

Revisiting the Application of the Exclusionary Rule to the Good Faith Exceptions in Light of *Hudson v. Michigan*

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Introduction

IN *HUDSON V. MICHIGAN*,¹ the United States Supreme Court held that the “exclusionary rule”² does not require the exclusion of evidence obtained in violation of the “knock and announce” rule.³ The knock and announce rule has generally required police officers executing a warrant at a person’s home to knock and announce their presence prior to any forcible entry into the home.⁴ Only after being denied entry, or if other necessary justifications exist, can police forcibly enter the home.⁵ Prior to *Hudson*, evidence obtained in violation of this rule was excluded from use at trial against the defendant in the prosecution’s case in chief.⁶ In *Hudson*, however, the Supreme Court held that violation of the knock and announce rule does not require

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1. 126 S. Ct. 2159, 547 U.S. 586 (2006).

2. In *Weeks v. United States*, 232 U.S. 383 (1914), the United States Supreme Court first articulated the principle that has become known as the federal exclusionary rule—that unconstitutionally-obtained evidence is inadmissible in a trial against a defendant in the prosecution’s case in chief.

3. *Hudson*, 126 S. Ct. at 2168.

4. See *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995) for the requirement that officers knock and announce their presence prior to any forcible entry into a residence. See also *Miller v. United States*, 357 U.S. 301 (1958), where the United States Supreme Court addressed the statutory requirement of announcement found in 18 U.S.C. § 3109 (1958).

5. See *Wilson*, 514 U.S. at 927.

6. See *id.* at 929, 934 (holding that the “‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment,” and “an officer’s unan-

the suppression of all evidence found in the search.⁷ Although the Court upheld the knock and announce rule and continued to require police to knock and announce their presence prior to executing a warrant in a home,⁸ the Court also held that if police do not follow the rule, the evidence obtained is still admissible against the suspect at trial.⁹

This decision seems to contradict decades of precedent holding that evidence unconstitutionally obtained is inadmissible against a suspect at trial,¹⁰ as well as precedent specifically holding that evidence obtained in violation of the knock and announce rule is inadmissible.¹¹ The Fourth Amendment proscribes “unreasonable searches and seizures.”¹² The knock and announce rule has been held to form “part of the reasonableness inquiry under the Fourth Amendment,”¹³ placing limitations on *how* or the *manner* in which the police may execute a search or seizure in a suspect’s home.¹⁴ Prior to the *Hudson* holding, failure to comply with the knock and announce rule made a search or seizure unreasonable, and therefore unconstitutional.¹⁵

The remedy for unreasonable searches and seizures has traditionally been the exclusion of the evidence from trial, referred to as the

nounced entry into a home might be unreasonable under the Fourth Amendment,” making it subject to the exclusionary rule).

7. *Hudson*, 126 S. Ct. at 2168.

8. *Id.* at 2170 (Kennedy, J., concurring in part and concurring in the judgment) (stating that “[t]he Court’s decision should not be interpreted as suggesting that violations of the [knock and announce] requirement are trivial or beyond the law’s concern”).

9. *See id.* at 2168 (majority) (holding that violation of the knock and announce rule did not require the suppression of all evidence found in the search).

10. *See Weeks v. United States*, 232 U.S. 383 (1914), where the United States Supreme Court first “adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment.” *Hudson*, 126 S. Ct. at 2163; *see also Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (holding that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”).

11. *See Sabbath v. United States*, 391 U.S. 585, 586 (1968) (holding that because officers entered without a proper knock and announcement, the subsequent arrest was invalid and the evidence seized in the subsequent search was inadmissible); *Miller v. United States*, 357 U.S. 301, 313–14 (1958) (holding that because “the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed”); *see also Wilson v. Arkansas*, 514 U.S. 927, 929 (1995); *United States v. Dice*, 200 F.3d 978 (6th Cir. 2000).

12. U.S. CONST. amend. IV.

13. *Wilson*, 514 U.S. at 929.

14. *See id.* at 934.

15. *See id.*; *see also* U.S. CONST. amend. IV.

exclusionary rule.¹⁶ In *Hudson*, however, the Court revisited this precedent and held that the exclusionary rule does not automatically apply whenever there is a technical constitutional violation.¹⁷ The Court carefully considered the historical purpose and scope of the rule, and it determined that the exclusionary rule is only applicable after applying a “cost/benefit analysis”¹⁸ and finding that the deterrent benefits of the rule outweigh the social costs of exclusion.¹⁹ Applying this analysis, the *Hudson* Court held the evidence obtained in violation of the knock and announce rule was admissible because its exclusion would not further the deterrent goal of the exclusionary rule.²⁰

The cost/benefit analysis is not a new test to determine when the exclusionary rule will apply—it has been used for years prior to *Hudson*.²¹ The *Hudson* Court applied the same test historically used in exclusionary rule precedent, but it arrived at a different result than in the past due to a number of modern day factors like new civil remedies and increased police professionalism.²² These factors change the outcome of the *Hudson* cost/benefit analysis because of their impact on the deterrent benefit of applying the exclusionary rule.

Similarly, the cost/benefit analysis has been used to establish a number of exceptions to the exclusionary rule—situations in which

16. See *Weeks v. United States*, 232 U.S. 383, 398 (1914), where the United States Supreme Court adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment.

17. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

18. See full discussion *infra* Part IV.

19. See *Hudson*, 126 S. Ct. at 2168, for application of the cost/benefit analysis, whereby the Court weighs the costs of application of the rule against the benefits of its application to help determine whether exclusion of the evidence is warranted. See also Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (holding that the exclusionary rule is only applicable “where its deterrent benefits outweighs its substantial social costs”).

20. See *Hudson*, 126 S. Ct. at 2165–68 where the Court held the social costs of applying the exclusionary rule to knock and announce violations are considerable. “Resort to the massive remedy of suppressing evidence of guilt is unjustified.” *Id.* at 2168.

21. See *Weeks*, 232 U.S. at 398. Although the Court did not expressly state the purpose of the exclusionary rule in its first application of the rule, deterrence has prevailed as the primary purpose of the rule. The cost/benefit analysis had early application for determining whether the exclusionary rule was appropriately applied. See, e.g., *United States v. Callandra*, 414 U.S. 338, 348 (1974) (specifically acknowledging use of the cost/benefit analysis to determine whether application of the exclusionary rule is appropriate); *Alderman v. United States*, 394 U.S. 165, 174–75 (1969) (holding that application of exclusionary rule would turn on balancing costs and benefits of exclusion); see also James Stribopoulos, *Lessons From the Pupil: A Canadian Solution to the American Exclusionary Rule Debate*, 22 B.C. INT’L & COMP. L. REV. 77, 101–110 (discussing the evolution of deterrence as the primary purpose of the exclusionary rule and how courts use the cost/benefit analysis to determine when to apply the exclusionary rule).

22. *Hudson*, 126 S. Ct. at 2166–68.

the evidence may still be admissible at trial even though there has been a technical constitutional violation.²³ In concluding that these situations do not warrant exclusion of the evidence, the Supreme Court, as in *Hudson*, determined that the deterrent purpose of the exclusionary rule was not furthered, and application of the rule was therefore not warranted.²⁴

Thus, *Hudson* is not new law. In holding that evidence obtained in violation of the knock and announce rule is admissible, the *Hudson* Court did not overrule exclusionary rule precedent. Instead, *Hudson* applies the same principles that have always been used to determine the admissibility of evidence, but it reached a different result than in previous knock and announce cases²⁵ due to changes in society.

The purpose of this Article is to examine other instances where the Court has historically held evidence inadmissible to determine whether such evidence should now be admissible in light of the *Hudson* analysis. In particular, it examines two "good faith" exceptions to the exclusionary rule—situations when an officer reasonably relies on a warrant later held inadmissible²⁶ or upon a statute later held invalid.²⁷ Applying *Hudson*'s cost/benefit analysis, the purpose and goal of the exclusionary rule is not furthered by excluding evidence that was obtained when an officer reasonably relied upon a warrant or statute,

23. See *Murray v. United States*, 487 U.S. 533, 537–39 (1988) (applying the inevitable discovery doctrine to admit evidence at trial and also using components of the cost/benefit analysis, including the "incentive" to commit the illegal act); *Nix v. Williams*, 467 U.S. 431, 442–44 (1984) (establishing the "inevitable discovery" exception to the exclusionary rule after finding that circumstances did not warrant the "socially costly course" of exclusion); see also *Segura v. United States*, 468 U.S. 796 (1984); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (applying the attenuated or purged taint exception to the exclusionary rule to admit evidence); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

24. See *Wong Sun*, 371 U.S. at 488; see also *United States v. Janis*, 428 U.S. 433, 454 (1976) (holding that "if . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted").

25. See *Sabbath v. United States*, 391 U.S. 585, 586 (1968) (holding that because officers entered without a proper knock and announcement, the subsequent arrest was invalid, and the evidence seized in the subsequent search was inadmissible); *Miller v. United States*, 357 U.S. 301, 313–14 (1958) (holding that because "the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed"); see also *United States v. Dice*, 200 F.3d 978 (6th Cir. 2000).

26. See *United States v. Leon*, 468 U.S. 897 (1984) (establishing the good faith exception to the exclusionary rule when an officer reasonably relies upon a warrant later held inadmissible).

