The constitutional “knock and announce” rule—the principle that officers executing a search warrant must knock and announce their presence to the home occupant before forcing entry into the home—is one of the most recently recognized constitutional rights. Although long a principle of common law, it was only in 1995 that the Supreme Court first recognized the rule as a component of the Fourth Amendment’s broad individual protections. Its life as a full-fledged Fourth Amendment right, however, was short-lived. This past term, in Hudson v. Michigan, the Court held that a violation of this Fourth Amendment right does not permit a criminal defendant to suppress inculpatory evidence obtained subsequent to that violation. Although the Court had already riddled the “knock and announce” rule with exceptions in various prior decisions, Hudson was important in that it definitively confirmed the rule’s status as a second-tier constitutional right. Apart from its effect on the “knock and announce” rule, however, Hudson may ultimately have far more significant consequences for the exclusionary rule. The Court’s use in Hudson of an amorphous cost/benefit balancing approach to divorce the “knock and announce” rule from the exclusionary rule, may portend future High Court decisions eroding the exclusionary rule’s scope as a remedy for Fourth Amendment violations.

The constitutional “knock and announce” rule—the principle that officers executing a search warrant must knock and announce their presence to the home occupant before forcing entry into the home—is one of the most recently recognized constitutional rights. Although long a principle of common law, it was only in 1995 that the Supreme Court first recognized the rule as a component of the Fourth Amendment’s broad individual protections. Its life as a full-fledged Fourth Amendment right, however, was short-lived. This past term, in Hudson v. Michigan, the Court held that, despite its many noble and worthy attributes, the “knock and announce” rule does not implicate the exclusionary rule, the traditional manner of enforcing Fourth Amendment rights. Thus, with Hudson, a “knock and announce” rule violation does not affect the validity of evidence uncovered subsequent to that violation for purposes of criminal prosecution. In effect, the Court’s ruling signals the death knell of the “knock and announce” rule as a legitimate Fourth Amendment right and relegates the “knock and announce” rule to a second-tier constitutional status.

Far from surprising, the Hudson ruling was only the final step in the Court’s steady effort to weaken the “knock and announce” rule. Ever since the justices first recognized the rule as a constitutional right, the Court has been whittling the rule away such that even before Hudson, the “knock and announce” rule was riddled with exceptions. Nonetheless, Hudson is a significant “knock and announce” rule decision, because it finally puts to rest the constitutional importance of the “knock and announce” rule in the criminal context. Although the Court left open the possibility that the rule will still carry weight through civil enforcement, it is unlikely that civil actions will prove as potent as the exclusionary rule in enforcing the “knock and announce” rule.

Of even greater importance than Hudson’s impact on constitutional “knock and announce” rule jurisprudence are Hudson’s potential implications for the exclusionary rule in general. The Court’s election in Hudson to dissociate the “knock and announce” rule from the exclusionary rule, after having passed up numerous other opportunities to so hold only a few years beforehand, suggests that the Court’s view on the exclusionary rule may be shifting. Depending on the extent of this shift, the analytical approach the Court used in Hudson, a balancing of costs of enforcement versus benefits, may have broader applicability to other Fourth Amendment rights. The effects of the Hudson decision on other Fourth Amendment rights, therefore, remains to be seen. But what does appear clear after the Court’s Hudson decision is that the constitutional “knock and announce” rule will no longer directly affect the outcome of criminal prosecutions.
The Supreme Court’s Pre-Hudson “Knock and Announce” Rule Jurisprudence

Although the Supreme Court has only recently recognized the “knock and announce” rule as a right protected by the Fourth Amendment, its constitutional foundation—the sanctity of the home—is well-established in Fourth Amendment jurisprudence. “[P]hysical entry of the home,” the Court has stated, “is the chief evil against which the wording of the Fourth Amendment is directed.” Thus, the Fourth Amendment principally “stands for the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”

Given this history, it is not surprising that the “knock and announce” rule has long operated through legislative statute. Nevertheless, it was not until 1995 that the Supreme Court first recognized the “knock and announce” rule as part and parcel of the Fourth Amendment. In Wilson v. Arkansas, a criminal defendant had moved to suppress evidence submitted against him based on police officers’ failure to “knock and announce” their presence before entering his home pursuant to a search warrant. The Arkansas Supreme Court, in rejecting the defendant’s argument that the Fourth Amendment required suppression, stated that there was “no authority” for the notion that the Constitution requires that officers knock and announce their presence while executing an otherwise valid search warrant.

