reason to follow procedure and wait until the car is impounded before conducting a full search of the car when there are no repercussions. The inevitable discovery doctrine does more than just reduce deterrence; it has the effect of encouraging and justifying unconstitutional searches. The police have an incentive to find evidence more quickly bypassing constitutional restraints.[90]

Taken to its logical extremes, the inevitable discovery exception creates a situation where there is no recognizable expectation of privacy in your vehicle if you are pulled over for driving without insurance or a license, or you are intoxicated, or you are in violation of some traffic law that gives police discretion to impound your vehicle. Essentially, the police no longer need probable cause or reasonable suspicion to conduct a search of your car if there is some administrative violation.[91] The ability to perform full searches without any probable cause opens the door for police misconduct. It shifts the justifying rationale from probable cause to some administrative oversight—erasing the true intent of the Fourth Amendment protections. It is difficult to justify a search based on an underlying rationale of administrative oversight, even for those that argue that the

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89. *See* discussion, *infra* notes 90-94. The Supreme Court in Hudson addressed this issue by finding that other remedial options and internal police procedures existed to provide the proper deterrence to uphold the constitutional integrity of the rule. However, the court did not rest its decision on that issue, rather it simply found that there was no causal "but for" relationship between the violation and evidence seized. The majority's opinion created a very narrow interpretation of "but for" causation and also complicated the test by adding an "attenuated interests" inquiry.

90. *See* People v. Stith, 506 N.E.2d 911, 911 (N.Y. 1987).

91. *See, e.g.*, United States v. Glenn, 152 F.3d 1047, 1047 (8th Cir. 1995) (registration and insurance); United States v. Zapata, 18 F.3d 971, 971 (1st Cir. 1994) (registration violation).

founding principles of the Fourth Amendment rest more on a concept of reasonableness rather than on probable cause.[92]

D. *Inevitable Discovery Applied to Knock and Announce Violations*

Police are constitutionally required to knock and announce their presence before lawfully executing a search warrant on a home.[93] The requirement of knocking and announcing is part of the reasonableness prong of the Fourth Amendment.[94] Knock and announce is required under federal law, as well as most state law.[95] The knock and announce requirement has a long history under both English[96] and American[97] common law. The underlying rationale has been the protection of one's rights within the sanctity of the home.[98] The practical purpose of the law has been to allow the occupants a reasonable time in which to prepare themselves for police visitors.[99]

The knock and announce rule is subject to a few exceptions. The police are not required to knock and announce when there is a reasonable suspicion that evidence will be destroyed or when announcement would place the police in considerable danger of harm.[100] The Supreme Court has held that these excep-

92. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (Feb. 1994) (for the argument that the Fourth Amendment is primarily principled on a theory of 'reasonableness.').

93. Wilson v. Arkansas, 514 U.S. 927, 934 (1995).

94. *Id.*

95. 18 U.S.C. 3109 (2005); MICH. COMP. LAWS SERV. § 28.1259(6) (LexisNexis 2005).

96. *Wilson*, 514 U.S. at 931 (citing *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) for support).

97. *See Wilson*, 514 U.S. at 933 (giving a great historical review of the American adoption of the English common law rule both at common law and through state regulation); Miller v. United States, 357 U.S. 301, 306 (1958).

98. *Wilson*, 514 U.S. at 931 (quoting *Semayne's Case*, 77 Eng. Rep. at 195-96).

99. *See* E. Martha Estrada, *A Toothless Tiger in the Constitutional Jungle: The "Knock and Announce Rule" and the Sacred Castle Door*, 16 J.L. & POL'Y 77, 79 (April 2005) (stating that "[a]t its heart, the 'knock and announce' rule stands for the dignity of the individual: the ability to prepare your property and your mind for governmental intrusion of the most invasive sort").

100. United States v. Banks, 540 U.S. 31, 36 (2003); United States v. Ramirez, 523 U.S. 65, 70 (1998).

tions are fact intensive inquiries and per se rules exempting police from the requirement are unconstitutional.[101]

There has been much controversy as to whether the inevitable discovery doctrine may be applied to evidence obtained as a result of a knock and announce violation.[102] Some courts have answered yes, refusing to exclude evidence obtained subject to a valid search warrant, but executed in violation of the knock and announce rule.[103] The Michigan Supreme Court justified the application of the inevitable discovery doctrine on the grounds that "it was not the illegal means of entry that led to the discovery of the evidence, but, rather, it was authority of the search warrant that enabled the police to search and seize the contested evidence."[104]

It is not surprising, given the wide latitude of application that circuit courts have granted to the inevitable discovery doctrine, that courts are legitimizing such an exception to the knock and announce doctrine. The primary justification is that exclusion would place the police in a worse position, not the same, than had the illegality never occurred.[105] Placing the police in a worse position was not the purpose of the exclusionary rule, nor does it strike the proper balance between deterrence and admitting relevant and truthful evidence.[106]

However, a majority of other courts have rejected this rationale, finding that application of the inevitable discovery doctrine would make the constitutional requirement of knock and

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101. *See* Richards v. Wisconsin, 520 U.S 385 (1997) (ruling that state law exempting per se knock and announce requirements for felony drug searches are unconstitutional).

102. *See e.g.*, Robin L. Gentry, Note, *Why Knock? The Door Will Inevitably Open: An Analysis of People v. Stevens and the Michigan Supreme Court's Departure From Fourth Amendment Protection*, 46 WAYNE L. REV. 1659 (Fall 2000); Troy E. Golden, Note and Comment, *The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Courts*, 13 BYU J. PUB. L. 97 (1998); Loly Garcia Tor, Note, *Mandating Exclusion For Violations of the Knock and Announce Rule*, 83 B.U. L. REV. 852 (Oct. 2003).

