
CAUSAL RELEVANCE IN THE LAW OF SEARCH AND SEIZURE

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INTRODUCTION

In *Hudson v. Michigan*,¹ the Supreme Court held that violations of the Fourth Amendment's knock-and-announce requirement do not trigger the exclusionary rule.² This holding was based in part on a straightforward balancing of the social costs and benefits of exclusion in this setting.³ But it was also based – at least for purposes of Hudson's own case – on an intriguing analysis of the causal connection between the unlawful entry and the discovery of the evidence.⁴ The Court said that even where unlawful police conduct is a

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¹ 126 S. Ct. 2159 (2006).

² *Id.* at 2168.

³ *Id.* at 2165-68.

⁴ *Id.* at 2163-65.

“but-for” cause of the discovery of evidence, and even where the causal connection between the illegality and the discovery of the evidence is proximate rather than remote, the exclusionary rule will apply only to evidence whose discovery flows from a violation of “the interest[s] protected by the constitutional guarantee.”⁵ The Court did not deny that the unannounced entry to Hudson’s home might have violated the interests underlying the knock-and-announce rule (e.g., Hudson’s dignity interest in preparing himself for the entry by police). The Court said, however, that the violation of these interests had “nothing to do with the seizure of the evidence.”⁶ Accordingly, the Court held that the exclusionary rule did not apply.⁷

The only real precedent for this aspect of the *Hudson* decision was the Court’s 1990 decision in *New York v. Harris*.⁸ In *Harris*, the defendant had moved to suppress his confession, which the police had obtained after entering his residence to arrest him.⁹ Though the arrest was supported by probable cause, the warrantless entry violated the rule of *Payton v. New York*,¹⁰ which requires the police to obtain a warrant before entering a suspect’s residence to make an arrest.¹¹ In rejecting Harris’s suppression argument, the Court held that “where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.”¹² This holding, like the holding in *Hudson*, was based in part on the Court’s analysis of the causal connection between the illegality and the evidence. According to the Court, the causal connection was not of the right kind: the confession did not flow from a violation of the interest that the *Payton* rule was designed to protect, namely, the occupant’s interest in preventing the exposure of the home’s contents.¹³ The confession, in short, “was not the fruit of the fact that the arrest was made in the house rather than someplace else.”¹⁴

In neither *Hudson* nor *Harris* did the Court formulate clearly the rule that underlay this aspect of its analysis.¹⁵ But the Court appears to have been

⁵ *Id.* at 2164.

⁶ *Id.* at 2165.

⁷ *Id.*

⁸ 495 U.S. 14 (1990).

⁹ *Id.* at 15-16.

¹⁰ 445 U.S. 573 (1980).

¹¹ *Harris*, 495 U.S. at 16 (“[*Payton*] held that the Fourth Amendment prohibits the police from effecting a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.”).

¹² *Id.* at 21.

¹³ *Id.* at 19-20.

¹⁴ *Id.* at 20.

¹⁵ See JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 504 (3d ed. 2006) (asking of this portion of the *Hudson*

applying what is known among tort scholars as the “risk rule.”¹⁶ The risk rule says that the defendant will be held responsible for another person’s injury only if the injury “flow[ed] from the realization of the sort of risks that led society to regard the [defendant’s] conduct as wrongful in the first place.”¹⁷ To illustrate, a person who hands a loaded shotgun to a child will not be held liable in tort if the child drops the shotgun on her foot and breaks a toe, even though the actor’s conduct was negligent, and even though his negligent conduct was a but-for cause of the child’s harm.¹⁸ In this situation, the harm suffered by the child does not result from a realization of the risk that makes the conduct negligent – namely, the risk that the loaded shotgun will be fired accidentally.¹⁹ The same requirement appears to be at work in *Harris* and *Hudson*. The gist of the Court’s analysis in *Hudson*, for example, was that the discovery of evidence in Hudson’s home did not result from a realization of any of the risks that make unannounced entries wrongful.²⁰

At first glance, the *Hudson* Court’s application of the risk rule – or something very like it – seems unobjectionable. In applying the fruits doctrine,²¹ the Court always has relied on rules of causation that are closely akin to those applied in tort and criminal law. This kinship is apparent, for example, in the requirement that the unlawful search or seizure be a but-for cause of the discovery of the evidence.²² This kinship also is apparent in the

opinion: “Is the Court applying the inevitable discovery doctrine, the independent source doctrine, or attenuation principles? Or, is the Court announcing some other principle?”; Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH. L. REV. 1207, 1213-16 (2007) (inquiring into the nature of what the author refers to as *Hudson*’s “Impaired-Interest Attenuation” rule).

¹⁶ John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2061 (1997).

¹⁷ *Id.*; see also RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005) (“An actor’s liability is limited to those physical harms that result from the risks that made the actor’s conduct tortious.”); ROBERT E. KEETON, LEGAL CAUSE IN THE LAW OF TORTS 10 (1963) (“A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent.”); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 34-36 (1998) (“The [risk] rule states that a defendant is liable in negligence for only those injuries that are realizations of the risks in relation to which the act was negligent.”).

¹⁸ RESTATEMENT (THIRD) OF TORTS § 29 cmt. d, illus. 3 (Proposed Final Draft No. 1, 2005).

¹⁹ *Id.*

²⁰ *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006).

²¹ The “fruits doctrine” requires that evidence and witnesses obtained as a result of a search or seizure in violation of the Fourth Amendment be excluded from evidence as the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 488-49 (1963).

²² See, e.g., *Segura v. United States*, 468 U.S. 796, 815 (1984) (stating that “evidence will not be excluded as ‘fruit’ [of an unlawful act] unless the illegality is at least the ‘but for’ cause of the discovery of the evidence”).

attenuation doctrine,²³ which requires the court to perform something “akin to a proximate causation analysis” with respect to the connection between the illegality and the supposed fruit.²⁴ Given the kinship of the fruits doctrine to causal principles applied in tort and criminal law, it seems less than troubling that the Court would adopt too the related requirement that the “harm” to the accused arise from a realization of the hazard that makes the conduct wrongful.

This first glance is deceiving, however. Application of the risk rule to Fourth Amendment cases would, at the very least, make the exclusionary rule inapplicable to cases that have long been thought to fall at its core. Under the risk rule, for example, the fruits of a warrantless residential search would not be subject to suppression if the police had probable cause to search the residence; what makes warrantless searches wrongful, after all, is the risk that the searches will be conducted on something less than probable cause. Worse, thoroughgoing application of the risk rule in the law of search and seizure might undercut the exclusionary sanction entirely. It is at least arguable that the risk that makes Fourth Amendment violations wrongful is the “unjustifiably high risk of an intrusion upon an *innocent* person’s privacy.”²⁵ This risk rarely, if ever, will be realized in cases where a criminal defendant ends up invoking the exclusionary rule.

The Court appears to have gone wrong, then, when it adopted the risk rule as a limitation on the exclusionary rule. Where the Court went wrong, I will argue, was in overlooking the fact that causation plays a different role in the law of search and seizure than it plays in tort and criminal law. In tort and criminal law, causation defines the required relationship between the actor’s wrongdoing and the victim’s harm.²⁶ By contrast, in the law of search and seizure, as in the law of restitution, causation defines the required relationship between the actor’s wrongdoing and the actor’s *gains*. Because the risk rule’s

²³ See *Wong Sun*, 371 U.S. at 487 (holding that evidence derived from an unlawful search or seizure is not subject to suppression if the “connection between the lawless conduct of the police and the discovery of the challenged evidence has ‘become so attenuated as to dissipate the taint’” (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939))).

²⁴ *United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998).

²⁵ Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1272 (1983) (emphasis added); see also Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1669 (2007) [hereinafter Colb, *Standing Room Only*] (arguing that “the universe to which the Fourth Amendment aspires is one that maximizes police searches and seizures of people who are, in fact, guilty and hiding evidence and minimizes police failures to search the factually guilty”).

²⁶ See RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985) (observing that the role of causation in the criminal law is to “help[] us to understand who should be punished by answering how the harm occurred”).

function is merely to ensure that the connection between wrongdoing and harm is of a particular kind, and because the fruits doctrine is concerned exclusively with the causal relationship between wrongdoing and *gains*, the risk rule is not an appropriate limitation on the fruits doctrine. What is demanded by way of causal relevance in the law of search and seizure is at most that the government's gains – its evidence – flow from a realization of the advantage conferred by the unlawful activity.

I will begin my argument, in Part I, with a brief explanation of the risk rule and its leading variant, the “wrongful aspect” rule. In Part II, I will argue that the Court was applying the risk rule when, in *Harris* and *Hudson*, it assigned a role to the “interest protected by the constitutional guarantee”²⁷ in the analysis of the causal connection between the constitutional violation and the seized evidence. In Part III, I will trace out the logical consequences of the Court's adoption of the risk rule as a limitation on the exclusionary rule. Finally, in Part IV, I will argue that, in adopting the risk rule as a limitation on the exclusionary rule, the Court overlooked important facts about the role causation plays in the law of search and seizure.

I. CAUSAL RELEVANCE IN SUBSTANTIVE CRIMINAL LAW AND TORT

A. *The Risk Rule*

By way of introduction to the risk rule, consider a typical case of drunk-driving homicide: *Rust v. State*.²⁸ William Rust's troubles began one afternoon in 1995, when he telephoned his domestic partner, Katherine Banfield, to find out when she would be home from work.²⁹ She told him that there had been a dispute at the trailer park where her daughter lived, and that she meant to stop there before coming home.³⁰ Rust was concerned when he heard Banfield's plan, because Rust and Banfield had been involved in an altercation with two strangers at the daughter's trailer park just two weeks before.³¹ Though Rust was intoxicated when he spoke to Banfield – he apparently had spent the afternoon drinking beer – he got into his Ford Bronco and headed for the trailer park.³² As he neared the trailer park, his car crossed the road's centerline and struck another vehicle head-on.³³ The impact killed the driver of the other vehicle and injured one of her passengers.³⁴ Though Rust received only a

²⁷ *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006).

²⁸ No. A-6053, 1997 WL 129080 (Alaska Ct. App. 1997).

²⁹ *Id.* at *1.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; Brief of Appellee at 2, *Rust v. State*, No. A-6053, 1997 WL 129080 (Alaska Ct. App. 1997) (on file with author).

³³ *Rust*, 1997 WL 129070 at *1.

³⁴ *Id.*

“small cut and a [few] bruises” in the collision, he was taken to the hospital, where blood tests revealed that his blood-alcohol level was 0.17, well above the legal limit.³⁵

Rust was charged with manslaughter under a statute that defined manslaughter as “recklessly caus[ing] the death of another person.”³⁶ Rust’s defense at trial was that the collision was attributable not to his intoxication but to the icy, rutted condition of the roadway.³⁷ His attorney argued to the jury that Rust’s “wheels caught in a rut” as he changed lanes just before the collision, and that under “these very slippery conditions the rear end of his vehicle went out of control, and before he knew it he was in an uncontrollable skid.”³⁸ Defense counsel argued that the same thing would have happened to a sober driver: “this was an accident like the 33 other accidents that happened that day, that could have happened to anyone, and . . . alcohol was not a cause of this accident.”³⁹

Rust’s defense seems intuitively sound, but its legal basis may not be immediately apparent. After all, Rust’s defense casts no doubt on whether Rust was reckless – his decision to drive while grossly intoxicated plainly reflected “conscious[] disregard[] [of] a substantial and unjustifiable risk.”⁴⁰ Further, Rust’s defense seems to cast no doubt on the existence of a but-for causal relationship between his conduct and the victim’s death: if Rust had not engaged in the reckless conduct – if he had stayed home that day instead of driving drunk – the collision would not have occurred.⁴¹ Finally, there is no question that the causal connection between Rust’s reckless conduct and the victim’s death was proximate rather than remote; this is not a case where the causal sequence connecting the defendant’s conduct to the result was long or tenuous.⁴²

Our intuitions, though, seem to demand something more here.⁴³ Specifically, what they seem to demand is a kind of *relevance*. Rust plainly did wrong when he placed his victim and others at risk by driving drunk. And

³⁵ *Id.*; Brief of Appellee, *supra* note 32, at 2-3.

³⁶ ALASKA STAT. § 11.41.120(a)(1) (2006).

³⁷ Brief of Appellee, *supra* note 32, at 11.

³⁸ *Id.* (quoting trial transcript).

³⁹ *Id.*

⁴⁰ See ALASKA STAT. § 11.81.900(a)(3) (2006).

⁴¹ See MODEL PENAL CODE § 2.02(2)(c) (1985).

⁴² See Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1467-68 (2003) [hereinafter Wright, *Legal Responsibility*] (identifying the traditional requirement of causal proximity as something distinct from both but-for causation and causal relevance); see also *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006) (identifying a requirement of causal proximity in the law of search and seizure that is distinct from both but-for causation and causal relevance).

⁴³ This resort to shared intuitions is in keeping with the fact that it is the “plain man’s notions of causation (and not the philosopher’s or the scientist’s) with which the law is concerned.” H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 1 (2d ed. 1985).

his decision to drive drunk plainly caused the victim's death. The trouble is that the risk he created by driving drunk had nothing to do with the victim's death. To borrow a phrase from *Hudson v. Michigan*, "the interests that were violated in this case" – the interests of the victim and others in not being placed at risk of an intoxication-related accident – "have nothing to do with the [result]."⁴⁴

Probably the best formulation of the principle underlying these intuitions is Dean Keeton's.⁴⁵ Keeton said, in essence, that a defendant who engages in wrongful conduct should not be held liable for an injury caused by her conduct unless the injury flows from a realization of the very risks that made the conduct wrongful in the first place.⁴⁶ In Rust's case, for example, the risk that made his conduct reckless was the risk ordinarily associated with drunk driving, namely, the risk that the alcohol's impairment of the driver's judgment, perception, or motor function would contribute to an accident. If, as Rust claimed, the accident was attributable to the condition of the roadway and not to Rust's intoxication, then the victim's death could not be said to have flowed from a realization of the risks that made Rust's conduct reckless. This is, in substance, what the trial judge would have told the jury in Rust's case.⁴⁷ In Rust's jurisdiction, as in others, the law would have required the judge to instruct the jury that Rust could not be held liable unless the accident was attributable to his intoxication.⁴⁸

Roughly the same rule would have been applied in a civil action for damages against Rust.⁴⁹ The current tentative draft of the *Restatement (Third) of Torts* summarizes the tort version of this rule in section 29, which provides: "An actor's liability is limited to those physical harms that result from the risks

⁴⁴ *Hudson*, 126 S. Ct. at 2165.

⁴⁵ See KEETON, *supra* note 17, at 3-11.

⁴⁶ *Id.* at 10; see also Goldberg, *supra* note 16, at 2061 (summarizing Keeton's version of the risk rule as "the rule that one should be held responsible only for harms flowing from the realization of the sort of risks that led society to regard the conduct as wrongful in the first place").

⁴⁷ See, e.g., *Lupro v. State*, 603 P.2d 468, 475 (Alaska 1979) (stating that "[w]here there is sufficient evidence that the driver was intoxicated at the time of the accident the state need only show beyond a reasonable doubt that the intoxication was the cause of the victim's death").

⁴⁸ *Id.*; see also *People v. Edmundson*, 617 N.E.2d 446, 451 (Ill. App. Ct. 1993) (applying a requirement that the government prove "some 'nexus' between defendant's intoxication and the cause of death" in a prosecution for reckless vehicular homicide); *Gant v. State*, 244 So. 2d 18, 20 (Miss. 1971) (stating that the government is required to prove, in a prosecution for manslaughter based on culpable negligence "that the [driver's] intoxication was the proximate cause of the death"); 1 WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* 489-90 (2d ed. 2003) ("For crimes requiring proof of recklessness or negligence by the defendant, it must be established that the reckless or negligent conduct (not just any conduct of the defendant) caused the prohibited result.").

⁴⁹ See RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005).

that made the actor's conduct tortious."⁵⁰ This section, according to the commentary, requires the jury, first, to identify "the risks that made the actor's conduct tortious" and, second, to determine "whether the harm for which recovery is sought was a result of any of those risks."⁵¹ The commentary illustrates this rule with a hypothetical case in which Richard, a hunter, hands a loaded shotgun to his hunting partner's nine-year-old daughter, Kim; "Kim drops the shotgun, which lands on her toe, breaking it."⁵² In this hypothetical, Richard plainly is negligent in handing the shotgun to Kim.⁵³ But the risk that makes his conduct negligent is the risk that Kim will accidentally shoot herself or someone else with the gun, not that she will drop the gun on her toe. Thus, according to the commentary, "Kim's broken toe is outside the scope of Richard's liability, even though Richard's tortious conduct was a factual cause of Kim's harm."⁵⁴

In both civil and criminal cases, then, the injury for which the defendant would be held liable must flow from a realization of the risk that made the defendant's conduct wrongful. Notice that this limitation is focused on the "pathway" along which the causal sequence moves, not on the character of the injury that lies at the pathway's end.⁵⁵ It is neither necessary nor sufficient that the injury suffered by the plaintiff or victim be of a particular kind.⁵⁶ In Rust's case, for example, it would not be sufficient that the physical injuries suffered by the other driver were of the kind normally associated with drunk-driving accidents. Nor, in the loaded-shotgun case, would it foreclose liability that the nine-year-old girl's injury was *not* of the kind normally associated with the mishandling of loaded shotguns. If, for example, the shotgun had gone off when the girl mishandled it, and she had injured her toe in dodging the blast, the risk rule would not necessarily foreclose recovery for her injured toe. In the words of the Restatement, the injury to Kim's toe "result[ed] from the risks

⁵⁰ *Id.*

⁵¹ *Id.* § 29 cmt. d.