27. See *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987) (establishing the good faith exception to the exclusionary rule when an officer relies on statutory authority later held unconstitutional).

even when certain exceptions to the good faith exceptions exists.²⁸ Under these circumstances, the officer has acted reasonably in relying upon such authority vested in him or her by a warrant or statute, so excluding the evidence obtained will have little deterrent effect on his or her future conduct. Since exclusion would not further the deterrent goals of the rule, the evidence should be admissible under *Hudson's* cost/benefit analysis.

Admitting evidence obtained when the exceptions to the good faith exceptions exist appears to contradict decades of precedent holding this evidence inadmissible at trial.²⁹ Nevertheless, this Article re-examines this precedent using the principles set out in *Hudson*, and it argues that since the deterrent benefit of admitting the evidence outweighs the social costs, the exclusionary rule should not be applied. Like *Hudson*, admitting this evidence would lead to a different result than in the prior cases on this issue, but it would not change the underlying law.

In addressing these issues, Part I of this Article discusses the reasonableness requirement of the Fourth Amendment. Part II discusses the knock and announce rule, and it explains how the rule forms a part of the reasonableness requirement of the Fourth Amendment. Part III discusses the exclusionary rule and explains the circumstances under which it is applied. This section explains the cost/benefit analysis, and it demonstrates how courts have used this analysis to develop exceptions to the warrant requirement. Part IV discusses how the *Hudson* Court used the cost/benefit analysis to determine that the exclusionary rule is not the appropriate remedy for a knock and announce violation. Part V applies the *Hudson* cost/benefit analysis to the good faith exception to the exclusionary rule when an officer reasonably relies upon a warrant, and it argues that the exclusionary rule is not the appropriate remedy when the exceptions to this good faith exception exist. Part VI similarly applies the cost/benefit analysis to the

28. See *Leon*, 468 U.S. at 923 (setting out exceptions to the good faith exception when an officer relies on a warrant: (1) misleading information; (2) abandonment of judicial role; (3) affidavit clearly insufficient to establish probable cause; and (4) facially deficient warrant); see also *Krull*, 480 U.S. at 349, 355 (setting forth exceptions to the good faith exception when an officer relies on statutory authority: (1) when the "legislature wholly abandoned its responsibility to enact constitutional laws," and (2) "when a reasonable officer should have known that the statute was unconstitutional").

29. See *Leon*, 468 U.S. at 923; see also *Massachusetts v. Sheppard*, 468 U.S. 981, 988–89 (1989) (upholding execution of warrant where the warrant was not facially deficient, and officers reasonably relied upon judge's actions); *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part) (indicating that warrant was clearly insufficient to establish probable cause).

good faith exception to the exclusionary rule when an officer reasonably relies upon statutory authority later held invalid, and it also demonstrates that the exclusionary rule is not the appropriate remedy when the exceptions to this good faith exception exist.

I. The Reasonableness Requirement of the Fourth Amendment

Hudson deals with the remedy for violation of the knock and announce rule.³⁰ The knock and announce rule has been held to form a part of the reasonableness requirement of the Fourth Amendment.³¹ An analysis of the proper remedy for violation of the knock and announce rule begins with pinpointing how and why violation of the rule is an unreasonable search and seizure.³²

The Fourth Amendment of the United States Constitution provides:

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.³³

The amendment contains two separate clauses: (1) the Reasonableness Clause, and (2) the Warrant Clause.³⁴

The Reasonableness Clause sets forth the requirement that searches and seizures by the government must be reasonable.³⁵ If there is no search or seizure within the Fourth Amendment's meaning, the Fourth Amendment is not implicated, and there is no requirement of reasonableness.

30. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

31. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

32. With respect to the Fourth Amendment, the United States Supreme Court has only applied the exclusionary rule to *unreasonable* searches and seizures as a remedy for Fourth Amendment violations. See *Weeks v. United States*, 232 U.S. 383, 398 (1914). As a result, determining whether the exclusionary rule applies begins by determining whether the conduct was unreasonable, and, therefore, unconstitutional. Only then must the Court determine whether the exclusionary rule is the appropriate remedy.

33. U.S. CONST. amend. IV.

34. *Id.*; see also *Payton v. New York*, 445 U.S. 573, 584 (1980) (holding that the Amendment contains "two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause").

35. *United States v. Stewart*, 468 F. Supp. 2d 261, 265 (D. Mass. 2007); see also *Payton*, 445 U.S. at 584.

The second clause, the Warrant Clause, sets forth the requirement for compliance with the reasonableness clause—a warrant supported by probable cause—and also includes the requirements for a valid warrant.³⁶ Searches and seizures without a warrant are per se unreasonable under the Fourth Amendment, subject only to a few specifically-established and well-delineated exceptions to the warrant requirement.³⁷ The judicially-created exceptions to the warrant requirement are circumstances where there was no warrant, but the government conduct was still reasonable and therefore satisfied the Fourth Amendment.³⁸ Some of these exceptions require probable cause, and some do not.³⁹ The primary basis upon which the courts have found the government conduct to be reasonable, even without a warrant, has been by applying a balancing test where the courts weigh the level of intrusiveness of the government activity involved against the government interest furthered by conducting the activity in question.⁴⁰ For “there can be no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”⁴¹ Courts have held the activity is reasonable when the government’s interest outweighs the level of intrusiveness into one’s individual liberty.⁴²

36. Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, the Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause as required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); see also *Flippo v. West Virginia*, 528 U.S. 11 (1999); *Payton*, 445 U.S. at 584.

37. *Katz v. United States*, 389 U.S. 347, 357 (1967).

38. Although the Court usually requires that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as per the Constitution), the Court has established a number of exceptions to the warrant requirement upon an ultimate finding of reasonableness. See *Payton*, 445 U.S. at 573, 590 (setting forth the exigent circumstances exception); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (indicating that the Court has permitted exceptions when “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable”).

39. See *United States v. Ross*, 456 U.S. 798, 825 (1982) (holding that probable cause justifies the search of a lawfully stopped vehicle); *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that no probable cause is required for a “stop and frisk”); *Louisiana v. Sims*, 426 So. 2d 148 (La. 1983) (holding that no probable cause is required for the inventory exception).

40. See *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967); see also *Terry*, 392 U.S. at 15 (holding search and seizure valid by applying a balancing test).

41. *Camara*, 387 U.S. at 536–37.

42. See *id.*; see also *Terry*, 392 U.S. at 15.

So, whether it is by a warrant or an exception to the warrant requirement, the search or seizure is constitutional if the conduct is reasonable.⁴³ The Reasonableness Clause of the Fourth Amendment thus predominates over the Warrant Clause.⁴⁴ This principle is the basis for an analysis of the admissibility of evidence obtained in violation of the knock and announce rule, and it also serves as the basis for determining the admissibility of evidence when the good faith exceptions to the exclusionary rule are present. It establishes that if the conduct in question is ultimately deemed reasonable, then the evidence is admissible at trial.

II. The Knock and Announce Rule

A. Overview of the Rule

The reasonableness of a search or seizure does not only go to when the search or seizure occurs, i.e., whether probable cause exists, but also to the manner in which the search or seizure is executed or "how it is carried out."⁴⁵ Courts have found searches and seizures unconstitutional, even when probable cause existed, when police used excessive or unnecessary force.⁴⁶ Similarly, the knock and announce rule focuses on how an arrest should be executed when the police, armed with a warrant supported by probable cause, are arresting an individual in his or her home. The United States Supreme Court has held that the knock and announce principle "forms a part of the reasonableness inquiry under the Fourth Amendment,"⁴⁷ and "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment,"⁴⁸ even with a warrant supported by probable cause.

Consequently, courts have placed limitations on the execution of an arrest at one's home due to the added constitutional protections

43. See U.S. CONST. amend. IV.

44. This conclusion is based on the many exceptions to the warrant requirement, each with an ultimate finding of reasonableness, even though there was no warrant. See *United States v. Ross*, 456 U.S. 798 (1982) (automobile exception to warrant requirement); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to a lawful arrest); *Terry*, 392 U.S. at 1 (stop and frisk exception to warrant requirement).

45. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

46. See *id.* at 1-2, where the United States Supreme Court held a statute unconstitutional insofar as it authorizes the use of deadly force against an apparently unarmed, non-dangerous fleeing suspect.

47. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

48. *Id.* at 934.

surrounding the sanctity of one's home.⁴⁹ The knock and announce rule, a long standing common law rule that has been codified in most states and by the federal government, provides that police may break into a person's home to execute a warrant only after they have given notice of their purpose and authority and have been refused entry.⁵⁰ After knocking and announcing their presence and authority, police must wait a reasonable time before forcibly entering the residence.⁵¹ The Court has held that the amount of time an officer should delay "depends largely on factual determinations made by the trial court."⁵² Courts have upheld the validity of searches where the delay was one minute, thirty seconds, fifteen to twenty seconds, and ten seconds.⁵³

Noncompliance with the rule may present itself in various forms. It might include: (1) failing to knock and announce all together;⁵⁴ (2) failing to wait a reasonable amount of time after announcement prior to forcibly entering;⁵⁵ or (3) using unnecessary or an unreasonable amount of force to make the entry after refusal.⁵⁶

The knock and announce rule recognizes many situations when it is unnecessary to knock and announce.⁵⁷ It is not necessary when "circumstances present a threat of physical violence," or if there is "reason to believe that evidence would likely be destroyed if advance notice were given."⁵⁸ Furthermore, the knock and announce requirement is not required if knocking and announcing would be futile.⁵⁹ Under these circumstances failure to knock and announce will not result in an unreasonable search or seizure. Police need only "'have a reasonable suspicion . . . under the particular circumstances' that one of these grounds for failing to knock announce exists."⁶⁰

49. See *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972) (holding that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

50. See 18 U.S.C. § 3109 (1958), where the rule has been codified in federal law. See also state laws codifying the provision: LA. CODE CRIM. PROC. ANN. art. 224 (2007); ALA. CODE § 15-5-9 (2007).