103. United States v. Langford, 314 F.3d 892, 894 (7th Cir. 2002); United States v. Espinoza, 256 F.3d 718, 727-28 (7th Cir. 2001); United States v. Jones, 149 F.3d 715 (7th Cir. 1998); People v. Stevens, 597 N.W.2d 53 (Mich. 1999); *but see* Lee v. State, 774 A.2d 1183, 1192 (Md. 2001).

104. *Stevens*, 597 N.W.2d at 64.

105. *Id.* at 64.

106. *Id.*

announce totally obsolete.[107] The Supreme Court, in two older cases, upheld the exclusion of evidence obtained through a violation of the knock and announce requirement.[108] However, these two cases have been distinguished on the grounds that in both cases the police did not have a warrant, and the exclusion was not based upon the Fourth Amendment, but rather upon a federal statute.[109] In response to this apparent split, the Supreme Court granted certiorari in *Hudson v. Michigan*. In determining the applicability of the inevitable discovery doctrine to knock and announce violations, the court also had the opportunity to flush out many of the issues plaguing the doctrine.

II. *Hudson v. Michigan*

Justice Scalia's majority opinion in *Hudson v. Michigan*[110] represents an important examination of the costs and benefits of the exclusionary rule and the requirement of causation as applied to Fourth Amendment violations. In *Hudson*, the Court had a great opportunity to flush out some of the issues regarding the inevitable discovery doctrine's application, especially considering the fact that the question certified was whether the inevitable discovery doctrine creates a *per se* exception to the exclusionary rule for knock and announce violations.[111] Such a *per se* exception creates a very interesting question regarding the degree of causation required between the illegally seized ev-

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107. United States v. Dice, 200 F.3d 978 (6th Cir. 2000); United States v. Marts, 986 F.2d 1216, 1219-20 (8th Cir. 1993); Mazepink v. State, 987 S.W.2d 648, 656-58 (Ark. 1999); State v. Lee, 821 A.2d 922 (Md. 2003); State v. Flippo, 575 S.E.2d 170, 190 (W. Va. 2002); Price v. State, 93 S.W.3d 358 (Tex. Ct. App. 2002) (reasoning that application of the inevitable discovery doctrine would "completely viscerate" the fundamental privacy and safety interests of the knock and announce rule).

108. Sabbath v. United States, 391 U.S. 585 (1968); Miller v. United States, 357 U.S. 301, 301 (1958).

109. *See* Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (discussing applicability).

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

111. The question certified on appeal was:

> 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, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held?

idence and the legal inevitable means of discovery. Unfortunately, the Court danced around the issue of inevitable discovery, ignoring the doctrine and focusing solely on the application of the exclusionary rule.[112] Essentially, the Court held that the evidence derived from the search of Mr. Hudson's home, although the warrant was unconstitutionally executed (violation of knock and announce requirement), did not require exclusion, because the causal relationship between the seizure of the evidence and the illegal execution of the warrant was too attenuated.[113] In doing so, the Court focused on the "substantial social costs" imposed by application of the exclusionary rule, reasoning that exclusion is appropriate only "'where its deterrence benefits outweigh its substantial social costs.'"[114]

Regarding causation, the Court rejected a strict "but for" application for exclusion, reasoning that such a test was never intended by *Mapp v. Ohio*.[115] Instead, the majority opinion reaffirmed that, even assuming a "but for" connection, the appropriate question should be, "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"[116] The Court added that, in addition to a direct evidentiary causation, attenuation may also arise on a more theoretical level, namely, when the "interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."[117] At the end of the day, the Supreme Court essentially crafted a two part test to determine whether evidence should be excluded: (1)

Question Certified, Hudson v. Michigan, No. 04-1360, 126 S. Ct. 2159 (U.S. June 22, 2005), *available at* http://www.supremecourtus.gov/qp/04-01360qp.pdf (last visited Mar. 31, 2007).

112. *See* Hudson v. Michigan, 126 S. Ct. 2159, 2162-65 (2006).

113. *Id.* at 2165.

114. *Id.* (quoting Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

115. *Id.* at 2164. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court, for the first time applied the exclusionary rule to the States through the Fourteenth Amendment. *Mapp* gave a very broad application to the exclusionary rule, finding that "*all* evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible . . . ." *Id.* at 655 (emphasis added).

116. *Hudson*, 126 S. Ct. at 2164 (quoting Wong Sun v. United States, 371 U.S. 471, 487-88 (1963)).

117. *Id.*

whether its deterrent benefits outweigh its substantial social costs, and (2) whether there is causal relationship between the illegality and the evidence seized.

The Court flushed out what it meant by its "attenuation of interests" test in its application to the knock and announce violation. It found that the knock and announce doctrine protects the interests of human life, property, privacy and dignity.[118] The warrant requirement entitles citizens to shield "their persons, houses, papers, and effects" from government scrutiny.[119] The court found that the interests protected by the knock and announce doctrine (property, privacy and dignity) are not related to the interests protected by the warrant requirement (right to shield evidence from the government's eyes).[120] Concluding, the Court held that, "[s]ince the interests that were violated in this case have nothing to with the seizure of the evidence, the exclusionary rule is inapplicable."[121] In case that reasoning was found suspect, the Court felt it necessary to discuss the second part of the of test: balance between deterrence and the social costs of exclusion.[122]

By implication, the Court admitted that application of the exclusionary rule to knock and announce would serve as a deterrent to future violations. However, the Court inevitably found that various social costs weigh against such deterrent value.[123] Those costs include, as always, the risk of releasing dangerous criminals back into society.[124] Additionally, the court found that application of the exclusionary rule in this context would release the "flood" gates of litigation[125] and lead to

118. *Id.* at 2165.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* The Court's distinction between the competing interests is suspect, to say the least. Both the warrant requirement and the knock and announce doctrine arose in different contexts, however they both share a similar fear of government intrusion. The Court's description of the warrant requirement is narrow and it is more than arguable that the interests protected are broader and more closely aligned with those of the knock and announce doctrine. Moreover, both violations are "unreasonable" under the Fourth Amendment.