⁵² *Id.* § 29 cmt. d, illus. 3.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Zipursky, *supra* note 17, at 49 (defining a "pathway-dependent" case as "one in which the injury of which the plaintiff complains occurred as a consequence of the realization of the hazard with relation to which the defendant's conduct was negligent"); see also Wright, *Legal Responsibility*, *supra* note 42, at 1479 (emphasizing the importance of distinguishing the risk rule from the "'harm matches the risk' rule"; the risk rule "does not require any matching between the actual harm and the foreseeable harms or hazards that made the defendant's conduct tortious. It rather requires that the actual harm result from the (actual or imminent) realization and playing out of one of the foreseeable risks that made the defendant's conduct tortious").

⁵⁶ Wright, *Legal Responsibility*, *supra* note 42, at 1479 (explaining that the risk rule, which Wright helpfully refers to as the "risk payout rule," has "no interest in the description of the actual harm").

that made the actor's conduct tortious,"⁵⁷ namely, the risk that the loaded gun would somehow be fired accidentally.⁵⁸

So far, my discussion has been limited to cases in which the defendant's liability was based on negligence or recklessness. In both the loaded-shotgun case and the drunk-driving case, the defendant's liability hinged in part on a jury determination that the defendant had acted in the face of an unacceptable risk. It would be natural to suppose that the risk rule is limited in scope to cases like these, where an assessment of the risk plays a direct role in the jury's threshold determination that the defendant's conduct is tortious or wrongful. That is, it would be natural to suppose that only where the jury is responsible for making a threshold assessment of the risk is the jury also responsible for determining that the injury is "within the risk," so to speak.

This supposition would be incorrect, however. The risk rule is not limited in scope to cases where liability hinges on the jury's determination of negligence or recklessness. It extends as well to cases where liability is based simply on violation of a specific statutory prohibition. It extends, for example, to cases where the defendant is charged criminally under one of the many state statutes that make it a felony to cause injury or death by driving drunk.⁵⁹ These statutes do not require a case-by-case assessment of the risks created by the defendant's conduct.⁶⁰ To convict, rather, the jury need merely determine that the defendant has driven drunk and thereby has caused death or injury to another person.⁶¹ In interpreting these statutes, though, most courts have required the government to prove, in effect, that the victim's death or injury flowed from a realization of the risk that made the defendant's drunk-driving wrongful, i.e., the risk that her impairment would bring about a traffic accident.⁶²

⁵⁷ RESTATEMENT (THIRD) OF TORTS § 29 (Proposed Final Draft No. 1, 2005).

⁵⁸ It is an indication of the difficulty of this point that earlier drafts of the *Restatement (Third) of Torts* appear to have confused the risk rule with the "harm matches the risk" rule. Tentative Draft No. 3, for example, stated the rule this way: "An actor is not liable for harm different from the harms whose risks made the actor's conduct tortious." RESTATEMENT (THIRD) OF TORTS § 29 (Tentative Draft No. 3, 2003); see also Wright, *Legal Responsibility*, *supra* note 42, at 1500 (commenting on this aspect of the tentative draft).

⁵⁹ See, e.g., IDAHO CODE ANN. § 18-8006(1) (2007); MICH. COMP. LAWS ANN. § 257.625(4) (West 2006); NEB. REV. STAT. ANN. § 28-306(1), (3)(b) (West 2006); N.Y. PENAL LAW § 125.12(2) (McKinney 2007); WYO. STAT. ANN. § 6-2-106(b) (2007).

⁶⁰ See, e.g., *Baker v. State*, 377 So. 2d 17, 20 (Fla. 1979) (holding that negligence is not an element of manslaughter when drunk driving provides statutory basis for charge); *Wyatt v. Commonwealth*, 624 S.E.2d 118, 121 (Va. Ct. App. 2006) (stating that involuntary manslaughter "does not require proof of criminal negligence but nevertheless permits the offender to be punished as if for common law involuntary manslaughter").

⁶¹ *Baker*, 377 So. 2d at 20.

⁶² See, e.g., *State v. Robinett*, No. 28564, 2004 WL 32949, at *2 (Idaho Ct. App. June 7, 2004), *aff'd*, 106 P.3d 436 (Idaho 2005); *State v. Neades*, No. 00-0725, 2001 WL 427556, at *4 (Iowa Ct. App. Apr. 27, 2001); *State v. Price*, 952 So. 2d 112, 117 (La. Ct. App. 2006);

Something like the risk rule also appears to be at work in cases where the defendant is prosecuted for causing injury or death to another person while engaged in an activity for which she lacks a required license or permit. In some states, statutes specifically impose criminal liability on persons who cause death or injury while, say, driving a car without a valid operator's license⁶³ or practicing medicine without a medical license.⁶⁴ More often, though, the prosecution of these defendants will be based on the combination of (1) a statute that makes it unlawful to engage in a particular activity without a license and (2) a statute that defines manslaughter to encompass any death caused during the performance of an "unlawful act."⁶⁵ For example, a person who drives without a valid operator's license in violation of state law might, if she kills someone, be subject to federal prosecution under 18 U.S.C. § 1112, which defines manslaughter in part as the killing of another human being without malice "[i]n the commission of an unlawful act."⁶⁶

Though the facts in these licensing cases nearly always will satisfy the but-for test of causation,⁶⁷ the courts generally have been reluctant to impose

Webber v. State, 577 A.2d 58, 63 (Md. 1990); State v. Sommers, 272 N.W.2d 367, 371 (Neb. 1978); People v. Baker, 826 N.Y.S.2d 550, 553 (N.Y. Co. Ct. 2006); Commonwealth v. Molinaro, 631 A.2d 1040, 1042 (Pa. Super. Ct. 1993); Hale v. State, 194 S.W.3d 39, 42 (Tex. Ct. App. 2006); State v. Papazoni, 596 A.2d 1276, 1276-77 (Vt. 1991); Wyatt, 624 S.E.2d at 121; State v. Bartlett, 355 S.E.2d 913, 916-17 (W. Va. 1987); Hodgins v. State, 706 P.2d 655, 657 (Wyo. 1985). Note, however, that a substantial minority of state courts reject the requirement of a nexus between the intoxication and the accident. See People v. Acosta, 860 P.2d 1376, 1381 (Colo. Ct. App. 1993); Baker, 377 So. 2d at 18-20; Micinski v. State, 487 N.E.2d 150, 152-54 (Ind. 1986); People v. Schaefer, 703 N.W.2d 774, 784 (Mich. 2005); State v. Benoit, 650 A.2d 1230, 1233-34 (R.I. 1994); State v. Rivas, 896 P.2d 57, 62 (Wash. 1995); State v. Caibaosai, 363 N.W.2d 574, 577-79 (Wis. 1985); see also Case Comment, *Criminal Law – Involuntary Manslaughter – Causal Connection Between the Unlawful Quality of the Act and the Homicide*, 41 HARV. L. REV. 661, 669-70 (1928) (discussing *Keller v. State*, 299 S.W. 803 (Tenn. 1927), which "present[ed] the question whether . . . a person should be criminally responsible for a homicide resulting from an unlawful act, when the unlawful quality of the act plays no causal rôle").

⁶³ See GA. CODE ANN. § 40-6-393(c) (2007); MICH. COMP. LAWS ANN. § 257.904(4) (West 2007).

⁶⁴ See CAL. BUS. & PROF. CODE § 2053 (2002); FLA. STAT. ANN. § 456.065(2)(d)(2) (West 2001).

⁶⁵ E.g., United States v. O'Brien, 238 F.3d 822, 824 (7th Cir. 2001); People v. Penny, 285 P.2d 926, 930 (Cal. 1955); State v. Gerak, 363 A.2d 114, 119 (Conn. 1975); Burns v. State, 242 S.E.2d 579, 580 (Ga. 1978); State v. Biechele, No. K1-03-653A, 2005 WL 3338331, at *8 (R.I. Super. Dec. 5, 2005); State v. Catellier, 179 P.2d 203, 227 (Wyo. 1947).

⁶⁶ *O'Brien*, 238 F.3d at 824.

⁶⁷ When an unlicensed driver is involved in a fatal accident, for example, it will nearly always be possible to conclude that the accident would not have occurred but for the fact that the person was on the roadway in violation of the licensing law. See Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 547-48 (1962). Likewise,

liability. Granted, the courts have had difficulty articulating the reasons for their reluctance.⁶⁸ Their decisions, however, point toward causal-relevance concerns like those underlying the risk rule. Some courts have said, for example, that the defendant's violation of the licensing law will not supply a basis for a manslaughter conviction unless the lack of a license was itself the cause of the victim's death.⁶⁹ Other courts have more explicitly sought a connection between the harm inflicted, on the one hand, and the risks that made the conduct wrongful, on the other. For instance, in cases where the defendant is prosecuted for unlawful-act manslaughter on the basis of her unlicensed practice of medicine, the courts sometimes have looked to whether the patient's death was attributable to incompetence of the kind that is the target of the licensing laws, e.g., "[g]ross ignorance of the art"⁷⁰ or "gross ignorance of the science of medicine."⁷¹

when a person practices medicine without a license and in so doing hastens a patient's death, the conduct of the would-be physician clearly qualifies as a but-for cause of the death, even if the care provided by the would-be physician in hastening death was entirely competent. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 14.02(C)(2)(a) (3d ed. 2001).

⁶⁸ See, e.g., *Catellier*, 179 P.2d at 227. The confusion is exacerbated by the various doctrines created by the courts in an effort to limit the scope of the misdemeanor-manslaughter offense, which understandably is held in disfavor by the courts. For a review of the law of misdemeanor manslaughter, see *State v. Yarborough*, 930 P.2d 131, 134-38 (N.M. 1996).

⁶⁹ See, e.g., *Penny*, 285 P.2d at 930 ("It is extremely dubious that defendant's lack of a license had any causal connection with [the victim's] death."); *Gerak*, 363 A.2d at 119 ("[I]t cannot reasonably be said that the failure to obtain a permit was the proximate cause of death."); *Burns*, 242 S.E.2d at 580 ("There was no showing of a causal relationship between appellant's not having complied with the state's licensing laws . . . and the victim's death."); *Biechele*, 2005 WL 3338331, at *8 (holding that the tour manager for the band "Great White" who, without a permit, ignited fireworks in a nightclub and in so doing caused a fire that killed 100 nightclub patrons would be guilty of unlawful-act manslaughter if his violation of the statute requiring a permit for igniting fireworks was a "proximate cause" of the patrons' deaths). These decisions apply the wrongful-aspect approach to causation, which, as discussed in Part I.B, *infra*, works to much the same effect as the risk rule, though its application in licensing cases is problematic.

⁷⁰ *Catellier*, 179 P.2d at 220. In *Catellier*, the defendant was a chiroprapist who was charged with manslaughter after causing a patient's death by administering a general anesthetic to him. *Id.* at 206-08, 214. The court acknowledged that practicing medicine without a license was an unlawful act. *Id.* at 219. But it said that this unlawful act would not automatically give rise to liability for misdemeanor manslaughter, which was defined under title 9, section 205 of the Wyoming Compiled Statutes of 1945 as unlawfully killing a human being in the commission of an unlawful act. *Id.* at 220-22. The Court suggested, though, that "[g]ross ignorance of the art . . . is sufficient to bring a defendant within the rule." *Id.* at 220.

⁷¹ *State v. Karsunky*, 84 P.2d 390, 395 (Wash. 1938); see also *Frazier v. State*, 289 So. 2d 690, 692 (Miss. 1974) (holding that defendant's lack of a driver's license was not a cause

In summary, then, the tort and criminal cases point toward the existence of a causal-relevance limitation that is distinct from both the requirement of but-for causation and the requirement of causal proximity. Moreover, this limitation applies not only to cases where the actor's liability hinges on a case-by-case assessment of the risks created by her conduct, but also to cases where the actor's liability is based simply on a violation of a specific statutory prohibition. Finally, this limitation applies to statutory violations that closely resemble violations of the warrant requirement, namely, violations of a requirement that a person obtain a license before engaging in a particular activity.

B. *The Wrongful-Aspect Variant*

There is widespread agreement among courts and scholars about how these cases – Rust's case, for example, and the hypothetical loaded-shotgun case – should be resolved. Nearly everybody agrees that the defendant should not be held liable, either in tort or in criminal law, if the thing that made his or her conduct wrongful was causally irrelevant to the victim's injury. But scholars are deeply divided about precisely what form this limitation on the defendant's liability should take. The scholars can be roughly divided into two camps.⁷² Adherents of Keeton's "risk rule" approach, as we have seen, would address the problem of causal irrelevance by adopting a separate limitation on the scope of the defendant's liability.⁷³ In contrast, adherents of the "wrongful aspect" approach would treat the entire problem of causal irrelevance merely as a symptom of a failure to be sufficiently precise in applying the but-for test of factual cause.⁷⁴ Accordingly, they would address the problem by "refining" the application of the but-for test.⁷⁵

The *Rust* case illustrates the difference between the two approaches. When we concluded before that William Rust's reckless conduct was a but-for cause of the other driver's death, we smuggled in a somewhat controversial assumption about how the but-for test should be applied.⁷⁶ The controversy over this assumption is what principally separates adherents of the risk rule

of an accident where "she had been driving for years" and "[t]here is no proof that she was an incapable driver").

⁷² Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1759-60 (1985) [hereinafter Wright, *Causation in Tort Law*].

⁷³ See RESTATEMENT (THIRD) OF TORTS § 29 cmt. g (Proposed Final Draft No. 1, 2005) (explaining that section 29 "treats factual cause and scope of liability separately").

⁷⁴ See Wright, *Legal Responsibility*, *supra* note 42, at 1494.

⁷⁵ *Id.*; see also David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1771 (1997); Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 398-99 (1992).

⁷⁶ See *supra* text accompanying note 41.

from adherents of the wrongful-aspect variant.⁷⁷ The controversy does not go to the basic form of the but-for test; both sides agree that the but-for test requires the fact-finder to determine the truth of a statement that takes the form, “If not X, then not Y.”⁷⁸ Nor is there any controversy about what “Y” denotes. Y is the injury for which we would hold the defendant liable. The controversy goes to the nature of X, the counterfactual antecedent.⁷⁹

In our first pass at Rust’s case, we assumed that the appropriate counterfactual antecedent – the appropriate X – was Rust’s “conduct,” i.e., the event that consisted of Rust driving drunk. In keeping with this assumption, we asked simply whether the other driver would have been killed if Rust had not driven his Bronco that afternoon, but instead had stayed home. Our unspoken assumption that “conduct” should serve as the counterfactual antecedent in the but-for test probably seemed entirely natural. As philosopher J.L. Mackie has said, “[i]t is one concrete event that in the most obvious sense leads on to or produces another.”⁸⁰ And so lawyers, like philosophers, “have long been inclined to speak of one *event* causing another.”⁸¹ This practice is evident, for example, in the *Restatement (Second) of Torts*, in which tort liability is made to depend on the existence of a particular causal relationship between the actor’s conduct and another’s harm.⁸² This practice also is evident in the Model Penal Code, in which liability for result-based crimes like murder is made to depend on the existence of a but-for causal relationship between the actor’s conduct and the proscribed result.⁸³

Adherents of the “wrongful aspect” approach to causal relevance take a different tack in identifying the counterfactual antecedent. For them, the counterfactual antecedent X must take the form not of an event or conduct, but of a particular fact *about* the event or conduct.⁸⁴ Specifically, for them, the appropriate counterfactual antecedent is “*that aspect of the conduct which is*

⁷⁷ Wright, *Causation in Tort Law*, *supra* note 72, at 1759-60; *see also* HART & HONORÉ, *supra* note 43, at 117-18 (identifying the disagreement as focused on whether to require a causal connection between the wrong, if any, sought to be avoided by the statute, and the harm caused by the defendant).

⁷⁸ *See, e.g.*, MODEL PENAL CODE § 2.03 (1985) (formulating the but-for test as providing that X is the cause of a result when X “is an antecedent but for which the result in question would not have occurred”); HART & HONORÉ, *supra* note 43, at 110 (identifying the but-for test with the question, “Would Y have occurred if X had not?”).

⁷⁹ Strassfeld, *supra* note 75, at 398-99.

⁸⁰ J. L. MACKIE, *THE CEMENT OF THE UNIVERSE* 265 (1974).