The Supreme Court reversed the decision, holding that “the common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment.” The Court evaluated the issue by focusing on the traditional protections afforded by the common law against unreasonable searches and seizures at the time of the founding. Surveying English law at the time the Constitution was drafted and ratified, the Court noted that the principles underlying the “knock and announce” rule had long been part of the common law. It was recognized as common law, the Court stated, that, before the king’s sheriff may break into an individual’s home, “he ought to signify the cause of his coming, and to make request to open doors,” because the law “abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue.” Further review of 18th- and 19th-century cases further confirmed that the “knock and announce” rule was part of the common-law inquiry regarding the reasonableness of the search. Therefore, the Court opined, “we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.” In its dicta, however, the Court tempered its holding, suggesting that appropriate circumstances might warrant dispensing the rule. The Court left it to the lower courts to sort out these issues.

Predictably, confusion in the lower courts soon necessitated another Supreme Court decision related to the “knock and announce” rule. In Richards v. Wisconsin, the Wisconsin Supreme Court applied its blanket rule that the requirements of the “knock and announce” rule could be dispensed with in felony drug cases. The Court disagreed of the Wisconsin Supreme Court’s approach, characterizing it as an “overgeneralization” that “impermissibly insulates [felony drug] cases from judicial review.” Whether or not the “knock and announce” rule may be dispensed with, the Court stated, must be determined by analyzing “the facts and circumstances of the particular entry” rather than by relying on blanket rules.

In so doing, the Supreme Court dismissed the notion that the “knock and announce” rule is “inconsequential” in comparison with its other, more well-known Fourth Amendment brethren: “While it is true that a no-knock entry is less intrusive than, for example, a warrantless search, the individual interests implicated by an unannounced, forcible entry should not be unduly minimized.” The “knock and announce” rule permits an individual both the opportunity “to comply with the law and to avoid the destruction of property” and to prepare for police to enter the home by “pulling[ing] on clothes or getting[ting] out of bed.”

Nevertheless, the Court qualified its ruling, stating that a “no-knock” entry may be justified under exigent circumstances, such as when police “have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by...” However, the Court held that police would not have a “reasonable suspicion” that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation. The reasonable suspicion standard functioned adequately by itself as the benchmark for all determinations of exigency.

The Supreme Court disagreed with the Ninth Circuit’s focus on property destruction. The Court instructed that it was “obvious” that reasonable suspicion alone is sufficient to justify a “no-knock” entry, even when such entry results in destruction of property. “Whether such a ‘reasonable suspicion’ exists,” the Court opined, “depends in no way on whether police must destroy property in order to enter.” Rather, “[u]nder Richards, a no-knock entry is justified if police have a ‘reasonable suspicion’ that knocking and announcing would be dangerous, futile, or destructive to the purposes of the investigation.” The reasonable suspicion standard functioned adequately by itself as the benchmark for all determinations of exigency.

Nonetheless, the Court cautioned that, in theory, “excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even
though the entry itself is lawful and the fruits of the search are not subject to suppression.” This observation would later play a crucial role in the Court’s ruling in *Hudson* that a “knock and announce” rule violation does not implicate the exclusionary rule.