123. *Id.* at 2168.

124. *Id.* at 2165-66.

125. *Id.* at 2166. The increase in litigation would result because of an increase in defendants' challenging the justification for the knock and announce violation. *Id.* In a moment of quotable whimsy, the court explained: "The cost of

uncertainty by police officers serving warrants.[126] In its weighted balancing act, the Court found that the deterrent benefits associated with exclusion are minimal compared with high social costs.[127] Interestingly and potentially far reaching, the Court found it highly relevant that other remedial options existed, so as to significantly diminish the deterrent benefits of deterrence.[128] Most significantly, the Court found that the option of relief through the Civil Rights Act is possible and preferable.[129] Also, in a rather oxymoronic way, the Court found that increased police professionalism, training in civil liberties, and the desire for promotion through the ranks, would adequately deter police misconduct.[130]

The strength of the majority opinion was limited by a concurring opinion by Justice Kennedy[131] and a four justice dissent written by Justice Breyer, and joined by Justices Stevens, Souter, and Ginsburg.[132] The dissent represents a powerful reminder that this area is far from fully decided and much litigation remains on many of the key issues. The dissent takes pains to point out that the majority opinion "represents a signif-

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entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card." *Id.*

126. *Id.* However, these are the same costs that accompany every Fourth Amendment case. As the Dissent aptly points out, "[t]he majority's 'substantial social costs' argument is an argument against the Fourth Amendment's exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected." *Id.* at 2177 (Breyer, J., dissenting).

127. *Id.* at 2168. The Court states that even if suppression were the only way to deter knock and announce violations, "it would not necessarily justify suppression." *Id.* at 2166.

128. *Id.* at 2167.

129. *Id.* at 2167-68. However, there is little evidence of successful 42 U.S.C. 1983 actions seeking damages for knock and announce violations. *Id.* at 2174 (Breyer, J., dissenting) (the court could not find a single case where anything but nominal damages was awarded); *cf.* Stewart, *supra* note 22, at 1388 (arguing that the deterrent effect of damages actions "can hardly be said to be great," because they are "expensive, time-consuming, not readily available, and rarely successful").

130. Hudson v. Michigan, 126 S. Ct. 2159, 2168 (2006). Such an assertion is ironic because the original rationale for creation and application of the exclusionary rule was that the police could not be entrusted with protection of civil liberties, since it is in there very nature as officers to solve crimes and catch criminals, even if that means violating certain liberties. *See* United States v. Léon, 468 U.S. 897, 929 (1984) (Brennon, J., dissenting); United States v. Weeks, 232 U.S. 383, 394 (1914); Mapp v. Ohio, 367 U.S. 643, 648 (1961).

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

132. *Id.* at 2171.

icant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock and announce protection."[133] Specifically, the majority misinterprets the long held application of the exclusionary rule to the Fourth Amendment, as well as creating a new, unprecedented element of the attenuation principle.

According to the dissent, the exclusionary rule should apply to knock and announce violations, just as it does to any other violation of the Fourth Amendment.[134] An evaluation of whether an officer complied with the knock and announce requirement requires assessing the "reasonableness of a search or seizure" under the Fourth Amendment.[135] Constitutionally, an unreasonable search and seizure is an illegal one.[136] Thus, according to the law set out in both *Weeks* and *Mapp*, the use of illegally searched and seized evidence is barred from use in criminal trials.[137] Anything less, the dissent argues, would amount to a complete disregard of both the *Weeks* and *Mapp* decisions.[138]

Second, the dissent argues that the knock and announce violation in the case was a "but for" cause of obtaining the evidence, and that the majority's assertion that it was not, rests on a fundamental misunderstanding of the law.[139] The dissent found that the majority's separation of the manner of entry from the related search was too thinly sliced.[140] Moreover, the majority's attempt to diminish the causal relationship by emphasizing the fact that the police were in possession of a warrant, implicitly relied upon the inevitable discovery doctrine and misstates it.[141] The inevitable discovery doctrine stands for the principle that "the remedial purposes of the exclusionary

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133. *Id.*

134. *Id.* at 2173.

135. *Id.* (citing Wilson v. Arkansas, 514 U.S. 927, 934 (1995)).

136. *Id.*

137. *Id.*

138. *Id.* at 2174. The dissent also emphasized the important of deterrence and the inefficacy of 42 U.S.C. 1983 actions to fill the void left by the absence of the exclusionary rule. *Id.* (quoting Justice Potter Stewart, *supra* note 22, at 1388 (the deterrent effect of damage actions "can hardly be said to be great," as such actions are "expensive, time-consuming, not readily available, and rarely successful.")).

139. *Id.* at 2177.

140. *Id.*

141. *Id.* at 2177-78.

rule are not served by suppressing evidence discovered through a 'later, lawful seizure' that is 'genuinely independent of an earlier, tainted one.'"[142] In *Hudson*, the existence of a warrant does not make the inevitable discovery doctrine applicable, since the entry was illegal and the warrant cannot be disassociated as independent.[143] To emphasize his point, Justice Breyer asks the question of whether "a warrant that authorizes entry into a home on Tuesday [would] permit the police to enter on Monday?"[144]

Lastly, the dissent argued that the majority gave the word "attenuation" new meaning,[145] departing from the common evidentiary meaning, towards a more esoteric ambiguous definition.[146] This is a radical departure from the earlier meaning of the word and its application to the exclusionary rule.