51. See *United States v. Dice*, 200 F.3d 978, 983 (6th Cir. 2000).

52. *United States v. Ruminer*, 786 F.2d 381, 383-84 (10th Cir. 1986).

53. *Id.* at 384; see also *United States v. Banks*, 540 U.S. 31, 40-41 (2003) (holding that fifteen to twenty seconds was enough time to wait before forcing entry to serve a narcotics search warrant).

54. See *Dice*, 200 F.3d at 983.

55. *Id.*

56. See *Wilson v. Arkansas*, 514 U.S. 927, 935-36 (1994).

57. *Hudson v. Michigan*, 126 S. Ct. 2159, 2162-63 (2006).

58. *Wilson*, 514 U.S. at 936.

59. *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997).

60. *Hudson*, 126 S. Ct. at 2163 (quoting *Richards*, 520 U.S. at 394).

B. How the Knock and Announce Rule Helps to Establish Reasonableness

The plain language of the Fourth Amendment specifically lists "houses" as a place protected from unreasonable searches and seizures.⁶¹ "The right of the people to be secure in their . . . houses . . . shall not be violated."⁶² That language unequivocally establishes that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."⁶³ The United States Supreme Court has reiterated that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."⁶⁴ Because of these added protections surrounding the home, courts have carefully crafted procedures, such as the knock and announce rule, for entry into residences even when police possess a warrant.⁶⁵

This knock and announce rule serves to protect a number of interests. "One of those interests is the protection of human life and limb."⁶⁶ Knocking before entering could prevent bodily injury to the police, who may be retaliated against "in supposed self defense by the surprised resident" if the occupants do not realize it is police who are entering the home.⁶⁷ It may further prevent injury to the occupants themselves if police are forced to defend themselves.⁶⁸ Another interest is the protection of property.⁶⁹ The knock and announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.⁷⁰ Knocking avoids unnecessary alarm to the occupants, and it could actually facilitate and speed up the search process.⁷¹ Finally, "the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance."⁷² It gives residents the opportunity to prepare themselves for the police entry.⁷³ Whether it is to "pull on

61. See U.S. CONST. amend. IV.

62. *Id.*

63. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

64. *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972).

65. See *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), for explanation of the knock and announce rule.

66. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006).

67. *Id.*

68. *Id.*; see also *McDonald v. United States*, 335 U.S. 451, 460-61 (1948).

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

70. *Id.*

71. See *Ker v. California*, 374 U.S. 23 (1963).

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

73. *Id.*

clothes or get out of bed,"⁷⁴ having a few moments notice to prepare prior to police entry helps to protect the dignity and sanctity associated with the home.

The knock and announce rule promotes reasonableness because it helps to avoid property damage, bodily injury, and death; it also helps to actually facilitate the goal of the official police presence. Because of these benefits and added protections of the knock and announce rule, the United States Supreme Court has held that the "'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment."⁷⁵ Therefore, in general, searches and seizures conducted without compliance with the knock and announce rule are unreasonable within the meaning of the Fourth Amendment.⁷⁶

Non-compliance with the knock and announce rule is thus technically an unreasonable search and seizure in violation of the Fourth Amendment.⁷⁷ Courts have created a remedy for unreasonable searches and seizures—the exclusionary rule. The exclusionary rule, however, is not automatically applied in every instance in which there has been a technical constitutional violation, i.e., just because there has been an unreasonable search or seizure. An examination of the exclusionary rule demonstrates how the cost/benefit analysis is used to determine when unconstitutionally-obtained evidence should be excluded from trial.

III. The Exclusionary Rule and Exceptions

A. Overview of the Rule

Although the Fourth Amendment proscribes unreasonable searches and seizures, it does not set forth a remedy for its violation. The exclusionary rule is a judicially-created remedy for constitutional violations. In *Mapp v. Ohio*,⁷⁸ the Court held that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in . . . court."⁷⁹

74. *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997).

75. *Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

76. *See id.* at 934.

77. *See id.* at 929 (holding that noncompliance with the knock and announce rule makes the search or seizure unreasonable).

78. 367 U.S. 643 (1961).

79. *Id.* at 655.

B. When is the Exclusionary Rule Applied?

An evaluation of the full scope of the exclusionary rule's application is necessary in this Article in order to: (1) analyze whether it is properly applied to a knock and announce violation; and (2) to determine whether it should be applied when the exceptions to the good faith exceptions exist.

Violation of the Fourth Amendment does not always warrant application of the exclusionary rule.⁸⁰ The rule is not automatically applied for every technical constitutional violation; it will not be applied merely because there is a "causal connection with police misconduct."⁸¹ The Supreme Court has held that the exclusionary rule generates substantial social costs, which sometimes include "setting the guilty free and the dangerous at large."⁸² As a result, the Court has been "cautious [in] expanding it."⁸³ Therefore, careful consideration of the circumstances surrounding the application of the rule is necessary in order to determine when the rule is properly applied to a technical constitutional violation.⁸⁴

The United States Supreme Court has held that the exclusionary rule "applies only in contexts 'where its remedial objectives are thought most efficaciously served.'"⁸⁵ Thus, application of the rule is only warranted when the rule's underlying purpose is furthered. There have been various purposes for the rule advanced in the past several decades.⁸⁶ Deterrence, however, has prevailed as the primary, and perhaps most compelling, purpose.⁸⁷

The Court has stressed that the prime purpose of the exclusionary rule is to deter future unlawful police conduct.⁸⁸ The rule is not

80. See *supra* notes 18–19 and accompanying text.

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

82. *Id.* at 2163.

83. *Id.* (quoting *Colorado v. Connelly*, 479 U.S. 157, 166 (1986)).

84. See *id.* at 2164 (Stevens, J., dissenting).

85. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

86. See *United States v. Ortiz-Hernandez*, 276 F. Supp. 2d 1119, 1122 (D. Or. 2003) (holding that the purposes of the exclusionary rule are "deterrence and judicial integrity"); *Illinois v. Gates*, 462 U.S. 213, 260 n.14 (1983); *Elkins v. United States*, 364 U.S. 206, 222 (1960).

87. See *Illinois v. Gates*, 462 U.S. 213, 260 (1983) (holding that "recent opinions of the Court make clear that the primary function of the exclusionary rule is to deter violations of the Fourth Amendment"); *United States v. Janis*, 428 U.S. 433, 446 (1976) (holding that the prime purpose of the rule, if not the sole one, is to deter future unlawful police conduct).

88. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (holding that application of the exclusionary rule may not be appropriate if it would have little deterrent effect on future police

designed to cure the harm already suffered by the defendant.⁸⁹ Since the Fourth Amendment violation is said to have been fully accomplished at the time the illegal search or seizure occurs, excluding the evidence cannot “cure the invasion of the defendant’s rights which he has already suffered.”⁹⁰ Therefore, the objective of the rule is remedial, and application of the rule is only appropriate when the remedial objective of deterrence is furthered.⁹¹

C. The Cost/Benefit Analysis

To determine when the goal of deterrence is sufficiently furthered to warrant application of the exclusionary rule, courts use what is commonly referred to as the cost/benefit analysis.⁹² The cost/benefit analysis is a balancing test whereby the extent or degree to which application of the rule advances the deterrent benefit of exclusion is weighed against the social costs of exclusion. The exclusionary rule has only been applied “where its deterrence benefits outweigh its ‘substantial social costs.’”⁹³

In criminal trials, the most obvious cost in applying the exclusionary rule is the exclusion of reliable evidence that may result in “setting the guilty free and the dangerous at large.”⁹⁴ Another cost is the loss of respect for the criminal justice system when defendants are set free based on what the public may view as a “technicality.”⁹⁵ Furthermore, it is often said that the exclusionary rule only protects those who are guilty and offers no meaningful protection to those who are innocent.⁹⁶ Police may have no deterrent incentive to forgo an intrusion

misconduct, “which is the basic purpose of the rule”); see also *Calandra*, 414 U.S. at 348 (holding that the exclusionary rule is a “judicially created means of deterring illegal searches and seizures”).

89. *United States v. Leon*, 468 U.S. 897, 906 (1984) (quoting *Stone v. Powell*, 428 U.S. 465, 540 (1976) (White, J., dissenting)).

90. *Id.*

91. See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 358 (1998).

92. See *Weeks v. United States*, 232 U.S. 383 (1914); *Calandra*, 414 U.S. at 348 (specifically acknowledging use of the cost/benefit analysis to determine whether application of the exclusionary rule is appropriate); *Alderman v. United States*, 394 U.S. 165, 174–75 (1969) (holding that application of the exclusionary rule would turn on balancing the costs and benefits of exclusion).