Finally, in *United States v. Banks*, the last “knock and announce” decision before *Hudson*, the justices addressed another exigent circumstances exception to the “knock and announce” rule: the standards that apply in determining how long officers executing a valid search warrant must wait before forcing their way into a home after knocking and announcing their presence. On direct appeal, the Ninth Circuit had created a broad categorical approach to this question, requiring that trial courts consider whether a pre-existing exigency was present and whether forceless entry was possible. The Supreme Court rejected this categorical approach, holding that the question should be answered by referring to the totality of the circumstances. Because the law “abors the destruction or breaking of any house,” and one of the central purposes of the “knock and announce” rule “is to give a person inside the chance to save his door,” the Court held that “the need to damage property in the course of getting in is a good reason to require more patience than it would be reasonable to expect if the door were open.” Yet, in the case at hand, in which the defendant was suspected of distributing drugs and police officers sought to confiscate cocaine in his home, the Court ruled that 15–20 seconds was a reasonable period of time to wait before forcing entry into the home.

**Hudson v. Michigan**

Certainly, the overarching trend in the Supreme Court’s “knock and announce” rule jurisprudence following its announcement of the constitutional “knock and announce” rule in *Wilson* was to limit the reach of the rule. Based on this general trend, one lower court had anticipated the Court’s decision in *Hudson* and held that a violation of the “knock and announce” rule does not warrant excluding evidence obtained as a result of the search. Nevertheless, it was not clear from the Court’s decisions subsequent to *Wilson—Richards, Ramirez, and Banks—that the Court would later hold that the exclusionary rule never applies to a violation of the “knock and announce” rule. After all, each of the Court’s pre-*Hudson* “knock and announce” cases had arisen in the context of a suppression motion. The Court had thus been afforded numerous opportunities to dissociate the “knock and announce” rule from the exclusionary rule before *Hudson* but had failed to do so.

All that changed with the *Hudson* ruling, in which the Supreme Court effectively rendered the “knock and announce” rule a second-class constitutional right by holding that a violation of the rule does lead to the suppression of evidence uncovered subsequent to that violation. The facts in *Hudson* presented the issue squarely: The State had conceded that the entry in question had violated the “knock and announce” rule, and the only question for the Court was to determine the proper remedy for this violation. The Court initially observed that, even though the common-law principle requiring that officers announce their presence before entering the home “is an ancient one,” the “knock and announce” rule is “not easily applied” and is riddled with exceptions. The Court then went on to hold that the “knock and announce” rule does not trigger the exclusionary rule for two independent reasons.

The first reason the Court noted was that the interests underlying the “knock and announce” rule are incompatible with the rationale behind the need to suppress evidence. The Court explained that the exclusionary rule does not apply when the constitutional violation is attenuated from the evidence obtained “when the causal connection is remote” or when “the interest protected by the Constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.” This latter basis for attenuation, the Court stated, applied here, because the interests protected by the “knock and announce” rule would not be served by suppressing the evidence obtained. The Court identified three interests protected by the “knock and announce” rule:

1. “the protection of human life and limb” from mistaken self-defense;
2. “protection of property,” namely, the entryway; and
3. protection of “privacy and dignity” by affording the home occupant “the opportunity to collect oneself before answering the door.”

None of these interests, however, justified suppressing evidence that had been obtained as a result of the violation of the “knock and announce” rule, because, according to the Court, the rule “has never protected … one’s interest in preventing the government from seeing or taking evidence described in a warrant.”

The second reason the Court gave for its decision that the “knock and announce” rule does not trigger the exclusionary rule was that it would be imprudent to suppress evidence based on a violation of the “knock and announce” rule, because the costs of suppression outweigh any potential benefits. The exclusionary rule is only applied, the Court stated, when its deterrent benefits outweigh its substantial social costs, and when it comes to the “knock and announce” rule, these costs are simply too steep. For starters, given the many exceptions the Court had already carved into the “knock and announce” rule, trial courts would find it difficult to determine whether or not a violation had actually occurred, and, consequently, police officers would hesitate to tread too close to the ambiguous line between a permissible entry and a “knock and announce” rule violation. With such ambiguity surrounding the rule, criminal defendants would be encouraged to routinely file “knock and announce” rule claims based on any police entry and thereby enter a “lottery” in which the prize would be suppression of inculpatory evidence. “The costs of entering this lottery would be small,” the Court cautioned, “but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card.” In light of the “considerable” social costs
of applying the exclusionary rule to “knock and announce” rule violations, the Court concluded that resorting to “the massive remedy of suppressing evidence of guilt is unjusti-