The Court's departure from earlier interpretations of the exclusionary rule begs the question of what effect it may have on the volatile area of inevitable discovery. Much of the Court's opinion was dicta, considering that it found no "but for" causal connection between the evidence seized and the illegal execution of the warrant.[147] However, both the lack of a "but for" connection in the context of knock and announce violations and the Court's new rationale regarding the exclusionary rule will invariably have long-ranging effects on the inevitable discovery doctrine's application in other situations, such as, warrant-less search and seizures.

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142. *Id.* at 2178 (quoting Murray v. United States, 487 U.S. 533, 542 (1998)).

143. *Id.* at 2179.

144. *Id.*

145. *Id.* at 2179-80

146. *Id.* Attenuation occurs when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id.* at 2180.

147. *See id.* at 2170 (Kennedy, J., concurring) (limiting support to the "but for" causation part of the majority opinion, not Part IV of the majority opinion). This may prove a vital sticking ground for future decisions regarding warrant-less and inventory searches.

III. Expanding the Reach of the Inevitable Discovery Exception: The Effects of *Hudson v. Michigan*

A. *Limiting the Scope of the Exclusionary Rule*

In *Hudson*, the Supreme Court made a decision to admit evidence obtained as a result of a violation of a key ingredient of the Fourth Amendment. In doing so, the Court expanded on the exclusionary rule's attenuation principle, creating a two prong test. The first part of the test is a "but for" causal relationship between the evidence seized and the constitutional violation.[148] The second prong of the test, "interest attenuation," is whether the interests protected by the constitutional guarantee which was violated would be served by the interests protected by the exclusionary rule.[149]

Without mentioning the inevitable discovery doctrine, the *Hudson* Court implicitly incorporated the inevitable discovery doctrine into the two prong analysis of attenuation. In reference to the first prong, the court concluded that there was no "but for" causation because "[w]hether the preliminary misstep [the knock and announce violation] had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."[150] Essentially, the warrant severs the tie between the illegality and evidence seized because "but for" the violation the police would have found the evidence through the warrant.[151] To make this argument, the court must causally separate a valid warrant from its illegal execution.[152] Without explicitly saying so, the court makes the argument that the illegal execution of a warrant does not taint the actual legality of the warrant itself.

This is the same argument that the inevitable discovery doctrine makes, by asking whether the "inevitable" means of

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

149. *Id.* at 2164-65.

150. *Id.* at 2164. However, this is not entirely true, because the police may not have found the drugs and evidence if they had complied with the knock and announce doctrine, because the evidence could have been hidden or destroyed.

151. *Id.*

152. *Id.* Justice Breyer points this anomaly out when he asks the question of whether "a warrant that authorizes entry into a home on Tuesday permit the police to enter on Monday." *Id.* at 2179 (Breyer, J., dissenting).

discovery is sufficiently purged of the initial illegality.[153] The court would have to find that the illegal execution of a warrant does not causally taint the actual warrant itself, so as to require exclusion of evidence seized as a result.[154] This was the argument relied upon by the Michigan Supreme Court and the Justice Department in their argument before the Court in *Hudson*.[155]

The second prong of attenuation that the Supreme Court analyzed also incorporates the policy concepts of the inevitable discovery doctrine. Essentially, the court is asking whether the interests protected by the constitutional guarantee would be served by suppression of the evidence obtained.[156] The interest served by suppression of the evidence is the deterrence of future violations of the guarantee. So the question becomes whether suppression would actually deter future violations so as to protect the interests served. This is similar to the concept of inevitable discovery, that exclusion would place the police in a worse position had the illegality never occurred.[157] Phrased another way, exclusion is not meant to put the person complaining of the violation in a better position had the illegality never occurred. Thus, the argument would be that there is a minimal deterrent value because the evidence would have been obtained in a lawful manner anyway.

What is clear is that *Hudson* represents a major development and expansion of the Supreme Court's attack on the exclusionary rule. At the moment it is unclear how much of an impact *Hudson* will have on future cases and their application of the exclusionary rule. The attenuation test enunciated in *Hudson* implicitly incorporates the causal separations first developed by the inevitable discovery doctrine.[158] It is no longer enough to ask whether evidence was seized as a result of an

153. *See* Nix v. Williams, 467 U.S. 431, 444 (1984) (the inevitable means must be lawful); *see also* Murray v. United States, 487 U.S. 533, 542 (1988) (lawful means are independent of initial illegal means, so as to lack any of the unlawful taint).

154. *See* People v. Stevens, 597 N.W.2d 53, 64 (Mich. 1999).

155. *Hudson*, 126 S. Ct. at 2178.

156. *Id.* at 2164.

157. *See Nix*, 467 U.S. at 445-46.

158. An interesting question would be whether this new development would shift the prosecution's burden of proof. Generally, the prosecution has the burden of establishing the inevitability of the lawful means. *See* Nix v. Williams, 467 U.S.

illegality, the question is now, granted the illegality, whether the same evidence "would have" been obtained by another "inevitable" lawful means.[159] Left unanswered is how these principles would apply to a warrant-less search.

B. *Justifying Warrant-less Searches*

The underlying rationale of the inevitable discovery doctrine is presented with a dire problem when used to prevent exclusion on the basis that a warrant would have been or was in the process of being obtained. Technically, the exception to the exclusionary rule should apply, because the evidence would have been inevitably obtained once a valid warrant was issued, which was under way at the time of search.[160] Exclusion would place the police in a worse position had the illegality not occurred.[161] If the illegality had not occurred, the police would have eventually obtained a valid warrant and obtained the evidence, now excluded. This issue was recently considered in *dicta* by the Seventh Circuit Court of Appeals in *United States v. Elder*.[162]

431, 444 (1984). Now the defense would have the burden of showing an absence of inevitable discovery, rather the prosecution having the final burden of persuasion.