93. *Scott*, 524 U.S. at 363 (White, J. dissenting) (quoting *Leon*, 468 U.S. at 907).

94. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006) (quoting *Colorado v. Connelly*, 479 U.S. 157, 166 (1986)).

95. *Stone v. Powell*, 428 U.S. 465, 490–91 (1976); *Illinois v. Gates*, 462 U.S. 213, 259 n.14 (1983).

96. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 268 n. 26 (1973) (“The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty.”).

upon the individual rights of an innocent person where they do not seek or expect to find evidence of a crime.⁹⁷ Additionally, it is argued that the rule does not provide for any direct sanction to the individual official whose illegal conduct results in the exclusion of evidence.⁹⁸ Courts also experience "extensive litigation to determine whether particular evidence must be excluded."⁹⁹ Finally, application of the rule may in some cases result in opening the floodgates of litigation and become, in effect, a "get-out-of-jail-free card."¹⁰⁰

The other prong of the cost/benefit analysis involves an examination of the benefits associated with excluding unconstitutionally-obtained evidence. The most important benefit and goal of the exclusionary rule is its deterrent effect—the rule is designed to "deter future unlawful police conduct."¹⁰¹ It is intended to discourage police from engaging in unlawful conduct in the future by taking away the incentive for the unlawful activity. If police know that unconstitutionally-obtained evidence will not be admitted at trial, the officers are less likely to engage in the unconstitutional conduct.¹⁰²

There are two other important considerations in the analysis of the deterrent benefit of the rule. The first is an analysis of "the strength of the incentive to commit the forbidden act."¹⁰³ The question of balancing the deterrent benefit of excluding evidence involves addressing how likely it is that police would want or need to engage in such conduct in order to obtain the evidence in the first place. The court will thus examine whether application of the exclusionary rule is needed to deter police from such conduct, or if the conduct in question is of the type that police will have little if any incentive to engage in it.¹⁰⁴ For example, if police have much more to lose than to gain from the illegality, they will not likely engage in such conduct. If the incentive to violate the rule is small, then this would lessen the deterrent benefit of applying the exclusionary rule. The other important

97. *Id.*

98. *See id.* at 267 ("The exclusionary rule has occasioned much criticism, largely on grounds that its application permits guilty defendants to go free and law-breaking officers to go unpunished.")

99. *Hudson*, 126 S. Ct. at 2166.

100. *Id.* at 2159.

101. *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

102. *See Dunaway v. New York*, 442 U.S. 200, 220–21 (1979) (Stevens, J., concurring) (indicating that the exclusionary rule, as an adjunct to the Fourth Amendment, seeks to deter unconstitutional police conduct and to avoid compromising the integrity of the courts by use of unconstitutionally-obtained evidence).

103. *Hudson*, 126 S. Ct. at 2166.

104. *See id.*

factor in analyzing the deterrent benefit of the exclusionary rule involves whether other forms of deterrence exist, such as civil suits or internal police discipline.¹⁰⁵ Both of these factors are important in helping the court determine the overall deterrent benefit of exclusion. They help determine whether the exclusionary rule is needed to deter police misconduct. If the incentive to commit the crime is minimal or if there are other deterrents, then this decreases the deterrent effect of excluding evidence.

D. The Exceptions to the Exclusionary Rule: An Application of the Cost/Benefit Analysis

The Supreme Court has applied the cost/benefit analysis to various types of police conduct and developed exceptions to the exclusionary rule.¹⁰⁶ The Court has found that, even though there was official police misconduct which amounted to a constitutional violation, to exclude the evidence from trial would do little or nothing to deter officers from engaging in such conduct in the future.¹⁰⁷ In those instances the costs are deemed to outweigh the minimal benefits of exclusion. The exceptions to the exclusionary rule the Supreme Court has developed are: (1) attenuation or purged taint;¹⁰⁸ (2) independent source;¹⁰⁹ and (3) inevitable discovery.¹¹⁰

The Supreme Court developed these exceptions using an analysis very similar to the *Hudson* cost/benefit analysis that determined the exclusionary rule did not apply to evidence obtained in violation of the knock and announce rule. In these exceptions, as in *Hudson*, the Supreme Court held the evidence admissible because the deterrent benefit is not furthered by excluding the evidence obtained.

1. Attenuation or Purged Taint

Attenuation or purged taint refers to situations where the link between the illegal search or seizure and the evidence obtained is so attenuated that the courts conclude that excluding the evidence would have little, if any, deterrent effect on the police.¹¹¹ The test for

105. *Id.* at 2168.

106. *See* discussion *supra* note 24 and accompanying text.

107. *See id.*

108. *See* *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963).

109. *See* *Murray v. United States*, 487 U.S. 533, 537 (1988); *see also* *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (recognizing the independent source doctrine for the first time).

110. *See* *Nix v. Williams*, 467 U.S. 431, 442–44 (1984).

111. *See* *Wong Sun*, 371 U.S. at 487–88.

its applicability is “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.”¹¹²

The Supreme Court has rejected a “but-for” test for determining admissibility of evidence; it held that evidence is not “‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police.”¹¹³ “In other words, exclusion may not be premised on the mere fact that a constitutional violation was a ‘but-for’ cause of obtaining evidence.”¹¹⁴ A but-for test would have very broad and far reaching effects in excluding evidence that could have no meaningful relationship to the initial illegality. Instead, the attenuation exception requires a determination of whether the evidence was obtained by some “exploitation of that illegality.”¹¹⁵ Only under these circumstances are the social costs of excluding the evidence outweighed by the deterrent effect or incentive for police not to engage in such conduct. When the evidence is so attenuated from the initial conduct, the deterrent effect is also similarly attenuated, and exclusion of the evidence is simply not warranted. This evidence is admissible under the same rationale as the Supreme Court held the evidence admissible in *Hudson*—the deterrent benefit is not furthered by its exclusion.¹¹⁶

2. Independent Source

The independent source doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently by lawful activities untainted by the initial illegality.¹¹⁷ Even though evidence may have been initially unconstitutionally discovered through illegal police conduct, if the evidence is subsequently uncovered by a lawful means unrelated to or independent of an earlier tainted one, the evidence will not be excluded from trial.¹¹⁸

112. *Id.* at 488.

113. *Id.*

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

115. *Wong Sun*, 371 U.S. at 488.

116. *See Hudson*, 126 S. Ct. at 2165–68.

117. *See Segura v. United States*, 468 U.S. 796 (1984).

118. *Id.* at 805.

In *Murray v. United States*,¹¹⁹ the police initially made an admittedly illegal entry into the premises but did not disturb anything.¹²⁰ They later obtained a valid search warrant for the same premises, but they did not include any of the information they obtained as a result of the initial illegal entry in the affidavit for the warrant.¹²¹ In upholding the subsequent search and seizure, the Court reasoned that the exclusionary rule is designed to put “the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred.”¹²² To exclude evidence obtained through a subsequent independent source would “put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.”¹²³

Applying the cost/benefit analysis, excluding evidence obtained by a subsequent legal means independent of the illegal conduct would have little, if any, deterrent effect on future police conduct.¹²⁴ Excluding the evidence can hardly make police more likely to engage in lawful conduct in the future because the police were already acting lawfully, at least as to the subsequent search or seizure. Furthermore, police have little incentive to engage in the illegal conduct in the first place, since they already have a legal source by which to conduct the search or seizure. Under these circumstances, the police have more to lose than to gain from the illegal conduct.

Upon this rationale, the independent source doctrine has been upheld as an exception to the exclusionary rule.¹²⁵ As in the *Hudson* cost/benefit analysis, this exception was established because the goal of the exclusionary rule is not furthered by excluding evidence obtained in this manner.

3. Inevitable Discovery

Another exception to the exclusionary rule is inevitable discovery.¹²⁶ Under this exception, evidence may be held admissible, even

119. 487 U.S. 533 (1988).

120. *See id.* at 535.

121. *See id.* at 535–36.

122. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

123. *Murray*, 487 U.S. at 541.

124. *Id.* at 544–45 (Marshall, J., dissenting) (recognizing that “the independent source exception, like the inevitable discovery exception, is primarily based on a practical view that under certain circumstances the beneficial deterrent effect that exclusion will have on future constitutional violations is too slight to justify the social cost of excluding probative evidence from a criminal trial”).

125. *Id.* at 541–43.

126. *See Nix*, 467 U.S. at 440–41.

though obtained by unconstitutional police activity, “[i]f the prosecution can establish by a preponderance of the evidence that the [evidence] ultimately or inevitably would have been discovered by lawful means.”¹²⁷

In *Nix v. Williams*,¹²⁸ the police found incriminating evidence as a result of a statement made by a murder suspect in violation of his *Miranda*¹²⁹ warnings.¹³⁰ The police were able to demonstrate that they had planned to search the area where the body was found the next day, despite the defendant’s statement about the location, and would have found the evidence even without the illegal conduct.¹³¹ As in *Murray*, the Court reasoned that excluding evidence obtained in this manner would “put the police in a worse position than they would have been in absent any error or violation.”¹³² This is not the goal of the exclusionary rule. Its goal is to put “the police in the same, not a worse position.”¹³³

Furthermore, in an inevitable discovery situation, the societal costs are great, but the deterrent benefits are small. In a similar rationale to that of the independent source exception, the Supreme Court has reasoned that excluding evidence under these circumstances can have little, if any, deterrent effect on police conduct.¹³⁴ It is not likely that excluding evidence that would have inevitably been discovered absent police misconduct can make police more likely to follow proper procedures in the future. Furthermore, under these circumstances police have little incentive to act illegally in the first place, since they may not know that evidence will be inevitably discovered.¹³⁵ Based on this rationale, evidence obtained in this manner is admissible at trial and not subject to the exclusionary rule. Even though there was illegal police conduct, application of the exclusionary rule is simply not warranted under these circumstances, when the social costs

127. *Id.* at 444.