Moreover, the Court opined that the potential benefits of applying the exclusionary rule to “knock and announce” rule violations would be minimal, because enforcement could be achieved through alternative means. According to the Court, those whose Fourth Amendment rights had been violated by a violation of the “knock and announce” rule can always pursue civil relief via an action under 42 U.S.C. § 1983 or Bivens v. Six Unknown Fed. Narcotics Agents.14 Rejecting the notion that only the exclusionary rule could provide effective constitutional enforcement, the Court observed: “As far as we know civil liability is an effective deterrent against violations of the “knock and announce” rule, as we have assumed it is in other con-

The Court further noted that, even if the resulting damages are small for such violations, there are numerous public-interest law firms that might take on such lawsuits, and plaintiffs’ attorneys would be attracted by the prospect of an attorneys’ fee award under 42 U.S.C. § 1988. In addi-

Enforcement of the “Knock and Announce” Rule After Hudson

Despite its holding that the exclusionary rule does not apply to a “knock and announce” rule violation, the Supreme Court went out of its way to clarify that its deci-

Further, the majority noted that important dignity interests undergird the “knock and announce” rule and stated that enforcement of the “knock and announce” rule could satisfactorily be achieved through the corollary civil remedies provided by 42 U.S.C. § 1983 and Bivens. Civil liability, the Court assured, would be an “effective deterrent” against widespread disregard for the “knock and announce” rule.

Yet, because the post-Hudson civil enforcement land-

regime for violations of the “knock and announce” rule as provided by the exclusionary rule. As the dissenting justices noted, civil actions for “knock and announce” rule violations are infrequent and have failed to result in more than nominal damages.18

There are several reasons that civil enforcement of the “knock and announce” rule will likely prove ineffective. First of all, any civil rights action under § 1983 or Bivens must first overcome the limitations imposed by the Court in Heck v. Humphrey. In that case, the Supreme Court held that in order to recover civil damages for a deprivation of constitutional rights that has been linked to a criminal conviction or prosecution, a claimant’s charges or conviction must be “reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.”19 Relying on Heck, some appellate courts have held that a civil rights action based on an alleged illegal search and seizure of evidence cannot be maintained unless any related criminal charges have first been dismissed or the conviction has been overturned.20 Other courts, however, have disagreed with such a sweeping application of Heck.21

Because a civil rights suit is barred under Heck only if “a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,”22 Hudson’s holding that “knock and announce” rule violations do not prevent admission of evidence in a subsequent criminal prosecution would suggest that Heck should not bar a civil rights suit based on a “knock and announce” rule violation even when a related criminal action remains pending. Even if a court were to find that a civil claimant’s rights under the “knock and announce” principle had been violated, this would not necessarily save the claimant from criminal liability since, under Hudson, criminal evidence may be admitted against a defendant notwithstanding a violation of the “knock and announce” rule. Nevertheless, this issue will have to be litigated in the lower courts.

Apart from Heck’s procedural hurdle, any potential civil rights claimant will encounter significant difficulty setting forth a valid claim for relief based on a violation of the “knock and announce” rule. A prerequisite to recovery under § 1983, of course, is deprivation of a constitutional right.23 Even before Hudson, however, the Supreme Court had substantially circumscribed the breadth of the protections provided by the “knock and announce” rule. Under Richards, if police officers are able to establish exigent circumstances—in other words, a reasonable suspicion that knocking and announcing their presence would create danger, jeopardize evidence, or even be futile—a “no-knock” entry will be justified. Even though the exigency requirement is not entirely pro forma, few experienced police officers will encounter difficulty rationalizing a “no-knock” search, especially when there are indications that the target is potentially dangerous or able to destroy relevant evidence swiftly.