159. This is just like the independent source doctrine, except that there never was an independent source. Unlike in *Murray*, when there is not a warrant or the one warrant was unlawfully executed, the question still has to be phrased in the hypothetical. In *Murray*, the court found that, although the first search was illegal, the second search executed by a warrant was legal. Murray v. United States, 487 U.S. 533, 553 (1988). The second search was an independent source of the evidence, because it was not tainted by anything obtained from the first illegal one. *Id.* Here, the warrant and illegal execution cannot be neatly separated like the two searches in *Murray*. The court must ask in the abstract whether, without the illegal execution, the warrant would have inevitably led to the same evidence and whether the illegal execution taints the warrant, so as to render it "useless."

160. The Seventh Circuit has been the main impetuous for such an application. *See, e.g.*, United States v. Goins, 437 F.3d 644 (7th Cir. 2006); United States v. Brown, 328 F.3d 352, 358 (7th Cir. 2003); United States v. Souza, 223 F.3d 1197, 1203-05 (10th Cir. 2000); United States v. Ford, 22. F.3d 374, 374 (1st Cir. 1994); United States v. Buchanan, 910 F.2d 1571, 1573 (7th Cir. 1990); United States v. Whitehorn, 829 F.2d 1225, 1225 (2d Cir. 1987).

161. *See* Nix v. Williams, 467 U.S. 431 (1984). In the converse, it has been stated the exclusionary rule "should not be used to make the person whose rights have been violated better off than he would be if no violation had occurred." United States v. Brown, 328 F.3d 352, 357 (7th Cir. 2003).

162. 466 F.3d 1090 (7th Cir. 2006).

In *Elder*, the District Court held that the inevitable discovery doctrine applies to prevent exclusion of evidence seized without a warrant.[163] In *Elder*, the police responded to a 911 call informing them that there was "meth" in the area.[164] The police responded to the defendant's home.[165] Upon arrival the police searched a shed next to the house and found chemicals used to make meth.[166] Later, after speaking with the defendant's wife, they searched and seized the evidence in the shed.[167] There was never any attempt to retrieve a warrant to search the shed, although one of the officers testified at the motion hearing that he had probable cause.[168] The District Court did not determine whether the police had consent to search the shed, because it found that the inevitable discovery rule applied.[169]

The District Court held that the police had probable cause and would have eventually obtained a warrant had the illegal search never occurred.[170] The District Court based its holding on the recent Seventh Circuit opinion of *United States v. Brown*.[171] In *Brown* the court held that even though there was clearly no valid consent and no warrant, the evidence seized should not be excluded because the police would have inevitably obtained a warrant.[172] The court tamed its holding by reasoning that the officers were acting in good faith, in that they thought they had consent and if they knew for sure that they did not they would have obtained a warrant.[173]

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163. United States v. Elder, 352 F. Supp. 2d 880, 888 (C.D. Ill. 2005).

164. *Id.* at 881-82.

165. *Id.* at 882.

166. *Id.* at 883.

167. *Id.*

168. *Id.*

169. *Id.* at 886-87. Most likely there was no consent; both the wife and defendant's father testified that they gave permission to search the house, but never the shed. There was no contradicting testimony from the officers. *Id.* at 886 n.3.

170. The court reasoned that "[t]o demonstrate that a discovery was truly 'inevitable,' the prosecution must establish that it had probable cause and prove the existence of 'a chain of events that would have led to a warrant . . . independent of the search.'" *Id.* at 887 (citing United States v. Brown, 328 F.3d 352, 357 (7th Cir. 2003)).

171. *Brown*, 328 F.3d at 352.

172. *Id.* at 356-57.

173. *Id.* at 357.

Both *Elder* and *Brown* are similar to the fact pattern in *United States v. Murray* and the court's application of the independent source doctrine.[174] However, in *Murray* the police actually returned with a warrant, and the court asked the question of whether the valid warrant and search was tainted by anything gathered in the first illegal search.[175] In *Elder*, there was no warrant; therefore, the court had to apply the inevitable discovery doctrine.

The Seventh Circuit conveniently side stepped this thorny issue by holding that because the initial search of the shed in response to the 911 call was reasonable, the subsequent search was also reasonable. However, Judge Easterbrook did not fail to posture that "[t]he usual understanding of that doctrine is that the exclusionary rule should not be applied when all steps required to obtain a valid warrant have been taken before the premature search occurs."[176] The court further reasoned that if probable cause alone, without a warrant, were enough to evoke the inevitable discovery doctrine, then the exclusionary rule would be effectively limited to searches without probable cause.[177] This is a revolutionary posture of the Fourth Amendment's requirements. What is even more surprising is that, three judges sitting on the Seventh Circuit Court of Appeals believed that this "would be a good development," since "the main requirement of the [*F*]*ourth* [A]mendment . . . is that the search be reasonable."[178] The opinion that a search is reasonable without a warrant, as long as there is probable cause, flies in the face of Supreme Court precedent holding that the warrant is an integral part of establishing probable cause.[179] Warrants are is-

174. United States v. Murray, 487 U.S. 533 (1988).

175. *Id.* at 542.

176. United States v. Elder, 466 F.3d 1090, 1191 (7th Cir. 2006) (citing Murray v. United States, 487 U.S. 533 (1988); Nix v. Williams, 467 U.S. 431 (1984)). The independent source doctrine, as articulated in Murray, does not stand for this proposition, since without a warrant there is no independent source. It is debatable whether the inevitable discovery doctrine stands for this proposition.