128. 467 U.S. 431 (1984).

129. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring that, prior to custodial interrogation, a suspect be advised that he has a right to remain silent, that anything he says shall be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires). Statements made in violation of *Miranda* violate the Fifth Amendment privilege against self incrimination. *Id.*

130. *See Nix*, 467 U.S. at 436.

131. *See id.*

132. *Id.* at 443.

133. *Id.*

134. *Id.* at 442–46.

135. *Id.* at 445–46.

are so great, but the deterrent benefit is small.¹³⁶ As in *Hudson*, the exclusionary rule is not appropriate because its deterrent goal is not furthered under these circumstances.

The above mentioned exceptions to the exclusionary rule are all situations where, although there was unconstitutional conduct on the part of the police, the evidence was still admissible at trial. Although each exception involves different circumstances surrounding the search and seizure, the rationale for admissibility of the evidence is the same—when applying the cost/benefit analysis, the social costs of excluding the evidence outweigh the deterrent benefit. As a result, the Supreme Court held the evidence admissible at trial.

This analysis is the same analysis that the Supreme Court used in *Hudson* to find the evidence admissible. These three exceptions to the exclusionary rule demonstrate that the analysis used in *Hudson* is not a new method by which the Supreme Court determines whether the exclusionary rule should be applied, and that its use in *Hudson*, although a new result, is not new law.

This is also the same analysis used below to demonstrate that when the cost/benefit analysis is applied to the exceptions to the good faith exceptions to the exclusionary rule, the evidence similarly should be held admissible. As in these exceptions and in *Hudson*, when the cost/benefit analysis is applied to the exceptions to the good faith exceptions, the costs outweigh the deterrent benefits, and therefore the evidence should be admissible at trial.

IV. *Hudson v. Michigan*: The Exclusionary Rule Vis-à-Vis the Knock and Announce Rule

In *Hudson v. Michigan*, the United States Supreme Court revisited whether the exclusionary rule was the appropriate remedy for a knock and announce violation. In *Hudson*, police obtained a warrant to search Booker Hudson's home for drugs and weapons.¹³⁷ After arriving at Hudson's home, the police knocked and announced their presence, "but waited only a short time, perhaps 'three to five seconds,'"¹³⁸ before entering Hudson's home. After entering the home, the police found drugs and a weapon, arrested Hudson, and

136. See generally *id.* at 434.

137. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2162 (2006).

138. *Id.* at 2162.

charged him under Michigan law with unlawful drug and firearm possession.¹³⁹

Hudson moved to suppress the evidence arguing that the evidence had been unconstitutionally obtained in violation of his Fourth Amendment rights.¹⁴⁰ The Michigan trial court granted his motion.¹⁴¹ The Michigan Court of Appeals reversed the trial court's ruling, relying on Michigan Supreme Court cases holding that exclusion is inappropriate for knock and announce violations if the officers had a valid warrant.¹⁴² The Michigan Supreme Court denied leave to appeal.¹⁴³ The evidence was subsequently introduced at trial against Hudson, and he was convicted of drug possession.¹⁴⁴ The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court declined review.¹⁴⁵ The United States Supreme Court granted certiorari.¹⁴⁶

A. The Historical Application of the Exclusionary Rule to Knock and Announce Violations

For years, evidence obtained in violation of the knock and announce rule was subject to the exclusionary rule and held inadmissible at trial.¹⁴⁷ In holding such evidence inadmissible, the Supreme Court apparently relied on the idea that excluding evidence under these circumstances furthered the goal of the exclusionary rule—detering future police misconduct.¹⁴⁸

Hudson re-examined this principle and ultimately overturned it. The court applied the cost/benefit analysis and found that the deterrent benefit of excluding evidence obtained in violation of the knock and announce rule was outweighed by the social costs of exclusion. As a result, the Supreme Court held the exclusionary rule was not the appropriate remedy for knock and announce violations.

139. *See id.*

140. *Id.*

141. *Id.*

142. *See id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See Miller v. United States*, 357 U.S. 301, 313–14 (1958).

148. *United States v. Calandra*, 414 U.S. 338, 347 (1974).

B. The Exclusionary Rule as Applied in *Hudson*: The Cost/Benefit Analysis

In *Hudson*, the Court overruled prior decisions which held that evidence obtained in violation of the knock and announce rule was inadmissible.¹⁴⁹ The *Hudson* Court maintained, however, that the knock and announce principle still forms a part of the reasonableness requirement under the Fourth Amendment, and that evidence obtained in violation of the rule is an unreasonable search and seizure.¹⁵⁰ The question in *Hudson* was merely one of the appropriate remedy for such violations.¹⁵¹ In concluding that evidence obtained as a result of a violation of the knock and announce rule was admissible at trial against a defendant, the Court applied the cost/benefit analysis and concluded that the costs outweighed the deterrent benefits of exclusion.¹⁵²

This is the same analysis the Court previously used to determine whether the exclusionary rule is applicable to knock and announce violations, but the *Hudson* Court came to a different result.¹⁵³ When examining *Hudson's* cost/benefit analysis, it is clear that this ruling, which uses well-established principles for application of the exclusionary rule, is not new law. Instead, previous decisions concluding that knock and announce violations warrant exclusion of evidence were inconsistent with these well-established principles.

1. The Costs of Excluding Evidence Obtained in Violation of the Knock and Announce Rule

In applying the cost/benefit analysis to a knock and announce violation, as the Court did in *Hudson*,¹⁵⁴ analysis begins with the social costs of excluding the evidence. The *Hudson* Court viewed the costs as "considerable,"¹⁵⁵ as in any case when there is a risk of "setting the guilty free and the dangerous at large."¹⁵⁶

149. See *Sabbath v. United States*, 391 U.S. 585, 586 (1968) (holding that because officers entered without a proper knock and announcement, the subsequent arrest was invalid, and the evidence seized in the subsequent search was inadmissible); *Miller v. United States*, 357 U.S. 301, 313–14 (1958) (holding that because "the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed").

150. *Hudson*, 126 S. Ct. at 2173.

151. See *id.* at 2163 (stating that "the issue here is remedy").

152. See *id.* at 2165–68.

153. See *Weeks v. United States*, 232 U.S. 383 (1914).

154. *Hudson*, 126 S. Ct. at 2165–67.

155. *Id.* at 2165.

156. *Id.* at 2163.

In particular, one cost of excluding evidence obtained as a result of a knock and announce violation is that it would generate a constant flood of defendants claiming alleged failures to observe the rule, and claims that any asserted *Richards v. Wisconsin*¹⁵⁷ justifications for a no-knock entry had inadequate support.¹⁵⁸ In other words, proving that an officer complied with the knock and announce rule may be difficult, and many defendants will argue noncompliance with the rule in order to exclude evidence.

“Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not),”¹⁵⁹ compliance with the knock and announce rule is not so straightforward. It is much more difficult to determine what constituted a “reasonable wait time”¹⁶⁰ in a particular case (or how many seconds the police in fact waited), or whether there was “reasonable suspicion” of the sort that would invoke the *Richards* exceptions.¹⁶¹ Unlike the *Miranda* or warrant requirement, compliance with the knock and announce rule is much more “difficult for the trial court to determine and even more difficult for an appellate court to review.”¹⁶²

As a result of these difficulties in proving compliance with the knock and announce rule, defendants are likely to prevail more often, resulting not only in opening the floodgates of litigation, but also in more acquittals of defendants due to the exclusion of the evidence. Indeed, this is a substantial cost to society. Furthermore, there is also fear that if officers know that noncompliance (such as not waiting a reasonable time) will result in the exclusion of evidence, then officers may refrain from making a timely entry after knocking and announcing resulting in destruction of evidence and danger to the officers.¹⁶³

157. 520 U.S. 385, 394 (1997) (justifying a no-knock entry when the police have 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, for example, allowing the destruction of evidence).

158. *Hudson*, 126 S. Ct. at 2166.

159. *Id.*

160. *United States v. Banks*, 540 U.S. 31, 41 (2003).

161. *Hudson*, 126 S. Ct. at 2166.

162. *Id.*

163. *Id.*

2. The Deterrent Benefits of Excluding Evidence Obtained in Violation of the Knock and Announce Rule

When examining the deterrent benefit of excluding evidence, it is essential to begin with an examination of the context of the violation. Prior to a knock and announce violation, it is evident that the police officer has already acted reasonably in a number of ways: the officer has conducted an investigation and has established probable cause for a search or an arrest; the officer has properly prepared an affidavit demonstrating those facts; and the officer has presented the affidavit to a magistrate who, satisfied that probable cause exists, has issued a warrant. Armed with the warrant, the officer goes to the residence to execute it. At this point, the violation occurs by either (1) failing to knock and announce altogether; (2) failing to wait a reasonable amount of time after announcement prior to forcibly entering;¹⁶⁴ or (3) using unnecessary or an unreasonable amount of force to make the entry after refusal.¹⁶⁵

As a result of one of these violations, the evidence is now unconstitutionally obtained due to the mere manner in which the search or seizure was made. The question then becomes what deterrent effect would excluding the evidence have on an officer's future conduct. What should the officer do differently next time?