Furthermore, even absent the existence of an exigency
before the search is initiated, an exigency may nonetheless develop after police officers announce their presence. In Banks, the Court held that the length of time officers wait at the door for a response can create an exigency that justifies forced entry. Although normally, “the police must knock and receive actual refusal or wait out the time necessary to infer one,”24 when the evidence that the officers seek are items that can be easily destroyed, a refusal to admit the officers will create an exigency and permit officers to force entry. At least when cocaine was at issue, the Court in Banks held that waiting for 15–20 seconds without answer created an exigency that justified forced entry.

The amount of time that creates an exigency under Banks will necessarily vary depending on the type of evidence at issue and the ease with which police officers can enter the premises without destroying property: “Police seeking a stolen piano,” the Court instructed, “may be able to spend more time to make sure they really need the battering ram.” Nevertheless, one can imagine that, in most circumstances when there is a delayed response or no answer at all, an exigency will develop quickly after officers announce their presence. Any time the intended search concerns items that may easily be destroyed or tampered with—such as narcotics, weapons, documents, or computer hard drives—or in cases where officers reasonably fear for their safety or the safety of individuals in the home, a court applying Banks is likely to find that a brief waiting period (akin to the 15–20 seconds approved of in the Banks decision) is sufficient to create an exigency that justifies forced entry.

Based on the significant exceptions the Supreme Court has carved out of the “knock and announce” rule, lower courts have demonstrated a willingness to find “no-knock” entries reasonable.25 Indeed, relying on the Court’s malleable exceptions to the rule, the Ninth Circuit has held that, although “[t]he general practice of physically knocking at the door and announcing law enforcement’s presence and purpose” is preferred, an actual physical knock “is not dispositive” in determining compliance with the “knock and announce” rule.26 Furthermore, some lower courts have developed a “futility exception” to the “knock and announce” rule, under which officers are not required to knock and announce their presence in executing a search warrant if such an announcement would be a “useless gesture.”27 Even though this futility exception normally applies when the home occupant “was not in a position to have ever answered his door,”28 some courts have applied the exception in cases when the home occupant already knows an officer’s identity and purpose.29

Even though the Court’s broad exceptions to the “knock and announce” rule would be just as difficult to overcome in a criminal suppression motion as they would be in a civil action, two additional factors make success far more difficult in the civil context. First, a civil claimant must overcome various immunities from suit, including prosecutorial immunity, Eleventh Amendment immunity, and assorted statutory pre-emptions. The most significant of these immunities for a “knock and announce” rule claimant may be qualified immunity. Under the doctrine of qualified immunity, a lawsuit based on a constitutional violation is barred unless the right in question is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.”30 Because the contours of the “knock and announce” rule are based on an amorphous reasonableness standard and are susceptible to broad exigency exceptions, it would be no mean feat to demonstrate by a preponderance of the evidence that a particular aspect of the rule is sufficiently clear that a reasonable officer would know his actions had violated the rule. Second, given the significant additional hurdles facing civil claimants and the uncertainty of succeeding on any claim for violation of the “knock and announce” rule, it would be far more difficult to marshal the resources necessary to present an affirmative civil case rather than to merely raise the claim as a basis for excluding evidence in a suppression hearing—in the Court’s words, the low-cost “lottery” for a possible “get-out-of-jail-free card.”31

It is not surprising, then, that, even before Hudson, the Court’s broad exceptions to the “knock and announce” rule rendered it unlikely that a civil rights claim based on a violation of the rule would ultimately prove successful. Doran v. Eckold provides a good example of the difficulty a claimant faces in establishing a successful civil rights claim based on a violation of the “knock and announce” rule violation. Based on the Court’s instruction in Richards that the burden to show a reasonable suspicion of exigent circumstances “is not high,”32 the Eighth Circuit in Doran, sitting en banc, reversed a § 1983 jury verdict in favor of a “knock and announce” claimant. The court based its ruling on a “reasonable suspicion of exigent circumstances” justifying the entry in question.33 Although in some cases courts have denied police officers qualified immunity in light of “knock and announce” rule claims,34 such cases have usually involved numerous constitutional claims that overshadow the “knock and announce” rule claim.35