⁸¹ *Id.* at 248.

⁸² RESTATEMENT (SECOND) OF TORTS § 430 (1965); *see also* RESTATEMENT (THIRD) OF TORTS § 26 (Proposed Final Draft No. 1, 2005) (“Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.”).

⁸³ MODEL PENAL CODE § 2.03(1) (1985).

⁸⁴ *See* Robertson, *supra* note 75, at 1770-71; Strassfeld, *supra* note 75, at 398; Wright, *Causation in Tort Law*, *supra* note 72, at 1759-60.

wrongful.”⁸⁵ Thus, they would reframe the but-for test to require the plaintiff or the government “to prove that the [wrongful] aspect of the defendant’s conduct – the aspect of the conduct that made it [wrongful], rather than the defendant’s conduct as a whole – was a cause of the plaintiff’s injury.”⁸⁶

In a large class of cases, this modification to the but-for test elegantly solves the problem of causal relevance without the need for a separate risk rule.⁸⁷ In Rust’s case, for example, instead of counterfactually subtracting Rust’s conduct – his drunk driving – we would subtract Rust’s intoxication, since Rust’s intoxication is the aspect of the conduct that makes it wrongful. The question for the jury then would simply be whether, but for Rust’s intoxication, the other driver would have been killed that day. If, as Rust argued, the accident was attributable entirely to the slick, rutted condition of the roadway, then he would be entitled to an acquittal, as he would be under the risk rule, too. Likewise, in the loaded-gun hypothetical, we will obtain the correct result by counterfactually subtracting the fact that the gun was loaded. That is, since the injury to Kim’s toe would have occurred even if the gun had not been loaded, the wrongful aspect of Richard’s conduct – the fact that the gun was loaded – was not a but-for cause of the injury.⁸⁸

⁸⁵ Fleming James, Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 789 (1951).

⁸⁶ Wright, *Legal Responsibility*, *supra* note 42, at 1494-95; *see also* James & Perry, *supra* note 85, at 789; Strassfeld, *supra* note 75, at 398 (explaining that the goal is to “frame the antecedent in terms of legally mandated conduct”; thus, in a case where a speeding driver is involved in a collision, we should not ask simply whether the person’s driving was a cause of the collision, but ask, instead, “Had the defendant driven at a reasonable speed would he have collided with plaintiff?”).

⁸⁷ Wright, *Causation in Tort Law*, *supra* note 72, at 1771.

⁸⁸ For the sake of simplicity, I have considerably understated the difficulty of applying the wrongful-aspect test. In truth, the preliminary task of identifying the “wrongful aspect” of the defendant’s conduct is tricky at best and impossible at worst. *See* Robertson, *supra* note 75, at 1770-71 (stressing that the “mental operation performed . . . must be careful, conservative, and modest”). Some adherents of the wrongful-aspect approach appear to assume that it is always possible to identify a single minimally counterfactual antecedent from which only the “wrongful aspect” of the conduct has been subtracted. *See* ARNO C. BECHT & FRANK W. MILLER, *THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES* 34 (1961); Robertson, *supra* note 75, at 1770. Strassfeld argues, for example, that the trier of fact, in applying the wrongful-aspect test, would not be required to choose among “a limitless array of antecedents; the negligence inquiry . . . defines the tortious element of the past that needs to be removed in framing the antecedent.” Strassfeld, *supra* note 75, at 398. Thus, in Rust’s case, presumably, the “correct” counterfactual antecedent would be formed by subtracting the fact that he was intoxicated. But it is unclear why this antecedent is better than the one formed by subtracting the fact that Rust was driving. After all, neither his drinking nor his driving is wrongful in itself; each is wrongful only in combination with the other. The matter is even more complicated in the loaded-shotgun case, where at least three “aspects” of the conduct are essential to the wrongdoing: the fact that the shotgun was loaded, the fact that the defendant handed Kim the gun, and the fact that Kim was nine years old. *See* David Howarth, “*O Madness of Discourse, That*

It would be natural, but incorrect, to suppose that the difference between the aspect-based version of the but-for test and the traditional event-based version lies in how finely they “slice” the defendant’s wrongdoing.⁸⁹ The difference between the two versions of the but-for test is not a matter of degree; it is not a matter of adopting one or the other level of precision in “slicing” the violation into discrete events. It is, rather, a matter of deciding whether to frame the counterfactual antecedent in terms of an *event*, however narrowly sliced, or in terms of a fact *about* the event.⁹⁰ Confusion over this point was exacerbated when one of the wrongful-aspect approach’s early critics, Leon Green, argued that the event-based version of the but-for test (to which he subscribed) requires the trier of fact counterfactually to subtract the defendant’s entire “course of conduct.”⁹¹ In a driving case, he said, the conduct should be identified as “[t]he affirmative undertaking to drive the car,” rather than any

Cause Sets Up With and Against Itself!,” 96 YALE L.J. 1389, 1413 n.110 (1987) (observing that proponents of the wrongful-aspect approach “fail to appreciate that . . . there are always two ways of acting lawfully: Carry on as before, but obey the statute . . . or refrain completely from the activity in question”).

Other adherents of the wrongful-aspect approach acknowledge that their approach actually would require the jury to construct not one but a series of counterfactual antecedents. Richard Wright, for example, has acknowledged that the jury’s task is to determine whether they can identify any “essential part of the description of the negligent aspect of [the defendant’s] conduct” that did not contribute to the plaintiff’s injury. Wright, *Legal Responsibility*, *supra* note 42, at 1527-28; *see also* Wright, *Causation in Tort Law*, *supra* note 72, at 1768 (“If a certain element did not contribute to the injury, but was necessary to make the conduct or activity tortious, then it cannot be said that the tortious aspect of the conduct or activity was a cause of the injury.”). This means, in effect, that the jurors would be required to subtract first one and then another “aspect” of the defendant’s conduct, to determine whether they could construct *any* counterfactual antecedent such that (1) the defendant’s conduct is lawful or non-tortious and (2) the harm would have come about anyway. What is troubling about this approach – apart from its cumbersomeness – is the degree of latitude accorded to the trier of fact in constructing the counterfactual antecedent. At some point, the jury no longer is applying the traditional but-for test but is instead asking the very different question whether the defendant’s conduct is “a necessary member of *every* set of sufficient conditions of a given type of occurrence.” HART & HONORÉ, *supra* note 43, at 112.

⁸⁹ *See* Hudson v. Michigan, 126 S. Ct. 2159, 2177 (2006) (Breyer, J., dissenting) (arguing that the majority, in “separating the ‘manner of entry’ from the related search,” had “slice[d] the violation too finely”).

⁹⁰ *See* MACKIE, *supra* note 80, at 248-69; Robertson, *supra* note 75, at 1770-71 (quoting Wex S. Malone, *Ruminations on Dixie Drive It Yourself Versus American Beverage Company*, 30 LA. L. REV. 363, 370 (1970)).

⁹¹ Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 547 (1962).

particular act performed while driving, e.g., “[p]ressing the accelerator” at a particular moment in the driver’s travels.⁹²

Rust’s case illustrates where Green went wrong. In Rust’s case, the adherent of the traditional, event-based version of the but-for test can slice Rust’s conduct as finely as she likes. She can viably identify the relevant conduct as, e.g., setting out to drive to the trailer park that day or, alternatively, as the continued operation of the car in the moment before the accident. But no degree of precision in the identification of the relevant conduct will undercut her event-based approach, for Rust’s intoxication at the moment of the accident cannot be “sliced” off as a separate event. True, his intoxication at the moment of the accident is *a consequence of* an earlier event, namely, Rust’s drinking on the afternoon before the accident. But this earlier act of drinking is not the basis for liability. Rather, the basis for liability is Rust’s intoxication when he engaged in the conduct of driving. This intoxication is not a discrete event or discrete conduct; it is a fact about – an aspect of – the conduct of driving. In the terminology of the Model Penal Code, it is an “attendant circumstance” rather than a “conduct” element.⁹³

There are, then, two fundamentally different approaches to the problem of causal relevance and, along with them, two fundamentally different ways of applying the but-for test. The wrongful-aspect approach to causal relevance collapses the issues of causal relevance and factual causation into a single question: namely, whether the “wrongful aspect” of the defendant’s conduct was a but-for cause of the victim’s injury. The risk-rule approach, in contrast, treats the two questions separately: in addressing the question of factual causation, it applies the traditional event-based version of the but-for test; then, to address the problem of causal relevance, it requires a separate determination whether the victim’s injuries flowed from a realization of the risk that made the defendant’s conduct wrongful in the first place.

This is not the place for resolving the longstanding disagreement between proponents of the risk rule and proponents of the wrongful-aspect approach. But some apparent shortcomings in the wrongful-aspect approach deserve at least passing mention, lest the reader go away believing that the entire problem of causal relevance arises from a simple failure to apply the but-for test correctly.

⁹² *Id.* Adherents of the wrongful-aspect approach have not hesitated to use Green’s misstep to their advantage in the sometimes heated debate over how to apply the but-for test. See Robertson, *supra* note 75, 1770 n.19 (describing Green’s model as “a decidedly eccentric view of cause in fact, shared by only a few analysts and having no appreciable judicial influence”); Wright, *Causation in Tort Law*, *supra* note 72, at 1761-63 (analyzing Green’s view that the “casual inquiry be applied to the defendant’s conduct as a whole”).

⁹³ MODEL PENAL CODE § 1.13 (1985); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 43-46 (2002) (explaining the Model Penal Code’s use of the term “attendant circumstance” and identifying “under the influence of alcohol” as an attendant-circumstance element).

First of all, subtracting the wrongful aspect of the defendant's conduct will not *always* produce the same intuitively sound result as the risk rule. Consider this modified version of Rust's case: Let us assume that (as Rust argued at trial) the rutted, slick condition of the roadway would have sent even a sober driver across the centerline. But let us also assume that Rust had taken a wrong turn before reaching that spot and that he was in fact mistakenly traveling *away from* the trailer park when the collision occurred. Assume further that his wrong turn was attributable solely to his intoxication; he had driven the same route a hundred times before, and it was only because he was intoxicated that he turned the wrong way onto the road where the accident occurred. In this scenario, the wrongful aspect of Rust's conduct – his intoxication – is a but-for cause of the harm; but for Rust's intoxication, he would not have taken the wrong turn and the accident never would have occurred.⁹⁴ Thus, under the wrongful-aspect approach, Rust is liable for the death.

This result feels wrong, of course. Most of us would say that this scenario raises causal-relevance concerns to exactly the same degree as the scenario in which Rust's impairment plays no role at all in the accident.⁹⁵ Further, if pressed to put this intuition into words, we probably would use words very like those in which the risk rule is formulated. The reason why Rust ought not to be held liable, we might say, is that the risk of taking a lawful wrong turn is not among the risks that make drunk-driving wrongful. The traditional "risk rule," then, seems better able to capture our intuitions about causal relevance here. By comparison, the wrongful-aspect limitation accomplishes too little.⁹⁶

⁹⁴ It is tempting to think that this problem might be solved simply by describing the wrongful aspect of Rust's conduct more narrowly, e.g., as "his intoxication at the time of the crash." But this does not solve the problem. If we were to reframe the hypothetical to make the crash occur *as he was making the wrong turn*, then even this narrowly defined "wrongful aspect" would still count as a cause of the harm.

⁹⁵ Hart and Honoré address a related problem: the speeding motorist problem. HART & HONORÉ, *supra* note 43, at 121-22. This problem arises in cases where "it is argued that a motorist's wrongful action in exceeding the speed limit was the cause of the plaintiff's injuries suffered in an accident on the road" but "the driver, having speeded earlier, either was not speeding at the time of the accident or his speeding at the time of the accident was admittedly irrelevant." *Id.* at 121. In these cases, as in the modified *Rust* hypothetical, the wrongful aspect of the motorist's conduct – his speeding – is a cause of the injuries, since "had he not speeded he would not have arrived at the scene of the accident at the time when he did, and so there would have been no accident." *Id.* at 122. Hart and Honoré suggest that these cases might be best addressed by a separate rule "that a factor, which is merely sufficient to secure the presence of a person or thing at a given place at a time different from what it would otherwise have been, is not to be treated as causally connected with the ensuing accident, unless the risk of the accident occurring at that different time was greater." *Id.*

⁹⁶ See Zipursky, *supra* note 17, at 36 n.149 ("[T]here is a category of risk rule . . . cases that cannot plausibly be handled in this manner.").

In other cases, though, the wrongful-aspect limitation accomplishes too much; the limitation negates liability where our intuitions tell us that liability is appropriate. For example, consider the licensing cases, where the defendant has, say, practiced medicine without a valid medical license, or driven a car without a valid operator's license, and by engaging in this unlicensed conduct has caused injury or death to another person. In some states, this conduct is proscribed by statute; a number of state legislatures have adopted statutes that make it a felony to cause injury or death while either practicing medicine without a license or driving a car without a license.⁹⁷ The risk rule offers a plausible interpretation of these statutes: it requires that liability for the death or injury be imposed only where (1) the "conduct" was a but-for cause of the death or injury; and (2) the death or injury flowed from the realization of the risks that led the legislature to make this conduct criminal, e.g., the risk that the unlicensed actor would be incompetent to engage in the licensed activity.⁹⁸

In contrast, adherents of the wrongful-aspect approach can do nothing with these cases. In these cases, the "wrongful aspect" of the person's conduct appears to be her lack of a license. But, as leading proponents of the wrongful-aspect test have acknowledged, it is never really the case that an injury or death is "caused" by the fact that a person does not have a particular piece of paper.⁹⁹ This point becomes clearer when we compare the lack of a license to, say, a driver's intoxication. Intoxication causes impairment of function, which in turn causes traffic accidents. Intoxication, then, lies causally "upstream" of the impairment that is the more immediate cause of the harm. In contrast, the lack of a required license usually lies causally "downstream" of the immediate

⁹⁷ See, e.g., CAL. BUS. & PROF. CODE § 2053 (West 2007) (making it a felony to practice medicine without a license "under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death"); FLA. STAT. ANN. § 456.065 (West 2007) (providing in part that "[i]t is a felony of the second degree . . . to practice a health care profession without an active, valid Florida license"); GA. CODE ANN. § 40-6-393(c) (2007) (providing that a person is guilty of "homicide by vehicle" if the person causes the death of another person by operating a motor vehicle while his driver's license is in revocation as a result of his "being declared a habitual violator" under state law); MICH. COMP. LAWS ANN. § 257.904(4) (West 2007) (imposing felony liability on persons who operate a motor vehicle under a suspended license and "by operation of that motor vehicle, cause[] the death of another person").

⁹⁸ See MACKIE, *supra* note 80, at 266.

⁹⁹ See *People v. Penny*, 285 P.2d 926, 930 (Cal. 1955); Strassfeld, *supra* note 75, at 398 (arguing that courts "incorrectly identify the violation of a licensing law as a responsible cause of the accident" by erroneously specifying the counterfactual antecedent); Wright, *Causation in Tort Law*, *supra* note 72, at 1773 (acknowledging that "[a]lthough the overall conduct of driving or practicing medicine contributed to the injury, the failure to have the required piece of paper (the license) did not"). *But see* *Commonwealth v. Samson*, 196 A. 564, 568 (Pa. Super. Ct. 1938) (appearing to conclude that the Commonwealth had proved the requisite causal connection between a landlord's failure to obtain a license to operate his premises as a tenant house and the death of seven tenants).

cause of the harm. The immediate cause of the harm in the licensing cases is the unlicensed driver's or the would-be doctor's incompetence or lack of training. But the lack of a license is never the *cause* of this deficiency; it usually is, rather, an *effect* of the deficiency.

Whatever its shortcomings, though, the wrongful-aspect test produces the right result in the vast majority of cases. It is perhaps unsurprising, then – given the success of the wrongful-aspect test in handling the ordinary run of cases, and given its apparent simplicity – that courts faced with issues of causal relevance invoke the wrongful-aspect test far more often than they invoke the risk rule.¹⁰⁰ Adherents of the risk rule cannot seriously argue that their approach better reflects what the courts actually *say* in cases where causal-relevance concerns arise. What they can argue, however, is that the risk rule better and more comprehensively captures the underlying principle. Adherents of the risk rule likely would argue that their approach bears the same relationship to the wrongful-aspect approach that the theory of relativity bears to Newtonian mechanics. Like Newtonian mechanics, the wrongful-aspect test produces the right answer in the vast majority of cases. But it is the risk rule that, like the theory of relativity, provides the more comprehensive and more accurate account of what is really going on.¹⁰¹

In any event, what principally matters for our purposes is the rough equivalence of the two approaches, which has been acknowledged by the leading proponents of both. Dean Keeton, whose *Legal Cause in the Law of Torts* made the case for the risk-rule approach to the problem of causal relevance, acknowledged that the risk rule, in essence, poses “the same inquiry as the question whether there is causal relation ‘between *that aspect of the defendant’s conduct which is wrongful* and the injury.’”¹⁰² H.L.A. Hart and Tony Honoré, whose *Causation in the Law* made the case for the wrongful-aspect approach, said much the same thing:

[T]he following propositions are equivalent to one another:

- (i) A negligent actor is legally responsible for that harm, and only that harm, of which the negligent aspect of his conduct is a cause in fact, and

¹⁰⁰ See HART & HONORÉ, *supra* note 43, at 118 (commenting that the tendency of courts to apply the wrongful-aspect test rather than the risk rule “is firmly marked”); Richard Wright, *Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1083 (2001) [hereinafter Wright, *Causal Contribution*] (commenting that courts have “clearly rejected” the risk-rule approach in favor of requiring the plaintiff “prove that the tortious aspect of the defendant’s conduct contributed to the plaintiff’s injury”).