The goal of the Fourth Amendment is to insure that officers act reasonably.¹⁶⁶ At the very core of reasonable conduct is obtaining a warrant supported by probable cause.¹⁶⁷ The officer who fails to knock and announce has already obtained a valid warrant, supported by probable cause, before the illegal entry into the home. Exclusion of the evidence certainly cannot cause the officer to act more reasonably prior to entry into the home. Thus, at this stage, the deterrent benefits are minimal in comparison to the costs.

There may be, however, more of a deterrent effect with respect to the manner in which the search or seizure is conducted. The mere fact that probable cause exists or the fact that the officer has a warrant does not give him or her the freedom to execute the search or seizure in any way that he or she chooses. If the officer violates the knock and

164. *United States v. Dice*, 200 F.3d 978, 983 (6th Cir. 2000).

165. *Tennessee v. Garner*, 471 U.S. 1, 8 (1984).

166. *See Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (“It is apparent that in order to satisfy the reasonableness requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”).

167. *See id.*

announce rule, excluding the evidence obtained as a result thereof would certainly have a deterrent effect in this respect. For instance, if an officer knows that by bursting into a home in order to execute a warrant, the evidence obtained will be excluded, this should influence him or her to comply with the rule on the next execution. So there is some deterrent effect with respect to the manner of execution, even though the officer has acted reasonably in many ways prior to the violation. It is also worth pointing out that, even though the officer has acted unreasonably with respect to the manner of execution, the officer has complied with the Fourth Amendment's most important requirement for reasonableness—obtaining a valid warrant.¹⁶⁸ Analysis does not end here, though—courts consider additional factors when analyzing the deterrent effect.

In *Hudson*, the Supreme Court also considered the strength of the incentive to violate the rule as a relevant factor in analyzing the deterrent benefit of exclusion. It held that “the value of deterrence depends upon the strength of the incentive to commit the forbidden act” in the first place.¹⁶⁹ In other words, is application of the exclusionary rule needed to deter police from such conduct, or is the conduct in question of the type that police will have little if any incentive in which to engage? In the case of a knock and announce violation, police have more to lose than to gain from violation of the rule. Because the officers had a warrant, they would have obtained the evidence anyway—even without the knock and announce violation.¹⁷⁰ Thus, they will gain nothing more by failing to knock and announce; by violating the rule they actually risk the exclusion of the evidence from trial. Officers also risk injury to themselves and others when they fail to knock and announce.¹⁷¹ Officers thus have little incentive to violate the knock and announce rule, and, therefore, exclusion of the evidence is not needed to deter the future misconduct.

The final factor the Court considered in evaluating the deterrent benefit is whether there are alternative means of deterrence if exclusion is not imposed.¹⁷² One possibility is that an officer may be sub-

168. See U.S. CONST. amend. IV (requiring a warrant for compliance with the Reasonableness Clause).

169. *Hudson v. Michigan*, 126 S. Ct. 2159, 2166 (2006).

170. “Whether that preliminary misstep 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.” *Id.* at 2164.

171. *Id.* at 2165.

172. See *id.* at 2166–68.

jected to civil liability.¹⁷³ Civil suits may be brought under 42 U.S.C. § 1983¹⁷⁴ for violations of constitutional rights.¹⁷⁵ There are also new laws that have opened the civil courts as a viable means of resolving violations of civil rights,¹⁷⁶ and these laws may offer the deterrent benefit in the absence of application of the exclusionary rule. These laws were not available in the early days of the exclusionary rule as a remedy for such violations. This may have been a factor in why the exclusionary rule was not needed then to further deterrence.

The *Hudson* Court also noted that “[a]nother development over the past half-century that deters civil rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.”¹⁷⁷ Increased training of officers and increased internal disciplinary measures, not in place when the exclusionary rule was adopted, serve as valuable deterrents for police, alleviating the need for exclusion of evidence to serve the deterrent goals.

3. The Costs of Exclusion Outweigh the Benefits

Weighing the substantial social costs associated with applying the exclusionary rule to a knock and announce violation against the minimal deterrent effect of its application, exclusion is not appropriate because the costs outweigh the deterrent benefits. The exclusionary rule has never been applied except “where its deterrence benefits outweigh its ‘substantial social costs.’”¹⁷⁸ This rationale, used in *Hudson*, is the same rationale that courts have used in establishing all the exceptions to the exclusionary rule.¹⁷⁹ It is not new law to refuse to apply the exclusionary rule after conducting the cost/benefit analysis and ultimately finding that the social costs outweigh the deterrent benefits. *Hudson* is not new law; it merely applied longstanding legal principles and reached a different result when it considered modern day factors as part of the cost/benefit analysis.

173. *Id.*

174. 42 U.S.C. § 1983 (2000).

175. See *Hudson*, 126 S. Ct. at 2166–68; see also 42 U.S.C. § 1983 (providing that “[e]very person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).

176. See, e.g., 42 U.S.C. § 1988(b) (2000) (authorizing attorneys fees for the prevailing party in civil rights actions).

177. *Hudson*, 126 S. Ct. at 2168.

178. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (White, J. dissenting) (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

179. See discussion *supra* Part III.D.

V. The Good Faith Exception to the Exclusionary Rule: Warrant

Hudson demonstrates the Court's intention to only apply the exclusionary rule when the deterrent benefits outweigh the social costs of exclusion. Strictly applying the cost/benefit analysis, the *Hudson* Court arrived at a different result than in previous knock and announce cases, but it remained consistent with well-established principles for application of the exclusionary rule.

Similarly, evidence has traditionally been excluded when an officer reasonably relied on a warrant later held invalid, when certain exceptions existed. Applying the cost/benefit analysis to those exceptions, as the Court did in *Hudson*, it is clear that the evidence should not be excluded because exclusion does not further the deterrent goal of the rule. A close examination of the costs and benefits of exclusion in this context demonstrates that application of the rule is not warranted.

A. Overview of the Exception

In addition to the exceptions to the exclusionary rule outlined above, there is another situation where application of the exclusionary rule has been held inapplicable: the good faith exception to the exclusionary rule when an officer reasonably relies on a warrant later held invalid.¹⁸⁰ In *United States v. Leon*,¹⁸¹ the United States Supreme Court held that "the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate," but which is ultimately found to be unsupported by probable cause.¹⁸² Even though the evidence was obtained as a result of an invalid warrant, a technically unconstitutional search and seizure, the Court held the evidence admissible if the officer reasonably believed the warrant issued was valid.¹⁸³

The rationale for admissibility of the evidence obtained under these circumstances is the same as that for admitting evidence under the previously discussed exceptions to the exclusionary rule and in *Hudson*. As in those instances, when applying the cost/benefit analysis,

180. See *Leon*, 468 U.S. at 905.

181. 468 U.S. 897 (1984).

182. *Id.* at 905-25.

183. *Id.*

the costs of exclusion outweigh the deterrent benefit, so the evidence is admissible.¹⁸⁴ The Court reasoned that when evidence is excluded after an officer has acted in reasonable reliance upon a warrant issued by a judge, even when later held invalid, excluding the evidence will have minimal, if not nonexistent, deterrent effect on the officer who has done all that he or she should have done under the Fourth Amendment.¹⁸⁵ As a result, the deterrent benefit is outweighed by the social costs and the exclusionary rule is not applicable.

In *Leon*, police prepared an affidavit and presented it to a judge who found that probable cause existed and issued a warrant for the arrest of the suspect.¹⁸⁶ The warrant was executed, but it was later found not to be supported by probable cause.¹⁸⁷ After a finding that the officers had reasonably relied upon the validity of the warrant, the United States Supreme Court held that although the warrant was not supported by probable cause, "exclusion [was] inappropriate."¹⁸⁸ The Court reasoned that excluding evidence obtained by officers acting in good faith reliance upon the validity of a warrant does not further the deterrent goal of the exclusionary rule, and the rule is therefore inapplicable under these circumstances.¹⁸⁹

In a case such as *Leon*, an officer has conducted an investigation and has presented his or her findings, which he or she believes constitute probable cause, in a sworn affidavit to the judge. The judge then finds that the affidavit does, in fact, constitute probable cause, and issues a warrant based thereon. The officer then executes the warrant within its scope. Thereafter, the warrant is found not to be supported by probable cause making the search technically an unconstitutional search or seizure. The officer, in this instance, has done all that is required of him or her under the Fourth Amendment. All that he or she could have done differently is to disbelieve the judge, which clearly he should not be required to do.¹⁹⁰ Here, the error clearly lies

184. See *id.* at 906–07, where the Court addressed the question of whether the exclusionary rule should apply when an officer relies on a warrant later held invalid and stated that "it must be resolved by weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."

185. *Id.* at 901–05.

186. See *id.*

187. See *id.*

188. *Id.* at 926.