177. *Id.*

178. *Id.* Judge Easterbrook wrote the opinion and was joined by Judges Posner and Sykes. For more information on the "movement" re-interpreting the Fourth Amendment and its "reasonableness" clause, see generally Amar, *supra* note 92.

179. *See* Katz v. United States, 389 U.S. 347, 357 (1967). It is a "'basic principle of Fourth Amendment law that searches and seizures inside a home without a

sued by neutral magistrates, and without that neutrality, police officers' would take the role of determining whether probable cause existed to invade the sanctity of the home.[180] The Seventh Circuit explicitly left the decision of "whether to trim the exclusionary rule in this fashion" to the Supreme Court.[181] Even though the court claimed to reserve the issue for the Supreme Court, they have already trimmed the exclusionary rule by invoking the inevitable discovery doctrine in *Brown*.

Such a decision by the Supreme Court may not be so far off, and its decision may be highly influenced by its revision of the exclusionary rule in *Hudson*. On the surface, *Hudson* is easily distinguished from the warrant-less search case, because in *Hudson* the officers had a valid search warrant, but just failed to legally execute it. In a case like *Elder*, there was no warrant. In *Hudson*, the circumstance that broke the causal link was the existence of the warrant.[182] In a case like *Elder*, the argument must be that the existence of probable cause and the likelihood that the police would have pursued a warrant are enough to break the causal taint between the warrant-less search and the evidence seized.[183] The eventual legal means may be great enough to break the taint of initial illegality.

Certainly, the second interest attenuation test crafted by the Supreme Court would support the argument. The warrant requirement protects citizens' entitlement to "shield "their persons, houses, papers, and effects."[184] More generally, the warrant requirement protects citizens from unreasonable searches.[185] Reasonableness is determined by probable

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warrant are presumptively unreasonable.'" Groh v. Ramirez, 540 U.S. 551, 559 (2004) (quoting Payton v. New York, 445 U.S. 573, 586 (1980)).

180. Police officers cannot be trusted with such discretion because it is in their interest to be zealous investigators, checked only by the courts. *See* United States v. Leon, 468 U.S. 897, 929 (1984) (Brennon, J., dissenting).

181. *Elder*, 466 F.3d at 1091.

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

183. For example, in *United States v. Souza*, 223 F.3d 1197, 1203-05 (10th Cir. 2000), the court required the prosecution to show the following: (1) the police had a high level of probable cause to obtain a warrant; (2) the police were in the process of obtaining a warrant; and (3) the same evidence would have been obtained pursuant to the eventual warrant.

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

185. *Id.*

cause.[186] If probable cause is present and there is evidence that a warrant would have been issued, suppression would not serve the interests of protecting against unreasonable searches. Like in inevitable discovery cases, suppression would place the police in a worse position had the warrant-less search never taken place. Like in situations where a warrant-less search is justified by an eventual vehicular inventory search, the deterrent value of exclusion is minimal because the police would have obtained the evidence anyway through legal means.[187]

However, the inquiry would not end with causation. The court would also have to decide whether the deterrent benefits of exclusion outweigh its "substantial social costs."[188] In *Hudson*, the court found that exclusion would obviously be a deterrent to future knock and announce violations; however, it found that other remedial options existed to better remedy the violation.[189] The court placed a large emphasis on the societal costs of exclusion because of the constable's blunder.[190] However, the Supreme Court would be hard pressed to find that section 1983 actions and increased police integrity are enough to safeguard the warrant requirement without completely eradicating it.

This is in line with the majority of other courts considering the issue of warrant-less searches and the inevitable discovery doctrine. Most courts have rejected this application of the inevitable discovery exception on the grounds that it would effectively make the warrant requirement obsolete.[191] Although technically a warrant-less search may be justified by inevitable discovery pursuant to a yet obtained warrant, the effect cannot be constitutionally justified. This paradox presents the main problem associated with the rule.[192] The inevitable discovery

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187. *See* United States v. Zapata, 18 F.3d 971 (1st Cir. 1994).

188. *Hudson*, 126 S. Ct. at 2165 (citing Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)).

189. *Id.* at 2167.

190. *Id.* at 2166-68. This is the argument that the Seventh Circuit made in *Elder*, reasoning that "[a]llowing the criminal to go free because of an administrative gaffe that does not affect substantial rights seems excessive." United States v. Elder, 466 F.3d 1090, 1091 (7th Cir. 2006) (the violation of the warrant requirement not being a substantial right).

191. *See, e.g.*, United States v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994); United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986).

192. *See Johnson*, 22 F.3d at 683.

exception is not narrowly tailored to adequately protect individual liberties when the only limitation is that the evidence would have been obtained through lawful means. Even when the possibility that evidence would have been obtained lawfully is clear, the taint of the evidence is often too great to justify admission. In *Hudson*, the Supreme Court's posturing of the exclusionary rule's principle of attenuation in the hypothetical ("would have") and its creation of an attenuated interests test comes very close to engulfing the principles of the inevitable discovery exception. In doing so, the court has re-crafted the scope and limits of the exclusionary rule, so as to include the possibility that evidence seized without a warrant is not protected by the exclusionary rule—much like the result when the inevitable discovery doctrine is taken to its logical extremes.