¹⁰¹ I borrowed this analogy from Richard Wright, who uses it to describe the relationship of the but-for test to the more comprehensive “necessary element of a sufficient set” test of factual cause. Wright, *Causation*, *supra* note 72, at 1792.

¹⁰² KEETON, *supra* note 17, at 12 (quoting 2 FOWLER V. HARPER & FLEMING JAMES JR., THE LAW OF TORTS 1138 (1956)).

(ii) A negligent actor is legally responsible for the harm, and only the harm, that not only (1) is caused in fact by his conduct but also (2) is a result within the scope of the risks by reason of which the actor is found to be negligent.¹⁰³

This is the critical point. The wrongful-aspect test and the risk rule are fundamentally designed to limit liability in exactly the same way. Thus, in considering the role of causal relevance in the law of search and seizure, we should be concerned with identifying not only those instances where the Court has applied the “risk rule” but also those instances where the Court has subtly altered the but-for test in keeping with the wrongful-aspect approach to causal relevance.

II. CAUSAL RELEVANCE IN *HUDSON* AND *HARRIS*

As it turns out, both the risk rule and the wrongful-aspect variant played a role in the Supreme Court’s decisions in *Hudson* and *Harris*. In both cases, the Court concluded that the fruits doctrine requires something more by way of causal connection than but-for causation and causal proximity.¹⁰⁴ And in both cases, the Court’s muddled efforts to articulate this “something more” pointed toward an analogue of the risk rule.¹⁰⁵ Finally, in both cases, the Court independently concluded that, even apart from this causal-relevance limitation, the but-for test was not really satisfied.¹⁰⁶ It reached this latter conclusion, though, only by applying an aspect-based version of the but-for test.¹⁰⁷

A. *The Risk Rule in Hudson and Harris*

In *Hudson v. Michigan*, the Court held that the exclusionary rule did not require suppression of evidence discovered by police officers in petitioner Hudson’s home after the officers violated the knock and announce requirement when making an otherwise valid entry to Hudson’s home.¹⁰⁸ The Court’s conclusion had two separate bases. First, the Court concluded, quite generally, that in this setting the social costs of applying the exclusionary rule outweigh its value as a deterrent.¹⁰⁹ It was this general conclusion that provided the basis for the Court’s broad holding that violations of the knock-and-announce rule *never* trigger the exclusionary rule.¹¹⁰ But the Court also articulated a second, alternative basis for its resolution of Hudson’s own case. It said that,

¹⁰³ HART & HONORÉ, *supra* note 43, at lxii-lxiii.

¹⁰⁴ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2164-65 (2006); *New York v. Harris*, 495 U.S. 14, 19-20 (1990).

¹⁰⁵ See *Hudson*, 126 S. Ct. at 2164-65; *Harris*, 495 U.S. at 19-20.

¹⁰⁶ See *Hudson*, 126 S. Ct. at 2164; *Harris*, 495 U.S. at 19.

¹⁰⁷ See *Hudson*, 126 S. Ct. at 2164; *Harris*, 495 U.S. at 19.

¹⁰⁸ *Hudson*, 126 S. Ct. at 2168.

¹⁰⁹ *Id.* at 2165-68.

¹¹⁰ *Id.* at 2168.

at least in Hudson's case, the requisite causal connection between the knock-and-announce violation and the evidence was lacking.¹¹¹ It is this second, causation-based holding that concerns us here.

In analyzing the causal connection, the Court emphasized, first, that "but-for causality is only a necessary, not a sufficient, condition for suppression."¹¹² Even where but-for causality is present, the Court said, the causal connection between the evidence and the constitutional violation "can be too attenuated to justify exclusion."¹¹³ The Court recognized two separate kinds of attenuation. First, attenuation can occur "when the causal connection is remote."¹¹⁴ But attenuation also can occur, the Court said, when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained."¹¹⁵

This last point is badly put. The suppression of evidence obtained after, say, an entry conducted in violation of the knock-and-announce rule will always advance "the interest protected by the constitutional guarantee," because it will always provide a general deterrent to future violations of the knock-and-announce rule. So the Court's statement cannot mean exactly what it says. It is plain enough, though, that the Court wanted to assign some role to the constitutionally-guaranteed interest in the analysis of the causal connection between the violation and the discovery of the evidence. What the Court appears to have meant was that the evidence seized by police must be causally connected not only to the constitutional violation, but also to the infringement of the interests protected by the guarantee.

This interpretation of the statement is borne out by what follows it. After making this general statement – that the requisite causal connection will be established only where "the interest protected by the constitutional guarantee that has been violated would . . . be served by suppression of the evidence obtained"¹¹⁶ – the Court identified the particular interests protected by the knock-and-announce requirement.¹¹⁷ According to the Court, these interests are three.¹¹⁸ First, the knock-and-announce requirement protects "human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident."¹¹⁹ Second, it minimizes property damage by giving individuals "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry."¹²⁰ Third, it

¹¹¹ *See id.* at 2163-65.

¹¹² *Id.* at 2164.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2165.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

protects “privacy and dignity” by affording the occupant an opportunity to, e.g., “pull on clothes or get out of bed.”¹²¹ In Hudson’s own case, the Court said, the discovery of cocaine in Hudson’s house bore no causal relationship to the invasion of any of these interests: “the interests that *were* violated in this case have nothing to do with the seizure of the evidence.”¹²² In other words, in Hudson’s case the violation of the interests protected by the knock-and-announce rule played no causal role in the discovery of the cocaine in Hudson’s house.

In *Hudson*, then, the Court’s analysis tracked perfectly the form of analysis that characterizes application of the risk rule. Recall what the drafters of the *Restatement (Third) of Torts* said about how the risk-rule analysis is to be performed: the risk rule requires the jury, first, to identify “the risks . . . that made the actor’s conduct tortious” and, second, to determine “whether the harm for which recovery is sought was a result of any of those risks.”¹²³ In *Hudson*, the Court first identified the risks that make unannounced entries wrongful: the risks of violence, property destruction, and indignity. Then it addressed the question whether the evidence obtained during the search “was a result of any of those risks.”¹²⁴ It concluded, of course, that it wasn’t.¹²⁵

It is telling that the Court, in concluding this analysis of the causal connection between the evidence and the violation, limited its reasoning to Hudson’s case. The Court did not say that the interests protected by the knock-and-announce requirement *never* can play a causal role in the discovery of evidence. It said, rather, that “the interests that *were* violated in this case have nothing to do with the seizure of the evidence.”¹²⁶ In so limiting its conclusion, the Court tacitly acknowledged that this alternative basis for the outcome would not have justified the Court’s broader holding – that violations of the knock-and-announce rule *never* justify application of the exclusionary rule. This acknowledgment was appropriate, for it is certainly possible to conceive of circumstances in which the discovery of evidence *would* flow from a realization of the risks that make unannounced entries wrongful.

Imagine, for example, that the police obtain a warrant to search the home of a physician for documentary evidence of Medicaid fraud. They enter without knocking, as a result of which the doctor is denied an opportunity to pull on his clothes before facing the police. During this embarrassing encounter, one of the investigators sees a distinctive tattoo on the doctor’s left buttock, which reminds her of a tattoo described by the victim of a recent rape. She reports this observation to a detective in the sex crimes unit, whose subsequent investigation of the doctor connects him to the rape, and the doctor is charged.

¹²¹ *Id.* (quoting *Richards*, 520 U.S. at 393 n.5).

¹²² *Id.*

¹²³ RESTATEMENT (THIRD) OF TORTS § 29 cmt. d (Proposed Final Draft No. 1, 2005).

¹²⁴ *Id.*

¹²⁵ *Hudson*, 126 S. Ct. at 2165.

¹²⁶ *Id.*

In this situation, the evidence against the doctor might well be said to have resulted from a realization of the risks that made the unannounced entry wrongful, namely, the risk that the unannounced entry would deny the homeowner an “opportunity to pull on clothes or get out of bed.”¹²⁷ In this hypothetical case, it could *not* be said (as it was in *Hudson*) that “the interests that *were* violated . . . have nothing to do with the seizure of the evidence.”¹²⁸

Further light is cast on *Hudson*’s reasoning by the Court’s heavy reliance on *New York v. Harris*,¹²⁹ where too the Court appears to have applied something like the risk rule. The issue in *Harris* revolved around the arrest and subsequent confession of Bernard Harris.¹³⁰ Harris had been arrested at his home for the murder of Thelma Staton and, shortly after his arrest, had confessed at the police station.¹³¹ When the police arrested Harris, they already had developed probable cause to believe that Harris had committed the murder.¹³² They had not, however, obtained a warrant for Harris’s arrest.¹³³ This meant that the entry to effect Harris’s arrest violated the rule of *Payton v. New York*,¹³⁴ which requires the police to obtain a warrant before entering a suspect’s residence to make an arrest.¹³⁵ Before trial, Harris moved to suppress his confession as a fruit of the *Payton* violation.¹³⁶ The trial court denied his motion.¹³⁷ But the New York Court of Appeals reversed, reasoning that the confession was a tainted fruit of the *Payton* violation.¹³⁸

On review, the Supreme Court did not deny the accuracy of the factual premise for the New York Court of Appeals’s decision; that is, it did not deny that if the police had remained outside Harris’s residence instead of entering unlawfully, the confession would never have occurred.¹³⁹ Instead, the Court held that suppression would be inappropriate because “suppressing the statement taken outside the house would not serve the purpose of the rule that

¹²⁷ *Id.* (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)).

¹²⁸ *Id.*

¹²⁹ 495 U.S. 14 (1990).

¹³⁰ *Id.* at 15-16.

¹³¹ *Id.*

¹³² *Id.* at 15.

¹³³ *Id.*

¹³⁴ 445 U.S. 573 (1980).

¹³⁵ *Id.* at 602-03.

¹³⁶ *Harris*, 495 U.S. at 16.

¹³⁷ *Id.*

¹³⁸ *Id.* at 16-17.

¹³⁹ *Id.* at 17-20; *see also Hudson v. Michigan*, 126 S. Ct. 2159, 2169-70 n.2 (2006) (noting that *Harris* involved “a confession that police obtained by illegally removing a man from the sanctity of his home”); *United States v. Duchi*, 944 F.2d 391, 395 (8th Cir. 1991) (observing that “[i]n *Harris*, . . . the illegal entry was a ‘but for’ cause of the later statements in that without the illegal arrest no statements would have been made”).

made Harris' in-house arrest illegal."¹⁴⁰ By this, the Court did not mean simply that "the incremental deterrent value [of suppressing confessions obtained after *Payton* violations] would be minimal."¹⁴¹ Rather, the Court appears to have meant, in addition, that the "purpose of the rule" ought to play a role in the analysis of the causal connection between the evidence and the constitutional violation. Specifically, the evidence should not be deemed a "fruit" of the constitutional violation unless it is causally connected – not just to the violation – but to the realization of the risks that make the police conduct wrongful.

This, in any event, is the rule the Court appears to have applied. After remarking that suppression of Harris's confession "would not serve the purpose of the rule that made Harris' in-house arrest illegal," the Court identified the interest that underlies the *Payton* rule as the protection of the home and its contents from observation by police officers during the making of an arrest.¹⁴² Harris's confession at the police station was not, the Court implied, causally connected to the police's observation of Harris's home and its contents during the arrest.¹⁴³ This was not a case where, for example, the police had observed evidence of a crime during the unlawful warrantless entry and later had used the information derived from these observations to elicit a confession from the defendant.¹⁴⁴ In the Court's words, the evidence was not "the fruit of [Harris's] having been arrested in the home rather than someplace else."¹⁴⁵

Interestingly, in dissent, Justice Marshall performed a risk-rule analysis of his own.¹⁴⁶ He argued that the majority's analysis rested in part "on a cramped understanding of the purposes underlying *Payton*."¹⁴⁷ The warrantless invasion of the suspect's home, he said, not only exposes the home and its contents to the officers, but also undermines the suspect's sense of safety and security.¹⁴⁸ After having been arrested in his home, "the suspect is likely to be so frightened and rattled that he will say something incriminating."¹⁴⁹ In other words, Justice Marshall thought that Harris's confession might well have been the result of a realization of one of the risks that makes unannounced entries

¹⁴⁰ *Harris*, 495 U.S. at 20.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 19.

¹⁴⁴ *Cf.* *United States v. Crawford*, 372 F.3d 1048, 1057 (9th Cir. 2004) (en banc) (observing that if the police had obtained evidence during an unlawful search and then had used the evidence to elicit a confession, "the confession would have been an indirect product of the search").

¹⁴⁵ *Harris*, 495 U.S. at 19.

¹⁴⁶ *See id.* at 21 (Marshall, J., dissenting).

¹⁴⁷ *Id.* at 27 (Marshall, J., dissenting).

¹⁴⁸ *Id.* at 28 (Marshall, J., dissenting).

¹⁴⁹ *Id.* (Marshall, J., dissenting).

wrongful, i.e., the risk that the occupants of the home will be terrorized. Justice Marshall thought that the facts satisfied the risk rule.

Admittedly, in neither *Harris* nor *Hudson* did the Court explicitly invoke tort or criminal-law formulations of the risk rule. But the analyses performed in both *Harris* and *Hudson* clearly track the analysis required under the risk rule. In both cases, moreover, the Court's reasoning unmistakably is grounded on the very intuitions about causal relevance that underlie the risk rule. In both cases, the Court concluded that the fruits doctrine requires something more by way of causal connection than (1) but-for causality and (2) relative causal "proximity."¹⁵⁰ And in both cases, the Court said that this "something more" is connected to an analysis of the interests protected by the constitutional rule at issue¹⁵¹ – which is just another way of saying that this "something more" is tied to the risks that justify the prohibition.

In their application of the risk rule, *Hudson* and *Harris* appear to have no precedent. In both cases, the Court relied heavily on a single sentence from *United States v. Ceccolini*:¹⁵² "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is designed to serve."¹⁵³ In *Ceccolini*, this sentence was offered in support of the Court's determination that the testimony of a witness who had come to light as the result of an unlawful search was not subject to suppression.¹⁵⁴ In *Ceccolini*, though, the facts raised causal-relevance concerns to no greater degree than any other Fourth Amendment case. Rather, in *Ceccolini*, the causal attenuation took the more traditional form: the causal chain between the unlawful search and the testimony of the witness was long and indirect.¹⁵⁵ In other words, of the two

¹⁵⁰ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006); *Harris*, 495 U.S. at 17 (citing *United States v. Ceccolini* 435 U.S. 268, 276 (1978)).

¹⁵¹ See *Hudson*, 126 S. Ct. at 2164; *Harris*, 495 U.S. at 17 (citing *Ceccolini*, 435 U.S. at 276).

¹⁵² 435 U.S. 268 (1978).

¹⁵³ *Id.* at 279; see also *Hudson*, 126 S. Ct. at 2164; *Harris*, 495 U.S. at 17.

¹⁵⁴ *Ceccolini*, 435 U.S. at 279.

¹⁵⁵ The unlawful search that was the basis for the suppression motion in *Ceccolini* occurred when a police officer casually opened an envelope he found lying on the counter at Ceccolini's flower shop. *Ceccolini*, 435 U.S. at 270. Inside the envelope, the officer found "policy slips." *Id.* This discovery led to an investigation of Ceccolini's gambling operation, which led, in turn, to the discovery of the witness whose testimony was the subject of Ceccolini's motion to suppress. *Id.* In sum, then, the unlawful search of the envelope led to the discovery of evidence in more or less the expected way; the envelope contained evidence of a crime, investigation of which ultimately led to further evidence.

It is certainly possible to imagine circumstances in which similar facts would give rise to causal-relevance concerns. Imagine, for example, that the envelope opened by the officer had contained nothing of interest – just a draft of a letter from Ceccolini to his girlfriend. But imagine, too, that a co-conspirator of Ceccolini's had wandered into the flower shop just as the officer was opening the envelope. Believing – on the basis of the officer's obvious

categories of “attenuation” recognized by the Court in *Hudson*, *Ceccolini* plainly involved the kind of attenuation that “occur[s] . . . when the causal connection is remote.”¹⁵⁶ It did not involve causal-relevance concerns of the kind at issue in *Hudson* and *Harris*.