Accordingly, § 1983 and Bivens actions based on violations of the “knock and announce” rule are unlikely to match the deterrent power of the exclusionary rule. One can anticipate, therefore, that with “knock and announce” rule violations even less likely to result in negative consequences for officers, they will observe the rule less vigilantly. In this sense, Justice Breyer’s view that the decision in Hudson “weakens, perhaps destroys, much of the practical value of the Constitution’s knock-and-announce protection,” may prove all too accurate.36

**Hudson’s Implications for the Exclusionary Rule**

Even though the Supreme Court’s ruling in Hudson certainly holds significant consequences for the “knock and announce” rule, the Hudson decision may have larger implications for exclusionary rule jurisprudence. In each of its pre-Hudson “knock and announce” rule cases, the Court chipped away at the “knock and announce” rule yet ignored the clear opportunity to dissociate that rule from the exclusionary rule. Because the Court elected to take the dramatic step of severing the “knock and announce” rule’s ties to the exclusionary rule in Hudson, notwithstanding the fact that the rule was already riddled with
exceptions, suggests a shift in the Court’s thinking about the exclusionary rule.

The curious fact that the Court had never before mentioned that the exclusionary rule does not apply to a “knock and announce” rule violation despite its numerous opportunities to do so seemed to trouble the Hudson Court. Justice Antonin Scalia strained to demonstrate that the Court’s prior “knock and announce” rule jurisprudence supported the majority’s holding in Hudson. In a portion of his decision not joined by Justice Kennedy, Justice Scalia asserted that language in Ramirez made it clear that the “knock and announce” rule does not trigger exclusion of evidence. The language referred to by Justice Scalia was an observation that “[d]estruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression.” As Justice Scalia rhetorically asked, “What clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?”

It is certainly possible to quibble with the asserted clarity of the language in Ramirez. For starters, Ramirez’s language on the relationship between excessive destruction of property and the exclusionary rule was pure dicta; nothing in the Court’s decision turned on this statement; the Court ultimately held that the officers’ destruction of property in Ramirez was reasonable. Furthermore, the language really had little to do with whether the exclusionary rule applies to violations of the “knock and announce” rule. Rather, it seemed to suggest that there could be consequences for officers’ unreasonable destruction of property in executing a search warrant, notwithstanding the fact that the execution of the search is otherwise entirely legal and proper. If anything, the phrase “the entry itself is lawful” suggests that the Ramirez Court did not include a “knock and announce” rule violation in its hypothetical property destruction scenario. The Court’s statement in Ramirez, therefore, hardly portended the holding in Hudson that the exclusionary rule does not apply to violations of the “knock and announce” rule.

Because every previous decision involving the “knock and announce” rule issued by the Court had arisen in the context of a motion to exclude evidence, the Court’s holding in Hudson is all the more curious. Even though the Court had devoted a great deal of effort to narrowing the scope of the “knock and announce” rule in those decisions, the justices never held that the exclusionary rule simply did not apply under those circumstances. Indeed, only three years earlier, in the Banks decision, the Court had failed altogether to rely on Ramirez’s purportedly “clear[] expression’’ that the exclusionary rule does not apply to violations of the “knock and announce” rule. The justices could have taken advantage of numerous earlier opportunities to announce that the “knock and announce” rule has nothing to do with the exclusionary rule. The Court’s failure to do so suggests that the justices’ thinking on the “knock and announce” rule shifted at some point between its last missed opportunity in Banks and the time that it decided Hudson.