IV. Imposing Limitations: Restoring Constitutional Integrity to the Doctrine of Inevitable Discovery

"Two roads diverged in a wood,
and I—I took the one less traveled by,
And that has made all the difference."[193]

The most logical and judicially prudent way to limit the stretch of the inevitable discovery doctrine would be to limit its application only to derivative evidence obtained as a result of the constitutional violation. Primary evidence would be inapplicable to the inevitable discovery doctrine because it is too tainted by the initial illegality to ensure further deterrence of police illegality in the future. Some courts have adopted this approach as the only reasonable policy.[194] Primary evidence is loosely defined as "'tangible materials obtained either during or as a direct result of an unlawful invasion.'"[195] For evidence discovered after the primary illegality—derivative evidence—the

193. ROBERT FROST, *The Road Not Taken*, *in* THE ROAD NOT TAKEN: A SELECTION OF ROBERT FROST'S POEMS 270, 271 (Henry Holt & Company 1951).

194. *See* United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 719-20 (D.C. Cir. 1992); People v. Stith, 506 N.E.2d 911 (N.Y. 1987); State v. Crossen, 536 P.2d 1263, 1264 (Or. Ct. App. 1975).

195. *Stith*, 506 N.E.2d at 913 (citing Wong Sun v. United States, 371 U.S. 471, 485 (1963)).

question to be considered is the degree of taint.[196] Determining how tainted the evidence is requires a balancing of the individual intrusion, police deterrence, and need for relevant evidence in prosecuting crime.[197] The problems associated with warrantless search cases make it clear that only a ban on primary evidence obtained is capable of properly deterring widespread police misconduct.

Appellate courts that have not adopted a bright-line ban on primary evidence have developed a number of different approaches to narrow the application of the inevitable discovery exception.[198] Some courts have required a three part test: (1) that the legal means are truly independent from the illegality; (2) that both the use of the legal means and the discovery by that means would be inevitable; and (3) that the application of the inevitable discovery exception does not provide an incentive for police misconduct or significantly weaken the Fourth Amendment protections.[199] These requirements have posed some serious questions for courts in varied contexts.

Some courts have worried that allowing the inevitable discovery doctrine to apply based on routine procedures is too speculative.[200] To stymie that speculation, these courts have required the police to show, not only that there was a hypothetical procedure that would have produced the same evidence, but that those other procedures were being actively pursued prior to the time the evidence was obtained through illegal means.[201] However, the active pursuit requirement does not solve the

196. United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 719 (D.C. Cir. 1992).

197. *Id.* at 719-21.

198. *See infra* notes 200-217 and accompanying text.

199. *See* People v. Stevens, 597 N.W.2d 53, 60 (Mich. 1999) (citing United States v. Silvestri, 787 F.2d 736 (1st Cir. 1986)); United States v. Rullo, 748 F. Supp. 36, 44 (D. Mass. 1990) (holding the inevitable discovery doctrine inapplicable because although the police would have inevitably found the evidence through lawful means, failure to exclude would create too great an incentive for police misconduct).

200. Nix v. Williams, 467 U.S. 431, 444 n.5 (1984) (requiring a demonstration of historical fact establishing that the evidence would have been found).

201. *See* Jefferson v. Fountain, 382 F.3d 1286, 1986 (11th Cir. 2004); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984); United States v. Brookins, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980); Golden, *supra* note 102.

problem highlighted within warrant requirement circumstances.[202]

For example, in the context of knock and announce violations or warrant-less searches, the legal means is the valid search warrant. Obviously this meets the active pursuit requirement, since getting the warrant is an active pursuit and the warrant itself is the legal means attenuated from the illegality. The court in *People v. Stevens* ruled that there was no causal relationship between the knock and announce violation and the warrant (eventual legal means).[203] Without the causal relationship, there was no illegal taint, thus precluding exclusion.[204] This was reasoning that the Supreme Court eventually agreed with in *Hudson*, but incorporated into the attenuation doctrine instead.[205]

However, when there is a causal gap between the legal means and the violation, the active pursuit doctrine is not a useful limitation in preventing the inevitable discovery doctrine from infringing on the Fourth Amendment.

A few state courts have attempted to develop a good faith rule incorporated in the inevitable discovery exception.[206] However, in *Nix v. Williams*, the Supreme Court ended any dispute about such a requirement in federal courts, reasoning that there was no reason to inquire into the subjective intent of the police officers.[207] In contrast, law professor Eugene Shapiro argues that a good faith requirement is essential in determining the applicability of the inevitable discovery exception, because any potential admissibility or exclusion is essential to deterrence of police misconduct.[208] When evidence is admissible through the inevitable discovery exception, police may be encouraged to take constitutional shortcuts, when they know

202. *See* Luukkonen, *supra* note 88, at 178.

203. *Stevens*, 597 N.W.2d at 64.

204. *Id.* at 60.

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

206. *See* State v. Wahl, 450 N.W.2d 710 (N.D. 1990) (requiring that the police show an absence of bad faith); *see generally* John E. Fennelly, *Refinement of the Inevitable Discovery Exception: The Need for A Good-Faith Requirement*, 17 WM. MITCHELL L. REV. 1085 (1991).

207. Nix v. Williams, 467 U.S. 431, 467 (1984).

208. Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 GONZ. L. REV. 295, 308 (2003).

there are no repercussions.[209] Indeed, the main impetus for the rule is to prevent relevant and truthful evidence from being excluded because of the "constable's blunder,"[210] when it may have been inevitably discovered through lawful means.[211] When police act in bad faith, taking shortcuts around constitutional procedures, we are no longer dealing with a mere blunder, but rather a deliberate and effective way of getting around the Constitution.

The New York Court of Appeals has not addressed a good faith requirement, but has considered the problem of deterrence, ruling that the inevitable discovery exception does not apply to primary evidence obtained as a result of the initial illegality.[212] In *People v. Stith*, the police unlawfully searched the cab of a truck trailer during a routine traffic stop, uncovering a loaded gun.[213] The evidence was admitted at trial on the basis that the police would have discovered the evidence pursuant to a legal inventory search, if they had performed a registration check and discovered that the vehicle was stolen.[214] The New York Court of Appeals rejected this line of reasoning, holding that application of the inevitable discovery exception to primary evidence would "amount to a post hoc rationalization of the initial wrong," leading to "an unacceptable dilution of the exclusionary rule."[215] The Court went on to reason that a failure to exclude primary evidence would encourage unlawful searches by police in hope that probable cause would develop after the

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209. *Id.*

210. *See* People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.) ("The criminal is to go free because the constable has blundered.").