B. *The Wrongful-Aspect Variant in the Law of Search and Seizure*

The next question is whether the wrongful-aspect approach to causal relevance also has played a role in the Supreme Court’s Fourth Amendment jurisprudence. As we have seen, application of the wrongful-aspect approach generally takes the form of a subtle modification of the but-for test: instead of asking whether the unlawful *conduct* or the unlawful *event* was a but-for cause of the harm, the court asks whether the unlawful *aspect* of the conduct or the event was a cause of the harm.¹⁵⁷ In the law of search and seizure, then, we would expect the wrongful-aspect approach to make itself manifest in a disagreement between the parties as to whether police misconduct was even the but-for cause of the evidence’s discovery.

That is just what occurred in *Hudson*.¹⁵⁸ In their brief, Hudson’s attorneys argued that the unannounced entry was unlawful, and that this unlawful entry was a but-for cause of the discovery of contraband in Hudson’s apartment.¹⁵⁹ In contrast, the government attorneys argued that the but-for test of causation was not satisfied. Attorneys for the State of Michigan argued that “but-for causation . . . is entirely missing here,” since the contraband in Hudson’s residence would have been discovered even if “the manner of entry” had not been unlawful.¹⁶⁰ Likewise, the Solicitor General, participating as *amicus curiae* in support of the State, argued that “causation is completely lacking here”; the evidence seized from Hudson’s apartment was, he argued, “the product of the warrant, rather than the product of the unreasonable manner in

investigatory purpose – that the gambling operation had come to light, the co-conspirator immediately had confessed. In this situation, it would be possible to argue that the co-conspirator’s confession fell outside the risk. *Ceccolini* was not such a case, however. The witness was discovered because of what the officer learned when he opened the envelope.

¹⁵⁶ *Hudson*, 126 S. Ct. at 2164.

¹⁵⁷ See Robertson, *supra* note 75, at 1770-71; Strassfeld, *supra* note 75, at 398; Wright, *Causation*, *supra* note 72, at 1759-60.

¹⁵⁸ Compare *Hudson*, 126 S. Ct. at 2164 (arguing that the evidence would have been obtained even if the wrongful conduct had not occurred), with *id.* at 2177-78 (Breyer, J., dissenting) (arguing that the illegal manner in which the officers entered the home is inseparable from their presence in the home, which “was a necessary condition of their finding and seizing the evidence”).

¹⁵⁹ Brief for Petitioner at 5-6, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360).

¹⁶⁰ Brief for Respondent at 33, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360).

which the police effected entry to execute the warrant.”¹⁶¹ The government attorneys, then, applied a wrongful-aspect approach to the question of causation. Instead of counterfactually subtracting the unlawful conduct – the unannounced entry – the government attorneys counterfactually subtracted what was unlawful about the entry, i.e., the fact that it was made without knocking and announcing.

The same disagreement over how to apply the but-for test played out in *Hudson*’s majority and dissenting opinions. As we have already seen, Justice Scalia’s majority opinion was grounded in part on his determination that a particular form of causal “attenuation” was present on these facts.¹⁶² But before he reached the question of attenuation, Justice Scalia said that even the threshold requirement of but-for causation did not appear to be satisfied here:

In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. 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.¹⁶³

Justice Breyer, who wrote for himself and three other dissenting justices, disagreed with the majority’s conclusion that the illegality “was *not* a but-for cause of obtaining the evidence.”¹⁶⁴ Not surprisingly, Justice Breyer adopted the traditional conduct-based version of the but-for test in preference to the majority’s aspect-based approach.¹⁶⁵ In support of this approach, he cited the 1984 edition of *Prosser and Keeton on Torts*,¹⁶⁶ which adopted a conduct-based version of the but-for test without, however, mentioning the alternative.¹⁶⁷ Applying this conduct-based version of the but-for test, Justice Breyer naturally concluded that the police would not have discovered contraband in Hudson’s house but for their unannounced entry:

Although the police might have entered Hudson’s home lawfully, they did not in fact do so. Their unlawful behavior inseparably characterizes their actual entry; that entry was a necessary condition of their presence in Hudson’s home; and their presence in Hudson’s home was a necessary condition of their finding and seizing the evidence.¹⁶⁸

¹⁶¹ Brief for United States as Amicus Curiae Supporting Respondent at 3, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006) (No. 04-1360).

¹⁶² *Hudson*, 126 S. Ct. at 2164-65.

¹⁶³ *Id.* at 2164.

¹⁶⁴ *See id.* at 2177-79 (Breyer, J., dissenting).

¹⁶⁵ *See id.* at 2177 (Breyer, J., dissenting).

¹⁶⁶ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 266 (5th ed. 1984) [hereinafter *PROSSER AND KEETON ON TORTS*].

¹⁶⁷ *Hudson*, 126 S. Ct. at 2177 (Breyer, J., dissenting).

¹⁶⁸ *Id.*

Justice Breyer's reference to the "inseparability" of the event from its unlawful aspect hints at the differences between the two versions of the but-for test.¹⁶⁹ So too does Justice Scalia's emphasis of the word "manner" in his assertion that the "illegal *manner* of entry was *not* a but-for cause of obtaining the evidence."¹⁷⁰ But neither Justice Scalia nor Justice Breyer ever reckons fully with the differences between the two approaches. Nor do the parties' briefs. The reader comes away from the opinions and the briefs with a vague sense that two very different versions of the but-for test are at work. But neither the briefs nor the opinions ever adequately identify what is distinctive about the two versions; in both the briefs and the opinions, the two sides talk past each other. Further, because neither the briefs nor the opinions adequately define the choice that faces the Court – between two alternative versions of the but-for test – neither the briefs nor the opinions ever say what consequences this choice has for the law of search and seizure; nobody draws the connection between these variants and the problem of causal relevance.

Justice Breyer only makes things worse when he identifies the defect in the majority's opinion as "slic[ing] the violation too finely."¹⁷¹ As already discussed, the difference between the two approaches is not a matter of degree; it is not a matter of adopting one or the other level of precision in "slicing" the violation into discrete events.¹⁷² It is, rather, a matter of deciding whether to frame the counterfactual antecedent in terms of an *event*, however narrowly sliced, or in terms of a fact *about* the event.¹⁷³ In *Hudson* itself, for example, it is a matter of deciding whether counterfactually to subtract the unlawful entry or, instead, to subtract the fact that the entry was unannounced.

Granted, the failure to knock and announce in *Hudson* is a separate "event." But it is not as a separate event that the failure to knock and announce provided the basis for Hudson's motion to suppress. After all, there is nothing wrongful *in itself* about not knocking on somebody's door or not announcing your presence, just as there is nothing wrongful about becoming intoxicated unless you later drive. The failure to knock and announce is significant purely as an aspect of – as a fact *about* – the subsequent entry of Hudson's home. In other words, the conduct or event that provided the basis for Hudson's motion to suppress was the entry; and what made the entry wrongful was an aspect of that conduct, namely, *the fact that* it was not preceded by knocking and announcing. Thus, when the majority demanded a causal connection between the failure to knock and announce and the discovery of evidence, it was applying an aspect-based version of the but-for test, not an event-based version.

¹⁶⁹ *See id.*

¹⁷⁰ *Id.* at 2164.

¹⁷¹ *Id.* at 2177 (Breyer, J., dissenting).

¹⁷² *See supra* text accompanying notes 89-93.

¹⁷³ *See* MACKIE, *supra* note 80, at 248-69.

Hudson differs, then, from cases where the Court, in applying the fruits doctrine, has finely “sliced” the officers’ conduct into discrete events.¹⁷⁴ Consider *Wilson v. Layne*,¹⁷⁵ where the Court addressed the question whether the homeowner-plaintiffs were entitled to recover damages against officers who had invited members of the media to accompany them during the execution of a residential search warrant.¹⁷⁶ After concluding that the officers had violated the Fourth Amendment by inviting members of the media to accompany them,¹⁷⁷ the Court said that evidence obtained during the search would not be subject to suppression unless it was causally related to the media’s presence.¹⁷⁸ This remark does not, however, reflect an application of the wrongful-aspect test of causation. The Court did not say that the media’s presence made the entry by police unlawful; it did not treat the media’s presence as a wrongful aspect of the police entry.¹⁷⁹ Rather, the media’s presence in the home at the invitation of the police was *itself* a violation of the Fourth Amendment,¹⁸⁰ in a way that the failure to knock and announce in itself is not. In *Wilson*, then, the Court was applying an event-based version of the but-for test, not an aspect-based version.¹⁸¹

Consider too the Court’s decision in *United States v. Ramirez*,¹⁸² where defendant Ramirez moved to suppress the fruits of a search of his residence on the ground that the officers, in executing the search warrant, had needlessly damaged his property by breaking a window.¹⁸³ The district court granted Ramirez’s motion, and the Ninth Circuit affirmed.¹⁸⁴ The Supreme Court unanimously reversed.¹⁸⁵ Despite concluding that the damage to Ramirez’s property was justified, the Court briefly addressed the question whether the unjustified destruction of property might sometimes lead to the suppression of evidence.¹⁸⁶ The Court said that the unjustified destruction of property will lead to the suppression of evidence only where the evidence is causally traceable to the property destruction itself.¹⁸⁷ In so holding, however, the Court was not applying an aspect-based approach to causation. The needless destruction of property, said the Court, is itself a distinct event, and a distinct

¹⁷⁴ See Brief for Petitioner, *supra* note 159, at 13-14.

¹⁷⁵ 526 U.S. 603 (1999).

¹⁷⁶ *Id.* at 605-06.

¹⁷⁷ *Id.* at 613.

¹⁷⁸ See *id.*

¹⁷⁹ *Id.* at 614 n.2.

¹⁸⁰ *Id.*

¹⁸¹ See *id.*

¹⁸² 523 U.S. 65 (1998).

¹⁸³ *Id.* at 68-69.

¹⁸⁴ *Id.* at 69 (citing *United States v. Ramirez*, 91 F.3d 1297, 1301 (9th Cir. 1996)).

¹⁸⁵ *Id.* at 70.

¹⁸⁶ See *id.* at 71.

¹⁸⁷ See *id.* at 72 n.3.

Fourth Amendment violation.¹⁸⁸ It is not merely a “wrongful aspect” of the entry or search; it does not make the entry itself unlawful.¹⁸⁹ Thus, in *Ramirez*, too, the Court applied an event-based version of the but-for test.¹⁹⁰

In summary, *Hudson* seems to be relatively unique among Supreme Court cases in its application of an aspect-based approach to causation. The only other case where the Court appears to have applied an aspect-based version of the but-for test is, not coincidentally, the *Harris* case.¹⁹¹ Granted, in *Harris*, the majority’s application of the wrongful-aspect test is badly muddled as a result of the majority’s failure to distinguish the *entry*, which was unlawful, from the *arrest itself*, which was lawful apart from the fact that it was “tainted” by the entry. It is clear enough, though, that the Court applied the wrongful-aspect test.

In *Harris*, again, the majority does not appear to have had any quarrel with the state court’s factual determination that Harris’s confession would not have occurred if the police had not entered his residence unlawfully.¹⁹² On this view of the facts, though, both of the two relevant events – the entry and the subsequent arrest – are but-for causes of the confession. If the police had not entered Harris’s residence unlawfully, they would not have arrested him, and if they had not arrested him, he would not have confessed at the police station. Nevertheless, Justice White, writing for the five-justice majority, denied that but-for causation had been established.¹⁹³ Justice White reached this result by framing the causation question as whether the wrongful aspect of the arrest – i.e., the fact that the arrest had been made in the home – was a but-for cause of the confession. He concluded, of course, that it wasn’t: “Harris’ statement taken at the police station was not the product of being in unlawful custody.

¹⁸⁸ See *id.* at 71.

¹⁸⁹ See *id.*

¹⁹⁰ The same thing is true of cases where officers use excessive force in making an otherwise lawful arrest. In these cases, the use of excessive force is *itself* a violation of the Fourth Amendment; it is not merely a “wrongful aspect” of the arrest. Accordingly, the use of force and the arrest itself are treated as separate *events* in the application of the fruits doctrine. The defendant who is a victim of excessive force will be entitled to suppression of evidence only in the rare case where the use of force itself leads indirectly to the discovery of evidence; he will not be entitled to suppression of evidence merely by showing a causal connection between the *arrest* and the discovery of the evidence. See William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1072 (1995) (“Suppression is less well suited to regulating police violence, because of the lack of a causal connection between unreasonable use of force and the discovery of incriminating evidence.”).

¹⁹¹ See *New York v. Harris*, 495 U.S. 14, 19 (1990).

¹⁹² See *Hudson v. Michigan*, 126 S. Ct. 2159, 2169-70 n.2 (2006); *Harris*, 495 U.S. at 17-20; *United States v. Duchi*, 944 F.2d 391, 395 (8th Cir. 1991).

¹⁹³ See *Harris*, 495 U.S. at 19.

Neither was it the fruit of having been arrested in the home rather than someplace else.”¹⁹⁴

Hudson and *Harris* demonstrate the relationship between the two approaches to causal relevance. In these two cases, as in most tort and criminal cases, the risk rule and the wrongful-aspect approach produce the same result. It is no coincidence, then, that the Court invoked both approaches simultaneously to justify these two decisions.

C. *Wrongful Aspect and Inevitable Discovery*

In arguing that *Hudson* and *Harris* are the only cases where the Court has resorted to the wrongful-aspect test, I might appear to have left myself open to an objection. Specifically, it might be argued that the Court has resorted to a variant of the wrongful-aspect test in every case where it has applied either the inevitable discovery doctrine or the independent source doctrine.¹⁹⁵ Both of these doctrines appear, at first glance anyway, to permit the same kind of counterfactual manipulation that occurs in connection with the wrongful-aspect test. That is, under these doctrines, as under the wrongful-aspect test, the Court counterfactually subtracts some unlawful feature of the actual events, after which it determines whether the evidence would have been discovered anyway.

This appearance of similarity is deceptive, however. Think about what happens when the Court applies either the inevitable discovery doctrine or the independent source doctrine. The Court begins by counterfactually subtracting the entire unlawful event. This is true, for example, of *Murray v. United States*,¹⁹⁶ where the police conducted an unlawful warrantless search of a warehouse and then obtained a search warrant and conducted a second, ostensibly lawful, search.¹⁹⁷ When the Court applied the independent source doctrine in *Murray*, it subtracted the entire unlawful search; it did not merely subtract the fact that the search was conducted without a warrant.¹⁹⁸ The same thing is true of *Nix v. Williams*,¹⁹⁹ where the defendant’s unlawfully obtained confession led the police to the victim’s body a few hours before a search party would have found it independently.²⁰⁰ When the Court applied the inevitable discovery exception in *Williams*, it counterfactually subtracted the entire

¹⁹⁴ *Id.*

¹⁹⁵ See Luke M. Milligan, *The Source-Centric Framework to the Exclusionary Rule*, 28 CARDOZO L. REV. 2739, 2740 n.6 (2007) (attributing to *Hudson* the holding “that the but-for consequences of an illegal search do not encompass information sources that the officers would have obtained inevitably had they not committed the challenged misconduct”).

¹⁹⁶ 487 U.S. 533 (1988).

¹⁹⁷ *Id.* at 535-36.

¹⁹⁸ *Id.* at 541-43.

¹⁹⁹ 467 U.S. 431 (1984).

²⁰⁰ *Id.* at 434-38.

confession rather than just subtracting the fact that the confession was obtained in violation of the Sixth Amendment right to counsel.²⁰¹

The second step in applying either the inevitable discovery doctrine or the independent source doctrine is simply to ask whether, in the hypothesized counterfactual universe where the unlawful event did not occur, the police would have found the evidence anyway. In *Murray*, for example, the trial court was charged with the difficult task of deciding whether, purely as a factual matter, the police would have bothered to obtain a warrant and conduct the second search if they had not already known, from the first, unlawful search, that the warehouse contained drugs.²⁰² And in *Williams*, the question was whether, purely as a factual matter, the independent search party would have happened upon the victim's body if the police had not arrived there first.²⁰³ Under both the independent source doctrine and the inevitable discovery doctrine, then, the Court just applies the event-based version of the but-for test. The entire substance of these two doctrines is that the government is permitted to use certain kinds of factual reasoning in answering the question posed by the event-based version of the but-for test.

The inevitable discovery doctrine might appear to overlap with the wrongful-aspect test in cases where the government asserts, in effect, "if we hadn't done it wrong, we would have done it right"²⁰⁴ – cases where the government asserts, for example, that if the police had not searched without a warrant, they would have obtained a warrant. But even if we were to assume, very controversially, that the inevitable discovery doctrine applies in cases like these,²⁰⁵ the inevitable discovery doctrine would still be critically different from the wrongful-aspect approach. The inevitable discovery doctrine would still require the government to prove, as a factual matter, that its agents *really would have* obtained a warrant if they had not searched without one. The wrongful-aspect test works differently. Under the wrongful-aspect test, the hypothesized counterfactual world in which the actor behaves lawfully need not even be *plausible*, much less probable.²⁰⁶ Robert Strassfeld, who is an adherent of the wrongful-aspect approach, explicitly makes this point.²⁰⁷ Strassfeld says that in applying the wrongful-aspect test "we select our antecedents on the basis of legal norms, not on the basis of what was predictable or plausible given the background circumstances."²⁰⁸ In other

²⁰¹ *Id.* at 449-50.