Even the least cynical observer would have difficulty focusing on anything other than the change in the Court’s composition to explain this shift in the Court’s view of the “knock and announce” rule’s relationship to the exclusionary rule. There was no new legal rule or decision in the interim that required the shift in Hudson. In fact, the Court’s decision in Hudson largely relied on decisions predating its “knock and announce” rule jurisprudence. Accordingly, the main factor responsible for the Court’s decision in Hudson appears to have been not doctrinal development but, rather, turnover in the makeup of the Court.

Seen in this light, the most significant aspect of the Court’s decision in Hudson may have less to do with the “knock and announce” rule than with the exclusionary rule itself. With new appointments to the Court, the tide may have turned on the exclusionary rule. The present composition of the Court appears poised to bring about increased limits and constraints on the exclusionary rule. Perhaps for this reason, the dissent in Hudson suggested that the majority’s approach in the case “could well complicate Fourth Amendment suppression law, threatening its workability.”

Certainly, the cost/benefit balancing approach applied by the majority in Hudson in determining that a violation of the “knock and announce” rule does not allow for exclusion of evidence could well have broad applicability. In most circumstances, the social costs of “suppressing evidence of guilt” are “considerable” and permit guilty defendants to enter the evidentiary suppression “lottery” to obtain a “get-out-of-jail-free card.” Indeed, the fact that the exclusionary rule inevitably allows some guilty people to go free is one of the most maligned aspects of Fourth Amendment law. Well before Hudson, Justice Scalia had observed, “One hears the complaint, nowadays, that the Fourth Amendment has become Constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all.” The social costs of exclusion, therefore, will always be given significant weight in the cost/benefit balancing test.

Numerous other Fourth Amendment rights beyond the less-entrenched “knock and announce” rule could find themselves on the losing end of a cost/benefit balancing test opposite the imposing weight of guilt going unpunished. Limits now applicable to Terry stops, protective pat-downs, and the like may seem inconsequential when compared with the danger of allowing crime to go unpunished. Furthermore, according to the Court’s analysis in Hudson, concerns regarding government intrusion on Fourth Amendment liberties will be minimized in the cost/benefit balancing test based on the Court’s view that Fourth Amendment rights are adequately safeguarded through civil actions under 42 U.S.C. § 1983 and Bivens.

Accordingly, in the final analysis, Hudson may have more significant repercussions for the exclusionary rule than the “knock and announce” rule. The cost/benefit balancing test employed by the Hudson Court has the potential to erode the exclusionary rule’s substantial breadth.
is possible, then, that Hudson marks the advent of an era in which many Fourth Amendment rights will be enforced by way of civil actions, rather than through motions to suppress evidence. Following Hudson, future criminal defendants may find themselves increasingly unable to try their luck in the suppression motion “lottery.”

E. Martin Estrada is a litigation associate in the Los Angeles office of Munger, Tolles & Olson LLP. He has previously written articles on federal civil and criminal procedure, including the “knock and announce” rule. All opinions expressed in this article are the author’s alone.