189. *Id.*

190. See *Massachusetts v. Sheppard*, 468 U.S. 981, 989–90 (1984) (holding that "an officer is not required to disbelieve a judge who has just advised him, by word and by

with the issuing judge, not the officer, for it is the judge's responsibility to make probable cause determinations¹⁹¹ after the officer has conducted an investigation and presented his or her findings in a sworn affidavit.¹⁹² When the judge has erred, excluding the evidence does not further the rule's goal of deterring an officer's conduct. The rule is not designed to deter the judge's conduct, for the judge has no stake in the outcome of a criminal trial, unlike the officer who is often said to be engaged in the "competitive enterprise of ferreting out crime."¹⁹³ Since the costs of excluding the evidence in this situation outweigh the minimal, if not nonexistent, deterrent benefits of exclusion, the Court has held that the exclusionary rule is not applicable. This analysis and application of the cost/benefit analysis is consistent with the Court's rationale in *Hudson* and the other exceptions to the exclusionary rule.

This good faith exception does have one essential requirement—the police officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable.¹⁹⁴ The officer must in fact have acted in good faith, i.e., he must possess a reasonable belief that the warrant was a valid warrant supported by probable cause.¹⁹⁵ The exception will only apply if reasonable minds could differ on the validity of the warrant.¹⁹⁶

As a result of the Fourth Amendment requirement that an officer must act reasonably, the Court has established four exceptions to this good faith exception in which the exclusionary rule will apply. The Court reasons that when these circumstances are present, application of the exclusionary rule is appropriate, and the evidence obtained as a result of the invalid warrant should be held inadmissible at trial. The exceptions to the good faith exception are: (1) a "facially deficient" warrant,¹⁹⁷ (2) the issuing judge "wholly abandoned his judicial role,"¹⁹⁸ (3) the affidavit was clearly insufficient to establish probable

action, that the warrant he possesses authorized him to conduct the search he has requested").

191. See U.S. CONST. amend. IV (providing that warrants be issued by a detached and neutral magistrate upon probable cause and supported by oath or affirmation).

192. See *supra* note 185 and accompanying text.

193. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

194. *United States v. Leon*, 468 U.S. 897, 922-25 (1984).

195. See *id.* at 919.

196. See *id.* at 914, 919.

197. *Id.* at 923.

198. *Id.*

cause,¹⁹⁹ and (4) the warrant contains misleading information.²⁰⁰ The rationale is that when these circumstances are present, the officer's conduct is not reasonable, and the evidence should be excluded from trial.²⁰¹

Applying the *Hudson* analysis, however, to the four exceptions, the evidence should be admissible in three of the four instances. Under those circumstances, excluding evidence does not serve the goal of deterrence, so the benefits of exclusion are outweighed by the social costs.

B. Application of the Cost/Benefit Analysis to the Exceptions to the Good Faith Exception: Warrant

Application of the *Hudson* analysis begins with assessing the costs to society when evidence is excluded from trial against a defendant. There are always "substantial social costs" whenever evidence is excluded from trial which could include "setting the guilty free and the dangerous at large."²⁰² Another import concern of excluding evidence is that it "allows lawbreaking officers to go unpunished,"²⁰³ which results in loss of respect for the criminal justice system. When these social costs are weighed against the minimal deterrent benefit of exclusion in each of the exceptions below, it is apparent that the exclusionary rule is not always warranted.

1. Insufficient Affidavit

The first exception to this good faith exception is when an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."²⁰⁴ The Court reasons that when an affidavit is clearly insufficient to establish probable cause, then the reasonableness and good faith required for applicability of the good faith exception are not present, and the good faith exception does not apply.²⁰⁵ If reasonable minds would all agree that probable cause does not exist, then an officer would not be reasonable in his or her belief that the warrant was a valid warrant, and evidence

199. *Id.*

200. *Id.*; see also *Franks v. Delaware*, 438 U.S. 154 (1978).

201. See *Leon*, 468 U.S. at 926 (holding that when an officer's reliance on the magistrate's determination of probable cause was objectively reasonable, "application of the extreme sanction of exclusion is inappropriate").

202. *Hudson v. Michigan*, 126 S. Ct. 2159, 2163 (2006).

203. *Schneckloth v. Bustamonte*, 412 U.S. 218, 267 (1973).

204. *Leon*, 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975)).

205. See *id.*

obtained as a result of the search would be subject to the exclusionary rule.

This rationale, however, overlooks one important factor—the search or seizure is not being conducted merely on the insufficient affidavit. The affidavit is presented to a judge, who makes a finding that it does establish probable cause and issues a warrant based thereon. If the judge makes a finding that an affidavit establishes probable cause, an officer should not be required to challenge this conclusion. Furthermore, excluding the evidence would not deter the officer's future conduct. When an officer relies upon a warrant, the officer has acted reasonably in a number of ways—he or she has conducted an investigation, prepared an affidavit of findings, and presented it to a judge who believed it constituted probable cause. Assuming he then executes it in a reasonable manner within its scope, it is unlikely that excluding evidence obtained from such a search would deter any future misconduct. This officer has done nothing wrong. Since the social costs of exclusion will outweigh the minimal if any deterrent benefit, under the cost/benefit analysis used in *Hudson*, the evidence should be admitted.

2. Issuing Judge Abandons Judicial Role

Another exception to this good faith exception is when a judge has “wholly abandoned” his or her detached and neutral judicial role.²⁰⁶ The Court pointed out that when this occurs, “no reasonably well-trained officer should rely on the warrant.”²⁰⁷ This happens when a judge is not acting as a detached and neutral magistrate, but instead he or she is acting in a similar capacity to that of an officer, engaged in the “competitive enterprise of ferreting out crimes.”²⁰⁸

The leading case on this issue is *Lo-Ji Sales v. New York*.²⁰⁹ In this case, the Court held that the judge “allowed himself to become a member, if not the leader, of the search party.”²¹⁰ The Court reasoned that evidence obtained when the judge has abandoned his or her judicial role is inadmissible because the officer who relies on a warrant issued by such a judge is not acting in good faith, and the evidence subsequently obtained is therefore inadmissible.²¹¹ Under

206. *Id.* at 923.

207. *Id.*

208. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

209. 442 U.S. 319 (1979).

210. *Id.* at 327.

211. *Leon*, 468 U.S. at 923.

those circumstances, excluding evidence is very unlikely to affect the officer's future conduct. Excluding this evidence has no effect on police conduct because the officer has acted reasonably in conducting an investigation, presenting a warrant supported by probable cause to a judge, and then executing it within its scope. Excluding this evidence has no deterrent effect on an officer who has done nothing wrong. It is the judge who has stepped out of his or her role. Since the deterrent benefit is minimal in such a case, the benefits are outweighed by the social costs of exclusion. Under *Hudson's* cost/benefit analysis, this evidence should be admissible at trial.

3. Facially Deficient Warrant

Another exception to this good faith exception exists when a warrant is facially deficient. The *Leon* Court held that "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid."²¹² The facially deficient exception refers to insufficiency regarding the particularity requirement of the Fourth Amendment.²¹³ If the warrant fails to particularly describe the persons to be searched or the persons or things to be seized, then the exception to the good faith exception is applicable because the warrant is presumed to be invalid on its face, and the courts presume the executing officer's should have known it.²¹⁴

There is a valid argument that this exception to the good faith exception could have a deterrent effect on police. If a warrant is clearly insufficient, then excluding evidence obtained as a result thereof can deter police from seeking and subsequently executing such a warrant. This exception, however, is similar to the facially deficient affidavit exception. The United States Supreme Court has held that "an officer is [not] required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."²¹⁵ When the officer has relied on the direction of the judge, his conduct is "reasonable," which is what the Constitution requires. Therefore, in this instance, like the other exceptions to the good faith exception, the costs

212. *Id.*

213. *See* U.S. CONST. amend. IV.

214. *See Leon*, 468 U.S. at 923; *cf. Massachusetts v. Sheppard*, 468 U.S. 981, 989–90 (1984) (finding that an officer acted reasonably in reliance on a facially deficient warrant).

215. *Sheppard*, 468 U.S. at 989–90.

outweigh the deterrent benefit. Therefore, applying the cost/benefit analysis, as it was applied in *Hudson*, exclusion is not warranted.

4. Misleading Information

The final exception to this good faith exception is when an officer has provided misleading information to the judge upon which to establish probable cause. This occurs when the magistrate who issued the warrant "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth."²¹⁶

The good faith exception does not apply here, even in light of *Hudson*. Unlike the other exceptions to this good faith exception, excluding evidence here will have a strong deterrent effect on future police conduct. In this situation, an officer has intentionally or recklessly represented facts to the judge regarding probable cause. If the evidence obtained as a result of these misrepresentations is excluded, the officer would have an incentive not to engage in such conduct in the future. In this case, the deterrent benefit outweighs the social costs of exclusion. This is exactly the type of situation that the exclusionary rule was designed to address. Therefore, the good faith exception is not applicable and the exclusionary rule is appropriate because here the deterrent benefit outweighs the social costs. Under this analysis, applied as it was in *Hudson*, this evidence should be excluded from trial.

C. *Hudson* Clearly Supports Admissibility of Evidence

Of the four exceptions to the good faith exception, only when an officer provides misleading information to the judge that the officer knew or should have known was false, will exclusion likely deter his or her future conduct. Since the deterrent benefit is great as compared to the social costs, the evidence should be inadmissible under the *Hudson* analysis. The exclusionary rule, however, is not the appropriate remedy in the other three exceptions where the deterrent benefit is minimal in comparison to the social costs.