²⁰² *Murray*, 487 U.S. at 543.

²⁰³ *Nix*, 467 U.S. at 449-50.

²⁰⁴ 6 WAYNE LAFAVE, SEARCH AND SEIZURE § 11.4(a), at 272 (4th ed. 2004) (quoting *State v. Topanotes*, 76 P.3d 1159, 1164 (Utah 2003)).

²⁰⁵ *See id.* at 272-74 (arguing that the inevitable discovery doctrine *does not* apply in such cases).

²⁰⁶ *See* Robertson, *supra* note 75, at 1770-71.

²⁰⁷ Strassfeld, *supra* note 75, at 400-01.

²⁰⁸ *Id.* at 401.

words, “we need not struggle to reconcile those [background] circumstances to our antecedent.”²⁰⁹

An example will help explain this distinction. Take a case like *Harris*, where the police, despite having probable cause that would have supported the issuance of an arrest warrant, declined to get one before entering the suspect’s residence.²¹⁰ Even if the inevitable discovery doctrine could be invoked in this case, the police still would be required to show that they *really would have* obtained a warrant if they had not entered without one. The government’s invocation of the inevitable discovery doctrine would not change the counterfactual antecedent – the counterfactual antecedent would still be, “if the police had not entered unlawfully.” The inevitable discovery doctrine merely would permit a certain form of factual reasoning about what might have occurred in the posited counterfactual universe. By contrast, the wrongful-aspect test *would* change the counterfactual antecedent. It would permit the construction of a counterfactual antecedent in which the police entered lawfully instead of entering unlawfully.²¹¹ The only *factual* question under the wrongful-aspect test would be whether a lawful entry, however implausible, would have had the same consequences as the unlawful entry.

Not surprisingly, this latter approach is exactly the one the Court follows in *Hudson*. The Court did not consider the factual question whether the police, if they had not entered without knocking and announcing, *really would have* entered after knocking and announcing.²¹² Instead, the Court simply asked, at one point in its opinion, whether the police would have discovered the same evidence if they had entered lawfully after knocking and announcing.²¹³ In his dissenting opinion, Justice Breyer commented upon the relationship of the Court’s reasoning to the kind of reasoning permitted by the inevitable discovery doctrine:

[The inevitable discovery] rule does not refer to discovery that would have taken place if the police behavior in question had (contrary to fact) been lawful. The doctrine does not treat as critical what *hypothetically could* have happened had the police acted lawfully in the first place. Rather, ‘independent’ or ‘inevitable’ discovery refers to discovery that did occur or that would have occurred (1) *despite* (not simply *in the absence of*) the unlawful behavior and (2) *independently* of that unlawful behavior. The government cannot, for example, avoid suppression of evidence seized without a warrant (or pursuant to a defective warrant)

²⁰⁹ *Id.*

²¹⁰ *New York v. Harris*, 495 U.S. 14, 15 (1990).

²¹¹ *See Strassfield*, *supra* note 75, at 398 (explaining that the appropriate counterfactual antecedent in cases where the defendant is accused of acting without a license is to analyze what would have occurred had the defendant obtained a license).

²¹² *Hudson v. Michigan*, 126 S. Ct. 2159, 2164 (2006).

²¹³ *Id.*

simply by showing that it could have obtained a valid warrant had it sought one.²¹⁴

Justice Breyer is correct. When the Court said that the police misconduct was not a but-for cause of the discovery of the evidence, it was relying on reasoning that was different from the reasoning permitted by the inevitable discovery doctrine. The Court applied the wrongful-aspect test of causation, not the inevitable discovery doctrine.²¹⁵

III. THE BROADER IMPLICATIONS OF *HARRIS* AND *HUDSON*

Harris and *Hudson* appear to be unique among Supreme Court decisions in their explicit reliance on causal-relevance principles to limit the scope of the Fourth Amendment exclusionary rule. But is this uniqueness attributable simply to the fact that these are the only cases in which the Court has actually *faced* questions of causal relevance? The answer to this question is no. I will argue in this Section that causal-relevance concerns lurk just beneath the surface of nearly every Fourth Amendment case, and that consistent application of causal-relevance limitations would drastically alter the scope of the exclusionary rule.

A. *The Risk Rule and the Warrant Requirement*

First, consider a case where the Supreme Court uncontroversially applied the exclusionary rule to evidence obtained during a search conducted in violation of the warrant requirement: *Vale v. Louisiana*.²¹⁶ Donald Vale was arrested on the front steps of his home immediately after the police had seen him sell drugs to the driver of a passing car.²¹⁷ Vale appeared to have obtained the drugs from his home, so the officers decided to search the home for drugs, despite not having obtained a search warrant.²¹⁸ During their search, the police found heroin in a rear bedroom.²¹⁹ When he was charged with possession of heroin, Vale argued that he was entitled to have the heroin suppressed as the fruit of an unlawful search.²²⁰ The Louisiana Supreme Court concluded that the search was justified as a search incident to arrest.²²¹ But the Supreme Court disagreed. It concluded that the search was not justified as a search incident to arrest, nor was there consent or exigency.²²² The police knew that there was no one else in Vale's house, said the Court, so they knew that there

²¹⁴ *Id.* at 2178 (Breyer, J., dissenting).

²¹⁵ See Brief for Respondent, *supra* note 160, at 3.

²¹⁶ 399 U.S. 30, 35 (1970).

²¹⁷ *Id.* at 32.

²¹⁸ *Id.* at 32-33.

²¹⁹ *Id.*

²²⁰ *Id.* at 31.

²²¹ *Id.* at 33 (quoting *State v. Vale*, 215 So. 2d 811, 816 (1968)).

²²² *Id.* at 33-35.

was no danger that the drugs would be destroyed if they waited for a warrant.²²³

In concluding that the search of Vale's house was unlawful, the Court did not deny that the police had probable cause to believe that Vale's house contained drugs. The Court said, however, that the existence of probable cause did not relieve the police officers of the constitutional obligation to obtain a warrant before searching: "'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.'"²²⁴ Further, the Court held that the violation of the warrant requirement in Vale's case triggered the exclusionary rule and that the Louisiana courts therefore had "committed constitutional error in admitting into evidence the fruits of the illegal search."²²⁵ To neither of these points did the Court devote extended discussion, because neither of these points is remotely controversial. Nobody questions the existence of a warrant requirement for residential searches.²²⁶ Nor, generally, does anybody appear to question the applicability of the exclusionary rule to the fruits of searches conducted in violation of this requirement.²²⁷

Though uncontroversial, the outcome of the *Vale* case is starkly at odds with the risk rule. Again, the risk rule requires the court, first, to identify the risks that made the actor's conduct wrongful and, second, to determine "whether the harm for which [relief] is sought," i.e., the discovery of the evidence, "was a result of any of those risks."²²⁸ In *Vale*, the risk that made the police officers' conduct wrongful was the risk that the search would be conducted on the basis of something less than probable cause. The warrant requirement is designed to ensure the reliability of the probable cause determination by "'interpos[ing] the magistrate's determination of probable cause'" between the officer and the citizen²²⁹ – by requiring that the inferences underlying the probable cause determination "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."²³⁰ Thus, only in cases where the search is unsupported by probable

²²³ *Id.* at 34.

²²⁴ *Id.* (quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925)).

²²⁵ *Id.* at 35.

²²⁶ *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (acknowledging that "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no").

²²⁷ *But see* *Powell v. Nevada*, 511 U.S. 79, 88-92 (1994) (Thomas, J., dissenting).

²²⁸ RESTATEMENT (THIRD) OF TORTS § 29 cmt. d (Proposed Final Draft No. 1, 2005).

²²⁹ *New York v. Harris*, 495 U.S. 14, 18 (1990) (quoting *Payton v. New York*, 445 U.S. 573, 602-03 (1980)).

²³⁰ *Johnson v. United States*, 333 U.S. 10, 14 (1948); *see also* *United States v. Grubbs*, 547 U.S. 90, 99 (2006) (remarking that "[t]he Constitution protects property owners . . . by interposing, *ex ante*, the 'deliberate, impartial judgment of a judicial officer . . . between the citizen and the police'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963))).

cause is the risk underlying the warrant requirement actually realized. This was not true in *Vale*, where the officers clearly did have probable cause to believe that Vale's residence contained drugs.²³¹ Accordingly, under the risk rule, the evidence in *Vale* would not be subject to suppression.

The same result would be required under the wrongful-aspect approach to causal relevance. In the tort setting, the wrongful-aspect test requires the plaintiff to "prove that the tortious aspect of the defendant's conduct – the aspect of the conduct that made it tortious, rather than the defendant's conduct as a whole – was a cause of the plaintiff's injury."²³² Transposed to the suppression setting, the wrongful-aspect rule would require the criminal defendant to prove that the wrongful aspect of the officer's conduct – the aspect of the conduct that made it wrongful, rather than the officer's conduct as a whole – was a but-for cause of the discovery of evidence. In *Vale*, then, it would not be enough for the defendant to prove that the heroin was the product of the unlawful search. Rather, he would be required to prove that it was a product of the aspect of the search that made it wrongful, i.e., the lack of a search warrant. But in no sense could the officers' lack of a certain piece of paper be said to be a but-for cause of their discovering the evidence in Vale's house.²³³

Our previous review of the tort and substantive criminal cases should have prepared us for this result. Cases like *Vale*, where the wrong is a failure to obtain authorization from a judge before conducting a search, are strikingly similar to the licensing cases, where the wrong is the failure to obtain a required license before, e.g., practicing medicine or driving a car.²³⁴ In these licensing cases, as we saw, courts have required something more than a but-for causal relationship between the unlicensed conduct and the result.²³⁵ At the very least, they have required a showing that the harm flowed from a realization of the risks that were the target of the license requirement, e.g., the risk that the unlicensed driver would be incompetent, or that the unlicensed physician would display "[g]ross ignorance of the art."²³⁶ The warrant requirement operates much as licensing laws do: not by proscribing harmful conduct, but by imposing a prophylactic requirement that identifies cases

²³¹ *Vale v. Louisiana*, 399 U.S. 30, 35 (1970).

²³² Wright, *Legal Responsibility*, *supra* note 42, at 1494-95; *see also* Strassfeld, *supra* note 75, at 398 (explaining that the goal under the wrongful-aspect test is to "frame the antecedent in terms of legally mandated conduct").

²³³ *See* AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 26 (1997) (arguing that where the police could have obtained a warrant before conducting the search, "the illegality is not a but-for cause of the introduction of the [evidence seized during the search]").

²³⁴ *See supra* text accompanying notes 67-71.

²³⁵ *See, e.g.*, *People v. Penny*, 285 P.2d 926, 930 (Cal. 1955); *State v. Gerak*, 363 A.2d 114, 119 (Conn. 1975); *Burns v. State*, 242 S.E.2d 579, 580 (Ga. 1978); *State v. Biechele*, No. K1-03-653A, 2005 WL 3338331, at *7-8 (R.I. Super. Dec. 5, 2005).

²³⁶ *State v. Catellier*, 179 P.2d 203, 220 (Wyo. 1947).

where harm is likely to occur. In other words, we require the police to obtain search warrants not because warrantless searches are harmful in themselves, but because the interposition of the magistrate between the police and the citizen will generally tend to prevent searches from being conducted on the basis of something less than probable cause.

I am not the first to draw attention to the “potential mismatch between the kind of risk against which the fourth amendment guards and the kind of injury that may result from its violation.”²³⁷ In an article published in 1989, the year before the Court decided *Harris*, John Jeffries argued that plaintiffs in constitutional tort actions should be permitted to recover damages only for “injuries within the risks that the constitutional prohibition seeks to avoid.”²³⁸ Jeffries pointed out that “[s]ometimes, conduct violative of a constitutional right will cause injury unrelated to the kinds of risks that constitutional prohibitions were designed to avoid.”²³⁹ This will often be true, he said, “where [the] constitutional doctrine is prophylactic.”²⁴⁰ Jeffries also pointed out that the warrant requirement, like many other Fourth Amendment rules, is prophylactic in that it “prohibits conduct not immediately productive of constitutionally relevant harms. . . . [T]he relation between the conduct proscribed and the harm ultimately feared is strategic and indirect.”²⁴¹ This means that violations of the warrant requirement often will produce “constitutionally irrelevant injur[ies],”²⁴² i.e., injuries the occurrence of which have “nothing to do with” the risks that are the target of the constitutional rule.

The risk rule’s implications for the warrant requirement have not entirely escaped even the Supreme Court’s attention. A brief but telling exchange on this subject is buried in the Court’s 1994 decision in *Powell v. Nevada*,²⁴³ where the Court applied the Fourth Amendment requirement that a person arrested without a warrant be provided a prompt judicial determination of probable cause.²⁴⁴ This requirement – first adopted in *Gerstein v. Pugh*²⁴⁵ – was made specific in *County of Riverside v. McLaughlin*,²⁴⁶ where the Court said that “prompt” means within forty-eight hours of the warrantless arrest, barring extraordinary circumstances.²⁴⁷ The defendant in *Powell*, Kitrich Powell, had been held for four days before a magistrate made a probable cause

²³⁷ John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1474 (1989).

²³⁸ *Id.* at 1461.

²³⁹ *Id.* at 1470.

²⁴⁰ *Id.* at 1471.

²⁴¹ *Id.*

²⁴² *Id.* at 1471-72.

²⁴³ 511 U.S. 79 (1994).

²⁴⁴ *Id.* at 83-84.

²⁴⁵ 420 U.S. 103, 126 (1975).

²⁴⁶ 500 U.S. 44 (1991).

²⁴⁷ *Id.* at 56-57.

determination.²⁴⁸ The delay was significant because Powell had made incriminating statements on the fourth day of his detention.²⁴⁹ It was in an effort to have these statements suppressed that Powell urged the Supreme Court to hold that the *McLaughlin* rule applied retroactively to his case.²⁵⁰

All of the justices agreed that the *McLaughlin* rule deserved retroactive application.²⁵¹ Where the justices disagreed was on the appropriate remedy for the violation of Powell's rights under *McLaughlin*. The seven-justice majority declined to address this question, observing that "the Nevada Supreme Court has not yet closely considered the appropriate remedy for a delay in determining probable cause."²⁵² In dissent, Justice Thomas, joined only by Chief Justice Rehnquist, argued that Powell was not entitled to the suppression of his confession because "the violation of *McLaughlin* (as opposed to his *arrest* and *custody*) bore no causal relationship whatever to his [confession]."²⁵³ Though Justice Thomas's analysis of the causal question is somewhat murky, it tracks the "risk rule" approach of *Harris*. The purpose of the *McLaughlin* rule, Justice Thomas said, is to protect suspects from being detained without probable cause.²⁵⁴ In this case, the risk of detention without probable cause was not realized because, "as the Magistrate found, the police had probable cause to suspect petitioner of child abuse."²⁵⁵ Thus, in substance Justice Thomas concluded that Powell's confession did not flow from a realization of the risk that made his detention unlawful.

Justice Ginsburg, writing for the Court, answered Justice Thomas's argument in a footnote. Justice Ginsburg pointed out that Justice Thomas's argument appeared to be at odds with other cases, where the Court had suppressed the fruits of searches conducted without a warrant but with probable cause.²⁵⁶ Where the police search without a warrant, she said, "[a] court's postsearch validation of probable cause will not render the evidence admissible."²⁵⁷ In other words, the fruits of a warrantless search are subject to suppression even in cases where they are not the product of a realization of the risk that makes warrantless searches unlawful, namely, the risk that the search will be conducted on something less than probable cause. Justice Ginsburg

²⁴⁸ *Powell*, 511 U.S. at 81.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 81-83.

²⁵¹ *Id.* at 85; *id.* at 87 (Thomas, J., dissenting).

²⁵² *Id.* at 84.

²⁵³ *Id.* at 90 (Thomas, J., dissenting).

²⁵⁴ *See id.* (Thomas, J., dissenting).

²⁵⁵ *Id.* (Thomas, J., dissenting).

²⁵⁶ *Id.* at 85 n.* (noting that in *Vale v. Louisiana*, 399 U.S. 30 (1970), the Supreme Court upheld the suppression of fruits of searches conducted without a warrant but with probable cause).