Endnotes

5 See United States v. Langford, 314 F.3d 892, 894–895 (7th Cir. 2002) (Posner, J.) (applying the “inevitable discovery” exception to the exclusionary rule to hold that “it is hard to understand how the discovery of evidence inside a house could be anything but ‘inevitable’ once the police arrive with a warrant”); see also E. Martin Estrada, A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce” Rule and the Sacred Castle Door, 16 U. Fla. J.L. & Pub. Pol’y 77, 90 (2005) (“Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the ‘knock and announce’ rule” since doing so would “impose significant societal costs by allowing a criminal act to go unpunished.”).
7 1282 F.3d 699, 704 (9th Cir. 2002).
8 United States v. Langford, 314 F.3d 892, 894–895 (7th Cir. 2002) (Posner, J.) (applying the “inevitable discovery” exception to the exclusionary rule to hold that “it is hard to understand how the discovery of evidence inside a house could be anything but ‘inevitable’ once the police arrive with a warrant”); see also E. Martin Estrada, A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce” Rule and the Sacred Castle Door, 16 U. Fla. J.L. & Pub. Pol’y 77, 90 (2005) (“Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the ‘knock and announce’ rule” since doing so would “impose significant societal costs by allowing a criminal act to go unpunished.”).
9 1282 F.3d 699, 704 (9th Cir. 2002).
10 United States v. Langford, 314 F.3d 892, 894–895 (7th Cir. 2002) (Posner, J.) (applying the “inevitable discovery” exception to the exclusionary rule to hold that “it is hard to understand how the discovery of evidence inside a house could be anything but ‘inevitable’ once the police arrive with a warrant”); see also E. Martin Estrada, A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce” Rule and the Sacred Castle Door, 16 U. Fla. J.L. & Pub. Pol’y 77, 90 (2005) (“Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the ‘knock and announce’ rule” since doing so would “impose significant societal costs by allowing a criminal act to go unpunished.”).
11 United States v. Langford, 314 F.3d 892, 894–895 (7th Cir. 2002) (Posner, J.) (applying the “inevitable discovery” exception to the exclusionary rule to hold that “it is hard to understand how the discovery of evidence inside a house could be anything but ‘inevitable’ once the police arrive with a warrant”); see also E. Martin Estrada, A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce” Rule and the Sacred Castle Door, 16 U. Fla. J.L. & Pub. Pol’y 77, 90 (2005) (“Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the ‘knock and announce’ rule” since doing so would “impose significant societal costs by allowing a criminal act to go unpunished.”).
14 See United States v. Langford, 314 F.3d 892, 894–895 (7th Cir. 2002) (Posner, J.) (applying the “inevitable discovery” exception to the exclusionary rule to hold that “it is hard to understand how the discovery of evidence inside a house could be anything but ‘inevitable’ once the police arrive with a warrant”); see also E. Martin Estrada, A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce” Rule and the Sacred Castle Door, 16 U. Fla. J.L. & Pub. Pol’y 77, 90 (2005) (“Under the cost-benefit balancing approach of the attenuated basis/connection exception to the exclusionary rule, the Court would be loath to exclude otherwise admissible evidence from trial based merely on a technical violation of the ‘knock and announce’ rule” since doing so would “impose significant societal costs by allowing a criminal act to go unpunished.”).
19 Id. at 2167–2168.
20 Id. at 2167–2168.
22 Id. at 2167–2168.
23 Id. at 2170 (Kennedy, J., concurring).
24 Id. at 2174–2175 (Breyer, J., dissenting).
26 Ballenger v. Owens, 352 F.3d 842, 846–847 (4th Cir. 2003); Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000); Shamaeizadeh v. Cunigan, 182 F.3d 391, 399 (6th Cir. 1999); Woods v. Candela, 47 F.3d 545, 546 (2d Cir. 1995).
27 Gibson v. Superintendent of NJ Dept. of Law and Public Safety, 411 F.3d 427, 437 (3d Cir. 2005); Beck v. City of Muskogee Police Dep’t, 195 F.3d 553, 559 n.4 (10th Cir. 1999); Cupus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998); Simmons v. O’Brien, 77 F.3d 1093, 1095 (8th Cir. 1996); Daugh v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995).
28 Heck, 512 U.S. at 487 (emphasis added).
30 United States v. Combs, 394 F.3d 739, 744–745 (9th Cir. 2005).
32 United States v. McGee, 280 F.3d 803 (7th Cir. 2002).
33 See, e.g., United States v. Peterson, 553 F.3d 1045, 1049 (9th Cir. 2003); Pelayo-Landero, 285 F.3d 491, 498 (6th Cir. 2002); United States v. Kane, 637 F.2d 974, 978 (3d Cir. 1981).
35 Hudson, 126 S. Ct. at 2166.
37 Ramirez, 523 U.S. at 71.
38 Hudson, 126 S. Ct. at 2170.
39 Id. at 2166.
40 See Akhil Reed Amar, Three Cheers (And Two Quibbles) for Professor Kennedy, 111 Harv. L. Rev. 1256, 1267 n.36 (1998) (stating that the exclusionary rule “breeds popular contempt for the Fourth Amendment”).