211. *Nix*, 467 U.S. at 488 (noting that the inevitable discovery doctrine helps to dissipate the extreme effect of Cardozo's reasoning, by allowing evidence to be admissible when there is no sufficient nexus between the illegality or blunder and the means inevitably discovered by).

212. People v. Stith, 506 N.E.2d 911 (N.Y. 1987); *see also* People v. Turriago, 90 N.Y.2d 77 (N.Y. 1997) (holding that the inevitable discovery doctrine applies to secondary evidence seized pursuant to a hypothetical inventory search); People v. Solano, 539 N.Y.S.2d 494 (App. Div. 1989) (refusing to apply the inevitable discovery doctrine to primary evidence seized during illegal inventory search); *but see* United States v. Pimentel, 810 F.2d 366, 368 (2d Cir. 1987) (rejecting any distinction between direct and indirect evidence).

213. *Id.* at 912.

214. *Id.*

215. *Id.* at 914 (emphasis in original).

fact.[216] In addition to New York, the Court of Appeals in the District of Columbia and the highest court in Oregon have both ruled along similar lines.[217]

Limiting the inevitable discovery doctrine to derivative evidence is contravention of the Supreme Court's opinion in *Hudson v. Michigan*. Specifically, the Court reasoned that the exclusionary rule may not apply even if there is a "but for" link between the evidence and illegal taint.[218] If finding a "but for" connection, the exclusionary rule may not apply if the interests served by the "right" are not served by the interests of exclusion[219] or when the substantial social costs of exclusion outweigh the benefits of deterrence.[220] Whether the tainted evidence is derivative or primary, the decision to apply the exclusionary rule involves a complicated process of balancing all the interests involved.

The Supreme Court should limit its decision in *Hudson* so that the exclusionary rule would still be applicable to the situation where the police attempt to justify a warrant-less search on the basis that they could have obtained a warrant. This reasoning is along the same line as those cases holding that the inevitable discovery doctrine is inapplicable where the police attempt to justify admission on the grounds that they were in the process of obtaining a warrant.[221] The dissent in *Hudson* addresses this situation reasoning that the inevitable discovery doctrine cannot be used to "avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant) simply by showing that it could have obtained a valid warrant had it sought one."[222] It is not appropriate to apply the inevitable dis-

216. *Id.*

217. United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars ($639,558) in United States Currency, 955 F.2d 712, 719-20 (D.C. Cir. 1992); State v. Crossen, 536 P.2d 1263, 1264 (Or. Ct. App. 1975).

218. Hudson v. Michigan, 126 S. Ct. 2159, 2164 (2006). When the police would not have obtained the evidence "but for" the constitutional violation, the evidence is considered "primary."

219. *Id.* at 2164-65.

220. *Id.* at 2165-66.

221. *See* United States v. Johnson, 22 F.3d 674, 683 (6th Cir. 1994); United States v. Echegoyen, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986); United States v. Satterfield, 743 F.2d 827 (11th Cir. 1984); Commonwealth v. Benoit, 415 N.E.2d 818, 823 (Mass. 1981).

222. *Hudson*, 126 S. Ct. at 2178.

covery doctrine in circumstances where a failure to exclude would eliminate all incentive for police to abide by the Constitution.[223]

Even if the police maintain that standardized procedures would have uncovered the same evidence, not excluding primary evidence would encourage further police shortcuts and fail to deter future unconstitutional activity.[224] This can be seen in the context of knock and announce cases, where the evidence obtained is a direct result of the illegal entrance. Deterrence of police misconduct is especially important when, unlike in *Hudson*, there is no warrant. Not excluding the evidence can only send one message to the police: that the Constitution is not a standard to be judged by, but merely a signpost, long stripped of any meaningful direction.

V. Conclusion

It has been over twenty years since the Supreme Court has made any decision discussing the inevitable discovery doctrine.[225] Circuit and state courts are increasingly becoming more divided on the doctrine's scope and applicability. The Supreme Court should lay down a bright-line rule determining the future effect of the inevitable discovery rule. In doing so, the Court must keep in mind the inherent potential for the doctrine to weaken constitutional protections by avoiding the exclusionary rule, such as, in the case of warrant-less searches. Limits must be set in order to reign in the scope of the doctrine. Only by creating a bright-line rule prohibiting application to primary evidence, can the court ensure the proper deterrence necessary for protecting our fundamental rights under the Constitution.

223. *Echegoyen*, 799 F.2d at 1280 n.7; *c.f. Johnson*, 22 F.3d at 684. This is the third prong in test developed by the First Circuit in United States v. Silvestri, 787 F.2d 736, 744 (1st Cir. 1986). For an application, *see* United States v. Rullo, 748 F. Supp. 36, 44-45 (D. Mass. 1990). The problem with this test is determining when a constitutional right has been made obsolete by a failure to exclude.

224. *C.f.* Stewart, *supra* note 22, at 1389 (arguing that for constitutional violations, "a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the Fourth Amendment. There is only one such remedy—the exclusion of illegally obtained evidence.").

225. The last and only decision the court made was in *Nix v. Williams*, 467 U.S. 431 (1984).

Particularly, where warrant-less searches are involved, exclusion is the only remedy capable of ensuring future compliance with the warrant requirement under the Fourth Amendment.