²⁵⁷ *Id.*

rightly identified the *Harris* decision as the linchpin of Thomas's analysis.²⁵⁸ But her response to *Harris* was limited to arguing simply that this case was different:

Powell does not complain [as *Harris* did] of a police failure to obtain a required arrest warrant. He targets a different constitutional violation – a failure to obtain authorization from a magistrate for a significant period of pretrial detention. Whether a suppression remedy applies in that setting remains an unresolved question.²⁵⁹

Justice Thomas appears to have the better part in this exchange. Contrary to what Justice Ginsburg appears to have assumed, Justice Thomas had not overlooked a fundamental distinction between Powell's case and *Harris*'s. Nor had Justice Thomas misread the rule of *Harris*; it really *does* say that suppression is appropriate only where the discovery of evidence flows from a realization of the hazard that makes the conduct illegal.²⁶⁰ The only trouble with Justice Thomas's argument is its conclusion, which is at odds with longstanding precedent. Wittingly or unwittingly, Justice Thomas drew attention to the dramatic implications of *Harris* for the law of search and seizure. These implications begin (but do not end, as we will see) with the conclusion that suppression is never appropriate where an officer who has probable cause – to search, to seize, or to detain – goes around the magistrate instead of through her.

B. *The Risk Rule and Fruitless Searches*

I said before that the warrant requirement is prophylactic in that it is designed to prevent searches from being conducted on the basis of something less than probable cause. But this statement does not go nearly far enough. Not only is the warrant requirement a prophylactic device designed to prevent searches from being conducted without probable cause; the probable-cause requirement itself is prophylactic. It is designed to minimize the frequency with which *fruitless* searches and seizures occur. In other words, it is designed to minimize the frequency with which innocent persons are arrested, and to minimize the frequency with which persons who do not possess evidence are nevertheless subjected to searches.²⁶¹ Multiple layers of prophylaxis are at work here.

To illustrate, suppose that a police officer who has neither a search warrant nor probable cause unlawfully searches a residence and, through happenstance, stumbles onto a methamphetamine lab. In this case, the discovery of the

²⁵⁸ *See id.*

²⁵⁹ *Id.*

²⁶⁰ *See supra* text accompanying notes 139-145.

²⁶¹ *See* Sherry F. Colb, *Innocence, Privacy and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1475 (1996) [hereinafter Colb, *Innocence, Privacy and Targeting*]; Colb, *Standing Room Only*, *supra* note 25, at 1663.

methamphetamine lab plainly is not *itself* a realization of the risk that made the search wrongful. The unlawful discovery of contraband or evidence of wrongdoing is not a “harm” of the kind the Fourth Amendment was designed to prevent.²⁶² That is why, in *Illinois v. Caballes*,²⁶³ the Court said that dog sniffs do not implicate Fourth Amendment rights.²⁶⁴ And that is also why the lower courts in civil rights actions have long held that the discovery of wrongdoing “is no evil at all,”²⁶⁵ and that the victim of an unlawful search or seizure therefore “cannot be compensated for injuries that result from the discovery of incriminating evidence.”²⁶⁶

Remember, though, that the risk rule is concerned with the pathway along which the causal sequence moves, not with its endpoint.²⁶⁷ This means that even if the discovery of the methamphetamine lab is not *itself* a realization of the risk that made the search wrongful, it might nevertheless *flow from* a realization of the risk that made the search wrongful. The defendant might argue, for example, that the discovery of the methamphetamine lab *flowed from* the exposure of the home’s innocent contents. This argument is problematic for at least a couple of reasons, however. The first problem with the argument is factual. In most cases where the police discover evidence of wrongdoing during an unlawful search, the discovery of the evidence will not “result from” the exposure of the home’s innocent contents. Rather, the exposure of the home’s innocent contents – the methamphetamine dealer’s collection of erotic drawings, for example – will be just so much collateral damage.

²⁶² Justice Breyer made a closely related point, albeit very briefly, in his dissenting opinion in *Hudson*. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2181 (2006) (Breyer, J., dissenting). Justice Breyer challenged the majority’s causal-relevance limitation on the exclusionary rule, arguing that “where a search is unlawful, the law insists upon suppression of the evidence consequently discovered, even if that evidence or its possession has little or nothing to do with the reasons underlying the constitutionality of a search.” *Id.* To illustrate this point, he said, “The Fourth Amendment does not seek to protect contraband, yet we have required suppression of contraband seized in an unlawful search.” *Id.*; see also David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 300-01 (arguing that “under Justice Scalia’s reasoning, drugs seized from a person who has been illegally detained and searched should not be suppressed because the rules governing lawful arrest are designed to protect people from the indignities and inconvenience of arrest, not to protect anyone’s possessory interest in narcotics”).

²⁶³ 543 U.S. 405 (2005).

²⁶⁴ *Id.* at 410.

²⁶⁵ *Townes v. City of New York*, 176 F.3d 138, 148 (2d Cir. 1999).

²⁶⁶ *Id.*; see also *Hector v. Watt*, 235 F.3d 154, 157 (3d Cir. 2000) (“[W]e believe that it follows that a plaintiff cannot recover the litigation expenses incurred because police officers discovered criminal conduct during an unconstitutional search.”).

²⁶⁷ See *supra* text accompanying notes 55-58.

This point will be clearer if we return briefly to the loaded-shotgun hypothetical.²⁶⁸ Suppose that the shotgun goes off on impact when it strikes the girl's toe and the blast injures a bystander. In this scenario, the firing of the shotgun clearly represents a realization of the risk that makes it wrongful to hand a nine-year-old girl a loaded shotgun. But the girl still would not be able to recover for her broken toe, since her broken toe did not *result from* this realization of the risk.²⁶⁹ It just *accompanied* the realization of the risk. The same thing will usually be true in cases where an unlawful search results in the exposure of both wrongdoing and innocent information. Although the exposure of the innocent information might well qualify as a Fourth Amendment harm, it will be a rare case where the officer's observation of innocent information actually *causes* the subsequent discovery of wrongdoing. The necessary causal relationship would be established only where, for example, the officer's observation of the homeowner's collection of erotic drawings leads her to search the bedrooms for additional erotica, which in turn leads her into the room containing the methamphetamine operation.

Even if we were to suppose, however, that the discovery of the methamphetamine *flowed from* the officer's observation of the home's innocent contents, we would encounter another, more serious difficulty. There is a strong argument to be made that where the exposure of innocent information is accompanied by the discovery of contraband or other evidence of wrongdoing, even the exposure of the innocent information cannot be regarded as the kind of harm the Fourth Amendment was designed to prevent.²⁷⁰ The very fact that the Fourth Amendment authorizes the issuance of search warrants on the basis of probable cause suggests that the public's interest in uncovering crimes outweighs a wrongdoer's interest in the privacy of the home.²⁷¹ In our hypothetical case, for example, the Fourth Amendment certainly would have authorized the issuance of a warrant to search the residence if the police had presented a magistrate with solid information indicating that a methamphetamine lab would be discovered inside. From the availability of a warrant here, it may be inferred that the discovery of

²⁶⁸ See *supra* text accompanying notes 52-54.

²⁶⁹ See RESTATEMENT (SECOND) OF TORTS § 281 cmt. f, illus. 3 (1965) (illustrating the risk rule with the following example: "A gives a loaded pistol to B, a boy of eight, to carry to C. In handing the pistol to C the boy drops it, injuring the bare foot of D, his comrade. The fall discharges the pistol, wounding C. A is subject to liability to C, but not to D.").

²⁷⁰ See Colb, *Innocence, Privacy, and Targeting*, *supra* note 261, at 1476 (explaining the "Innocence Model" of the Fourth Amendment, which "deems injury to have occurred when and only when the innocent are searched").

²⁷¹ Notably, the government's interest in finding evidence outweighs the privacy interest even where the crime is very minor. See, e.g., *State v. Euteneier*, 31 P.3d 111, 112 (Alaska Ct. App. 2001) (upholding a search warrant that authorized police to search for evidence of "minors consuming alcoholic beverages," which is a violation punishable only by a fine of not less than \$100).

methamphetamine labs is, on balance, a public good, even when it results in an invasion of a homeowner's privacy interest.

This is not to say merely that the discovery of wrongdoing *in itself* does not represent a harm. Rather, it is to say that even the invasion of privacy that accompanies the discovery of wrongdoing cannot be regarded as a harm under the Fourth Amendment, since the Fourth Amendment authorizes invasions of privacy that are likely to uncover evidence of wrongdoing. Put another way, the Fourth Amendment is designed to protect the innocent, not the guilty. Thus, the risk that makes Fourth Amendment violations wrongful is just "the risk of an intrusion upon an *innocent* person's privacy."²⁷² And thus, in cases where an unlawful search turns up contraband or other evidence of wrongdoing, the risk that makes the search wrongful is never realized.

This sounds strange, of course, because we *do* permit the owner of the methamphetamine lab to move for suppression of the evidence if the evidence was obtained in a search unsupported by probable cause. If the unlawful search of her house was not harmful, why would we permit the owner of the lab to pursue an exclusionary remedy? The answer, which will become clearer in the next section, is that we permit her to seek suppression of the evidence only to vindicate indirectly the rights of innocent people who might be subject to the same sort of search.²⁷³ Police officers are not infallible;²⁷⁴ they do not know in advance which houses contain methamphetamine labs and which do not. As a result, their efforts to find methamphetamine labs will inevitably result in intrusions upon the privacy of people who *do not* operate methamphetamine labs. It is to minimize these intrusions upon the privacy of innocent persons that the Fourth Amendment imposes restrictions on police activity. As Arnold Loewy has said, "Criminals or those who possess evidence of crime are allowed to object to the manner in which such evidence was

²⁷² Loewy, *supra* note 25, at 1272 (emphasis added); *see also* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 88 (asserting that "the constitutional restraints on public power were primarily intended" to benefit law-abiding citizens). The same recognition is apparent in the tests applied by the Court in determining what qualifies as a "seizure" or a "search." In *Florida v. Bostick*, 501 U.S. 429 (1991), for example, the Supreme Court held that the question whether a particular encounter with the police amounts to a seizure is judged from the perspective of a reasonable "*innocent* person." *Id.* at 438. This makes sense, and not just because the general standards governing police conduct should be formulated for the ordinary person, who happens to be innocent of crime. It makes sense too because the seizure of a guilty person – who is subject to seizure anyway – isn't a cognizable harm, and thus it just doesn't matter whether a guilty person would feel as if he had been "seized."

²⁷³ *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 271-72 (1988).

²⁷⁴ *See* Colb, *Standing Room Only*, *supra* note 25, at 1663.

obtained only because the search or seizure may have created an unjustifiably high risk of an intrusion upon an innocent person's privacy."²⁷⁵

In summary, the Fourth Amendment is characterized by multiple layers of prophylaxis. The warrant requirement is a prophylactic device designed to prevent searches from being conducted on something less than probable cause. Additionally, the probable-cause requirement itself is a prophylactic device designed to prevent fruitless searches and seizures. Given these multiple layers of prophylaxis, we would expect to see a "mismatch between the kind of risk against which the fourth amendment guards and the kind of injury that may result from its violation."²⁷⁶ After all, as Jeffries argued, "[t]he greater the distance between conduct proscribed and harm ultimately feared, the greater the prospect that proscribed conduct may cause injury of a different sort."²⁷⁷

But even this understates the point considerably where the exclusionary rule is concerned. Not only is there a mismatch between the kind of risk against which the Fourth Amendment guards and the kind of "injury" that provides the basis for motions to suppress; the mismatch is complete, or nearly so. By definition, the defendant will invoke the exclusionary rule only in cases where the invasion of her privacy or liberty interests has borne *fruit*; only, that is, in cases where there is evidence to be suppressed.²⁷⁸ But the risk rule will be satisfied only in cases where the invasion of the defendant's privacy or liberty interests has been *fruitless*; only, that is, in cases where the unlawful search or seizure has not resulted in the discovery of evidence. Thus, not only is there a mismatch between the class of cases in which the exclusionary rule may be invoked and the class of cases in which the risk rule is satisfied; there is no overlap between the two at all. If the risk rule were to be applied consistently as a limitation on the exclusionary rule, the exclusionary rule would require exclusion only in cases where there is no evidence to exclude.²⁷⁹

²⁷⁵ Loewy, *supra* note 25, at 1272.

²⁷⁶ Jeffries, *supra* note 237, at 1474.

²⁷⁷ *Id.* at 1472.

²⁷⁸ Cf. Colb, *Innocence, Privacy, and Targeting*, *supra* note 261, at 1476 (observing that "in the case of the exclusionary rule, the availability of the remedy *requires* a beneficial result – the obtaining of evidence of crime").

²⁷⁹ This tension between the risk rule and the exclusionary rule has an interesting analogue in the tension between current Fourth Amendment standing doctrine and the exclusionary rule. Current Fourth Amendment standing doctrine requires the defendant to demonstrate that "the disputed search or seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978). Sherry Colb argues forcefully that this requirement "necessarily entails the demise of the exclusionary rule," since the Fourth Amendment was not designed to protect the interests of persons who are concealing evidence of a crime. Colb, *Standing Room Only*, *supra* note 25, at 1666.

IV. WHERE THE COURT WENT WRONG IN ADOPTING THE RISK RULE AS A
LIMITATION ON THE EXCLUSIONARY RULE

The argument in the preceding section is in the nature of a *reductio ad absurdum*. The question remains, however, why the risk rule produces absurd results when applied as a limitation on the exclusionary rule. In this Part, I will try to identify the source of the trouble. Specifically, I will argue that the risk rule is not an appropriate limitation on the causal analysis where, as in the law of search and seizure, causation's only role is to define the required relationship between the wrongdoing and wrongdoer's gains. What is demanded by way of "causal relevance" in this context is at most that the wrongdoer's gains flow from a realization of the advantage conferred by the unlawful activity.

A. *Why Causation's Role Matters*

There are tort scholars for whom the aspect-based version of the but-for test is not just an elegant method of resolving the occasional case in which problems of causal relevance arise. For these scholars, there is something fundamentally incoherent, or at least needlessly imprecise, about attributing causal significance to *events* rather than to *facts about events*.²⁸⁰ The arguments of these scholars raise a threshold question. If they are right – if “it is facts, rather than events, that count as causes”²⁸¹ – then it would seem not to matter exactly what role causation plays in the law of search and seizure. If they are right, then strict causal-relevance limitations are built into the very concept of but-for causation, and the exclusionary rule's fate was sealed when the Court held long ago that but-for causation is a necessary condition for suppression.

In truth, there is nothing incoherent about the event-based version of the but-for test. There is nothing incoherent about asking whether “a possible world constructed from the actual world by excising the whole concrete occurrence and then letting things run on in accordance with the actual laws of working will not contain the effect.”²⁸² In Rust's case, for example, each of us knows what is meant when the question is posed whether the victim would still have died that day if Rust had not made the fateful decision to drive to the trailer park. Each of us knows how to answer the question, too.

The viability of the event-based version of the but-for test is also evident from its persistence in tort and criminal law. This persistence is illustrated by the tentative draft of the *Restatement (Third) of Torts*, whose definition of factual cause requires simply that the defendant's “tortious conduct” be a but-

²⁸⁰ See Robertson, *supra* note 75, at 1770; Strassfeld, *supra* note 75, at 398; Wright, *Causal Contribution*, *supra* note 100, at 1083; Wright, *Legal Responsibility*, *supra* note 42, at 1494.

²⁸¹ See MACKIE, *supra* note 80, at 258 (summarizing an argument made by Zeno Vendler).

²⁸² *Id.* at 257.

for cause of the harm.²⁸³ The tentative draft reflects the drafters' recognition that – whatever the merits of collapsing the questions of factual causation and causal relevance into one – there is nothing incoherent in treating the two separately, or in making event-based causation a separate element of liability.²⁸⁴ Nor is this recognition limited to adherents of the risk rule. For example, though James Henderson and Aaron Twerski adopt the wrongful-aspect approach, they nevertheless treat the wrongful-aspect test as imposing a limitation separate from the basic test of factual causation.²⁸⁵ The basic test of factual causation, they argue, is simply whether “the conduct of the defendant, quite apart from its wrongful nature, was a necessary, ‘but-for’ condition to the plaintiff’s harm.”²⁸⁶ Only after this question has been resolved does the finder of fact turn to the separate question whether, “assuming actual causation, the *negligent aspect* of the defendant’s conduct was a necessary, ‘but-for’ condition of the plaintiff’s harm.”²⁸⁷

The point of this digression is not that the event-based version of the but-for test is the “correct” one, or that there is something incoherent or “wrong” about the aspect-based version. Rather, the point is simply that there is room in the law for both ways of talking about causation.²⁸⁸ In any particular legal setting, the choice between these two ways of talking must be based on an analysis of the reasons why the law assigns significance to causation in that setting. The choice must be based, in other words, on an analysis of the role played by causation in that particular legal setting. Much the same point was made by Hart and Honoré in the second edition of *Causation in the Law*.²⁸⁹ In the first edition, Hart and Honoré had argued in favor of the aspect-based version of the but-for test.²⁹⁰ In the second edition, though, they acknowledged that courts were required to choose between the two versions: “The choice between them is clearly a matter of law. The analysis of causal concepts cannot tell us how to choose.”²⁹¹

B. *The Role of Causation in Search and Seizure*

Causation plays at least two fundamentally different roles in the law. First, in cases where the law assigns significance to the *harm* inflicted by the actor on another person, causation defines the required connection between the

²⁸³ RESTATEMENT (THIRD) OF TORTS § 26 (Proposed Final Draft No. 1, 2005).