The Court in *Hudson* reasoned that, although admitting evidence obtained in violation of the knock and announce rule was a significant change in the law, the conclusion relied on well-established principles

216. *Leon*, 468 U.S. at 923.

that had historically been applied to render a different result.²¹⁷ Here, even though this evidence has traditionally been excluded, if well-established principles regarding application of the exclusionary rule are applied, the evidence should be held admissible as not furthering the goal of the exclusionary rule. Like *Hudson*, this would appear to be a significant change in the law regarding admissibility of this evidence, but it is not new law. As in *Hudson*, this is the same test that has historically been applied to determine application of the exclusionary rule with a different result upon a more thorough application of the cost/benefit analysis.

VI. The Good Faith Exception to the Exclusionary Rule: Statutory Authority

A. Overview of the Exception

In *Illinois v. Krull*,²¹⁸ the United States Supreme Court held that a good faith exception to the exclusionary rule should also be recognized when officers act in objectively reasonable reliance upon a statute later held unconstitutional.²¹⁹ As in *Leon*, the *Krull* Court reasoned that an officer who reasonably relies on a statute later found to be unconstitutional has done nothing wrong, so excluding the evidence can have no deterrent effect on his future conduct.²²⁰ Like the judge in the good faith exception to an invalid warrant, here it is the legislature that is in error. The legislature, like the judge, has no real stake in the prosecution and cannot be deterred by the threat of exclusion of evidence. As in *Hudson*, the Court held the costs of exclusion outweigh the benefits, and the exclusionary rule is inapplicable in this context.²²¹

In establishing this good faith exception to the exclusionary rule, the Court again pointed out exceptions where the exclusionary rule should apply. In the first instance, the Court held that “a statute cannot support objectively reasonable reliance if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitu-

217. See *Miller v. United States*, 357 U.S. 301, 313–14 (1958); see also *United States v. Calandra*, 414 U.S. 338, 348 (1974) (applying the cost/benefit analysis to determine whether application of the exclusionary rule is appropriate); *Alderman v. United States*, 394 U.S. 165, 174–75 (1969) (holding that application of exclusionary rule would turn on balancing costs and benefits of exclusion).

218. 480 U.S. 340 (1987).

219. *Id.* at 347, 359–61.

220. See *id.* at 352.

221. See *id.* at 349–59.

tional laws."²²² Secondly, the Court held that the exception is not applicable if the statutory provision is such that a reasonable law enforcement officer should have known that the statute was unconstitutional.²²³ In both of these situations, the officer is deemed to have acted in bad faith, so the Court reasons that the good faith exception is not applicable, and the evidence should be excluded from trial.

Applying the *Hudson* cost/benefit analysis, however, it is clear that this evidence should not be excluded from trial. As in the case of an officer who reasonably relies upon an invalid warrant, when an officer reasonably relies upon a statute later held unconstitutional, the minimal deterrent benefit is substantially outweighed by the social costs. Therefore, the evidence should be admissible.

B. Application of the Cost/Benefit Analysis to the Exceptions to the Good Faith Exception: Statutory Authority

The costs of excluding evidence obtained when an officer relies upon statutory authority are great. As in the case of relying on a warrant, the costs here are heightened by the fact that the evidence is being excluded from trial after being obtained by an officer who reasonably relied upon statutory authority. Relying on statutory authority removes the fear that officers will instead rely on their own colored perceptions in making probable cause determinations. Removing officer discretion is at the very core of the Fourth Amendment warrant requirement.²²⁴ Here, there is similarly a neutral and objective party who has provided the authority upon which the officer relies. When evidence is excluded under these circumstances, resulting in the guilty going free, the costs to society are great.

1. Legislature Wholly Abandons Responsibility to Enact Constitutional Laws

The Court has ruled that if the legislature "wholly abandoned its responsibility to enact constitutional laws" at the time the statute was passed, then the evidence obtained by an officer in reasonable reliance thereon should be excluded.²²⁵ Excluding this evidence, however, can have little if any deterrent effect on the officer who has in good faith relied upon statutory authority. The officer has acted prop-

222. *Id.* at 355.

223. *Id.*

224. *See generally* U.S. CONST. amend. IV (providing that warrants be issued by a detached and neutral magistrate upon probable cause and supported by oath or affirmation).

225. *Krull*, 480 U.S. at 355.

erly in relying on the statute. This is what he or she should have done. In *Krull*, the Court held that application of the exclusionary rule cannot be justified on the basis of deterring legislative misconduct.²²⁶ The Court reiterated that police, not legislators, are the focus of the rule.²²⁷ An exception that makes the exclusionary rule applicable when the legislature abandons its legislative role ignores the purpose of the rule. It is the police not the legislature whose perceptions are sometimes colored in making probable cause determinations because they are the ones who are engaged in the “competitive enterprise of ferreting out crime.”²²⁸

Based on this analysis, there is little or no deterrent benefit to gain in excluding this evidence from trial. When weighed against the costs society suffers in excluding this evidence, the costs simply outweigh the benefits. Under *Hudson’s* cost/benefit analysis, this would warrant admissibility of the evidence.

2. Reasonable Officer Should have Known the Statute Was Unconstitutional

Similarly, the social costs outweigh the deterrent benefits of exclusion in the second exception to this good faith exception. This situation exists when the statutory provision on which the officer relies, is such that a reasonable law enforcement officer should have known that the statute was unconstitutional.²²⁹

Only in the rarest of circumstances, however, could an officer be charged with reasonably believing a duly acted statute is unconstitutional and thus, reasonably disregard it. “Before assuming office, state legislators are required to take an oath to support the Federal Constitution.”²³⁰ Even the “courts presume that legislatures act in a constitutional manner.”²³¹ An officer would not be justified in disregarding the legislature’s determination of the constitutionality of a statute.

An officer must follow the law as it is written.²³² Reliance on a statute is just the type of objectively reasonable conduct that is most desirable from law enforcement, rather than having them make probable cause determinations themselves. This is no different than the

226. *Id.* at 354–55.

227. *Id.*

228. *Johnson v. United States*, 333 U.S. 10, 13 (1948).

229. *Krull*, 480 U.S. at 355.

230. *Id.* at 351.

231. *Id.*

232. *See id.* at 350.

rationale for requiring a detached and neutral magistrate to issue warrants. The goal is to remove the discretion from the officer who is often engaged in the "competitive enterprise of ferreting out crimes."²³³ It seems that it would be better for officers to rely on a statute authorizing their conduct than upon their own conclusions and observations.

Based on this analysis, an officer will not likely be deterred from future misconduct when evidence is excluded in this context. As in the case of a warrant later held invalid, here the officer has done all that he or she can do to act reasonably. If this evidence is excluded, there is nothing more that he or she can do differently in the next instance other than to disbelieve the legislature and act on his or her own accord. The deterrent benefit of the exclusionary rule is simply not furthered in this context. Since the social costs outweigh the deterrent benefits, admitting the evidence is appropriate.

Conclusion

The exclusionary rule is a judicially-created remedy for constitutional violations. In developing this remedy, the United States Supreme Court has continued to carefully justify it and carve out the circumstances providing for its applicability. The Court has been careful in its application, and it has been clear that the rule should only be applied when the deterrent benefits of exclusion outweigh the social costs of exclusion. The Court strictly applied the cost/benefit analysis in *Hudson* to find that evidence obtained in violation of the knock and announce rule should not be excluded from trial because the social costs of exclusion outweigh the minimal deterrent benefit of excluding such evidence. Although *Hudson* overruled prior decisions which excluded this evidence, the *Hudson* ruling is consistent with well-established principles that have created a number of exceptions to the exclusionary rule, including the good faith exceptions.

Similarly, when *Hudson's* cost/benefit analysis is applied to the exceptions to the good faith exceptions, the exclusionary rule should not be applied. When an officer reasonably relies upon a warrant issued by a magistrate later held invalid or upon a statute later held unconstitutional, he or she has acted reasonably, as the Fourth Amendment requires. When the judge or the legislature, and not the officer, has acted improperly, application of the rule can have no real effect on the officer's future conduct. Since the deterrent benefit is

233. *Johnson*, 333 U.S. at 14.

minimal and the social costs great, the evidence should be admissible, as in *Hudson*. If the goal of the rule is not furthered, the rule should not be applied.

As in *Hudson*, admitting evidence obtained in violation of the exceptions to the good faith exceptions would appear to change the law, but it does not. As demonstrated in the above analysis of the exceptions to the exclusionary rule, the Court has for many years only excluded evidence when deterrent benefits are furthered by exclusion of the evidence. That analysis has not changed. In *Hudson*, the Court strictly applied the cost/benefit analysis taking into account all relevant factors necessary to adequately assess both the costs and benefits—including new law and policies—to conclude that when a knock and announce violation has occurred, the costs outweigh the benefits, and the evidence should be admissible. *Hudson* signals the end of any arbitrary application of the exclusionary rule, and it clarifies the circumstances under which the exclusionary rule is appropriately applied. Based on that analysis, the exclusionary rule is not the appropriate remedy for the exceptions to the good faith exceptions to the exclusionary rule, and the evidence should be admissible at trial.