²⁸⁴ *Id.* § 29, cmt. g.

²⁸⁵ See James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 GEO. L.J. 659, 663-64 (2000).

²⁸⁶ *Id.* at 663.

²⁸⁷ *Id.* at 664.

²⁸⁸ See MACKIE, *supra* note 80, at 258.

²⁸⁹ HART & HONORÉ, *supra* note 43, at xxxviii.

²⁹⁰ *Id.*

²⁹¹ *Id.* at lix.

actor's conduct and the victim's injuries. Second, in cases where the law instead assigns significance to the *gains* acquired by the actor from her conduct, causation defines the required connection between the actor's conduct and her gains. Cases arise where these two analyses happen to overlap – where the victim's loss corresponds perfectly to the wrongdoer's gain, and where the causal mechanism that connects the wrongdoing to the victim's loss also connects the wrongdoing to the wrongdoer's gain.²⁹² But this overlap is contingent, rather than necessary. Cases also arise where, as in Rust's case, the victim's loss does not bring any corresponding gain to the defendant. And cases arise where the wrongdoer profits without actually harming anyone.²⁹³ Therefore, causation plays two distinct roles in the law. Sometimes it defines the required connection between wrongdoing and harm, and sometimes it defines the connection between wrongdoing and gain.

In tort, causation plays the first of these two roles; it defines the required relationship between the defendant's wrongdoing and the plaintiff's harm. For example, in order to recover in a tort action for negligence, the plaintiff must prove that the defendant's negligence was the factual and legal cause of her injuries.²⁹⁴ In the criminal law too, causation generally defines the required relationship between the defendant's wrongdoing and some statutorily proscribed social harm.²⁹⁵ For example, in a prosecution for homicide, the government must prove that the defendant's conduct, in addition to being

²⁹² RESTATEMENT (THIRD) OF RESTITUTION § 3, cmt. a (Discussion Draft 2000).

²⁹³ See, e.g., *Leigh v. Engel*, 727 F.2d 113, 122 (7th Cir. 1984) (holding that the plaintiffs, who sought disgorgement of profits from fiduciaries' improper use of ERISA fund assets, "are not required to show that the trust lost money as a result of the alleged breaches of fiduciary duties").

²⁹⁴ RESTATEMENT (SECOND) OF TORTS § 430 (1965). Scholars disagree regarding *why* the law of tort assigns importance to the causal relationship between the wrongdoing and the harm. Dean Keeton said that the requirement of causation – and, more specifically, of causal relevance – is designed to ensure that the defendant's liability is proportional to his fault. KEETON, *supra* note 17, at 20, 21. On this view, causation essentially "supplies the particular feature about the defendant that singles him out from the generality of those available for the shifting of the plaintiff's loss." Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHL-KENT L. REV. 407, 412 (1987). Perhaps the better view, however, is that the causal connection between wrongdoing and harm would continue to matter even in a tort system in which the liability of any particular defendant were severed from the question of whether his risky conduct had actually caused harm to another person. See *id.* at 414-15; see also Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 467 (1990) (arguing that "[w]hat distinguishes tort from public health care and first-party insurance . . . is the tort requirement that, to recover, the plaintiff's injury must have been caused by an action against whose consequences the system intends to protect").

²⁹⁵ See DRESSLER, *supra* note 67, at § 14.01. In criminal law, as in tort, the reasons why the law assigns importance to causation – and hence to causal relevance – are somewhat obscure. See Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 118-28 (2005) (considering various possible explanations for why causation matters).

performed with the requisite culpable mental state, also was a factual and legal cause of the victim's death.²⁹⁶ Granted, the absence of tangible social harm will not preclude criminal prosecution for certain lesser offenses, like reckless endangerment and attempted murder. Where these offenses are concerned, though, causation doesn't matter at all. When causation *does* matter – as it does, for example in prosecutions for homicide, battery, and arson – it nearly always matters because it defines the required relationship between the wrongdoing and the social harm.

Causation plays a different role in the law of restitution.²⁹⁷ In the law of restitution or “unjust enrichment,” the causal analysis is undertaken for the purpose of determining what the defendant herself gained by her wrongdoing, not what her victim lost.²⁹⁸ Indeed, relief of this form may be available even in cases where the victim suffered little or no harm as a consequence of the wrongdoing.²⁹⁹ This is true, for example, in trademark and copyright infringement actions, where the plaintiff need not prove actual damages as a prerequisite to recovering the defendant's profits from the infringement.³⁰⁰ Likewise, in actions based on breach of fiduciary duty, the plaintiff need merely prove that the breach occurred and that the fiduciary profited by it; the plaintiff is not required to show that she sustained an economic loss from the breach.³⁰¹

²⁹⁶ See, e.g., MODEL PENAL CODE §§ 2.03(1), 210.1 (1985).

²⁹⁷ Persons familiar with the term “restitution” from criminal cases – where the term is used to refer to an award compensating the victim for his damages – will be surprised by the fact that in civil law the word restitution often means something very nearly the opposite of what it means in criminal law. In civil cases, “[t]he word restitution means restoration. Restitution is a return or restoration of what the defendant has *gained* in a transaction.” 1 DAN DOBBS, LAW OF REMEDIES 551 (2d ed. 1993) (emphasis added).

²⁹⁸ See *id.* at 555 (“Restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain.”); see also RESTATEMENT (THIRD) OF RESTITUTION § 3, cmt. a (Discussion Draft 2000), which states:

Because profits referred to in this section are realized in consequence of the defendant's wrongdoing, the same transaction that makes the defendant liable in restitution will often result in liability for a tort or other breach of duty. The most obvious distinction between these overlapping theories of liability is that liability in restitution is measured by the benefit to the defendant, whereas liability for breach of duty is measured by the injury to the plaintiff.

²⁹⁹ See RESTATEMENT (THIRD) OF RESTITUTION § 1, cmt. c (Discussion Draft 2000); Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 154 (1996) (explaining that “the law of restitution appears to represent a major exception to the focus on harm caused rather than benefits received”).

³⁰⁰ See 2 DOBBS, *supra* note 297, at 59; see also, e.g., Estate of Bishop v. Equinox Int'l Corp., 256 F.3d 1050, 1055 (10th Cir. 2001) (explaining that “a showing of actual damages is not required to recover a portion of an infringing defendant's profits in a trademark action”).

³⁰¹ See RESTATEMENT (SECOND) OF TRUSTS § 205, cmt. h (1959); *id.* § 206, cmt. j; see also, e.g., Leigh v. Engle, 727 F.2d 113, 122 (7th Cir. 1984).

The distinctive role assigned to causation in the law of restitution is in keeping with the distinctive purpose of restitution. From the availability of restitution even in cases where the plaintiff has suffered no loss, it is apparent that restitution is not designed to compensate the plaintiff for her loss.³⁰² Rather, restitution in the form of disgorgement of profits is designed primarily to deter future wrongdoing.³⁰³ “What is struck at . . . is not only actual evil results but [the conduct’s] tendency to evil in other cases.”³⁰⁴ Moreover, restitution deters wrongdoing in a very particular way: not by assessing a uniform penalty on every wrongdoer, nor even by assessing a penalty gauged to the degree of the defendant’s fault; but, rather, by removing the incentive to future wrongdoing by taking from the defendant just what she gained from her wrongdoing on this occasion.³⁰⁵ It is to this end that the law of restitution assigns significance to profits, and to the causal relationship of wrongdoing to profits.³⁰⁶

Causation plays the same role in search and seizure law.³⁰⁷ Like restitution, the exclusionary sanction is not designed to compensate anybody; it is “neither intended to nor able to ‘cure the invasion of the defendant’s rights which he has already suffered.’”³⁰⁸ Rather, the sanction is “designed to safeguard Fourth Amendment rights generally through its deterrent effect.”³⁰⁹ Moreover, the

³⁰² 1 DOBBS, *supra* note 297, at 555.

³⁰³ In its single-minded focus on deterrence, unjust enrichment differs from tort and perhaps substantive criminal law, where “deterrence is always subsidiary to and limited by its consistency with the remedies deemed appropriate as a matter of the just rectification of wrongs, based on an individual’s legal responsibility for such wrongs.” Wright, *Legal Responsibility*, *supra* note 42, at 1433-34.

³⁰⁴ Woods v. City Bank Co., 312 U.S. 262, 268 (1941) (quoting Weil v. Neary, 278 U.S. 160, 173 (1929)); *see also* Leigh, 727 F.2d at 122 n.17 (explaining that “the purpose of this strict rule [requiring disgorgement even where the victim does not suffer a loss] is to deter breaches [of fiduciary duty] by denying fiduciaries any profits from their misuse of assets”).

³⁰⁵ *See* RESTATEMENT (THIRD) OF RESTITUTION § 3, cmt. b (Discussion Draft 2000); *see also* Leigh, 727 F.2d at 139.

³⁰⁶ In keeping with restitution’s deterrent purpose, the remedy usually is limited to cases where the defendant’s wrongdoing is deliberate. *See* RESTATEMENT (THIRD) OF RESTITUTION § 3, cmt. c (Discussion Draft 2000); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 37, cmt. e (1995); *see also* Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 968 (D.C. Cir. 1990) (holding that “an award based on a defendant’s profits requires proof that the defendant acted willfully or in bad faith”).

³⁰⁷ The relationship between unjust enrichment and the exclusionary rule has not gone unnoticed. *See, e.g.*, Saul Levmore & William J. Stuntz, *Remedies and Incentives in Private and Public Law: A Comparative Essay*, 1990 WIS. L. REV. 483, 490-95; Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443, 1443.

³⁰⁸ United States v. Leon, 468 U.S. 897, 906 (1984) (quoting Stone v. Powell, 428 U.S. 465, 540 (White, J., dissenting)).

³⁰⁹ *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)); *see also* Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335 (“The

exclusionary sanction, like restitution, goes about deterring future misconduct in a very particular way, “not by penalizing those responsible for misconduct, but rather by removing the incentive to [engage in the misconduct] in the first instance.”³¹⁰ In accordance with this goal, the exclusionary rule requires the court to trace the causal relationship between the wrongdoing and the “challenged evidence,”³¹¹ not the relationship between the wrongdoing and the defendant’s “harm.” As in restitution, the goal of the causal analysis is simply to ensure that the wrongdoer is not left “in a better position than it would have been in if no illegality had transpired.”³¹²

C. *Causal Relevance in the Reckoning of Profits*

It almost goes without saying that the risk rule is not an appropriate limitation on the causal analysis where causation’s only role is to define the required relationship between the wrongdoing and wrongdoer’s gains. The risk rule operates in cases where culpable, risk-creating conduct is not sufficient in itself to trigger liability. That is, it operates in cases where liability hinges not just on risk-creating conduct, but also on the occurrence of *harm* to another person. The risk rule’s function in these cases is to ensure that the connection between the defendant’s wrongdoing and the plaintiff’s or victim’s harm is of the right kind. The risk rule operates, then, by distinguishing among instances of actual harm. It operates by identifying certain actual harms – like the broken toe in the loaded-shotgun hypothetical – that do not satisfy the requirement of harm despite the existence of a but-for causal connection between the conduct and harm.³¹³ Logically, the risk rule ought not to operate where harm is not required.³¹⁴

This logic is borne out by the case law. The courts in restitution cases have not required that the wrongdoer’s gains be tied somehow to a realization of the risks associated with the conduct. For example, consider the Seventh Circuit’s

objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward.”).

³¹⁰ Meltzer, *supra* note 273, at 267.

³¹¹ *Wong Sun v. United States*, 371 U.S. 471, 487 (1963).

³¹² *Nix v. Williams*, 467 U.S. 431, 443 (1984) (explaining that “the prosecution is not to be put in a better position than it would have been in if no illegality had transpired,” but neither is it to be “put in a *worse* position simply because of some earlier police error or misconduct”; rather, the exclusionary rule’s purposes are adequately served “by putting the police in the same, not a *worse*, position that [sic] they would have been in if no police error or misconduct had occurred”).

³¹³ See RESTATEMENT (THIRD) OF TORTS § 29, cmt. d, illus. 3 (Proposed Final Draft No. 1, 2005).

³¹⁴ *But see* *Leymore & Stuntz*, *supra* note 307, at 491 (opining that “[a]ny difficulties encountered in determining causation [in the fruits setting] are unlikely to be different from those confronted in a regime based on the remedy of damages”).

decision in *Leigh v. Engel*.³¹⁵ In *Leigh*, the administrators of an employee profit-sharing trust had breached their fiduciary duties to the trust's beneficiaries by investing the trust's assets in three companies in which the administrators had a personal stake.³¹⁶ What made the administrators' conduct wrongful was the risk associated with the investments – “the *risking* of the trust's assets at least in part to aid the defendants in their acquisition program.”³¹⁷ In arguing that they should not be required to make restitution of profits attributable to the breach of their fiduciary duty, the trust's administrators pointed out that the risks associated with the investments had not been realized, even in part.³¹⁸ The trust had “lost no money in the challenged transactions.”³¹⁹ Indeed, the questionable investments “produced in the aggregate the extraordinary return on investment of 72%, exclusive of dividends.”³²⁰ The court, however, held that the risk-creating conduct itself was sufficient to justify disgorgement of the profits.³²¹ It was irrelevant whether the risk associated with the venture had been realized:

The nature of the breach of fiduciary duty alleged here is not the *loss* of plan assets but instead the *risking* of the trust's assets at least in part to aid the defendants in their acquisition program. . . . [P]laintiffs are not required to show that the trust lost money as a result of the alleged breaches of fiduciary duties. If ERISA fiduciaries breach their duties by risking trust assets for their own purposes, beneficiaries may recover the fiduciaries' profits made by misuse of the plan's assets.³²²

The same lesson can be drawn from the trademark cases. None of the risks that make trademark infringement wrongful need to be realized, even in part, as a prerequisite to disgorgement of the infringer's profits.³²³ This is illustrated, for example, by the Second Circuit's decision in *W.E. Bassett Co. v. Revlon, Inc.*,³²⁴ where the court found that Revlon had infringed the plaintiff's rights in the trademark “Trim” by selling a cuticle trimmer under the name “Cuti-Trim.”³²⁵ The court held that the plaintiff was entitled to recover

³¹⁵ 727 F.2d 113 (7th Cir. 1984).

³¹⁶ *Id.* at 119, 132.

³¹⁷ *Id.* at 122.

³¹⁸ *Id.* at 121-22.

³¹⁹ *Id.* at 122.

³²⁰ *Id.* at 121.

³²¹ *Id.* at 122.

³²² *Id.*

³²³ Three risks make trademark infringement wrongful: (1) that the infringement will divert sales from the trademark owner; (2) that the owner's reputation will suffer in consequence of the infringer's sale of inferior merchandise under the trademark; and (3) that the public will suffer harm as a consequence of being misled as to the origin of the product. *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1215 (8th Cir. 1976).

³²⁴ 435 F.2d 656 (2d Cir. 1970).

³²⁵ *Id.* at 659, 664.

Revlon's profits from these sales, despite the fact that the plaintiff had not been harmed.³²⁶ The infringement could not have diverted sales from the plaintiff, the court said, because the plaintiff "did not sell a cuticle trimmer at the time."³²⁷ Nor could the infringement have injured the plaintiff's reputation, since "Revlon's product was of high quality."³²⁸ The court even acknowledged that "there was no likelihood of immediate confusion" among consumers.³²⁹ Despite these findings – despite the fact that none of the risks that make trademark infringement wrongful was realized – the court held that Revlon should be required to disgorge its profits for the sake of deterrence.³³⁰

These cases, again, only confirm what logic dictates. Where the law does not require that the actor's conduct actually cause harm – where harm is relevant neither as a measure of the need for compensation nor as an element of fault – it would be perverse to require that the risks associated with the actor's conduct somehow come partway to fruition as a prerequisite to the imposition of a deterrent sanction.

This is not to say that causal relevance has no role to play in cases where causation defines the required relationship between wrongdoing and profit. If causal relevance were to play a role in these cases, though, it clearly would play a different role than it plays in cases where causation defines the relationship between wrongdoing and harm. Recall that where causation defines the required relationship between wrongdoing and *harm*, causal relevance consists in a particular relation between the victim's harm and the conduct's *potential* for harm – its risk, in other words. One might expect, then, that where causation instead defines the required relationship between wrongdoing and *gain*, causal relevance would consist in a particular relation between the wrongdoer's gain and the conduct's *potential* for gain; between the wrongdoer's gain and the advantages conferred on her by her wrongdoing.

This, as it turns out, is more or less what the cases suggest. In the trademark-infringement cases, for example, the plaintiff usually is not awarded

³²⁶ *Id.* at 664-65.

³²⁷ *Id.* at 664.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.* at 664-65; *see also* Gracie v. Gracie, 217 F.3d 1060, 1068 (9th Cir. 2000) (holding that "[w]hile *actual* confusion may be relevant as evidence of the *likelihood* of confusion (which *is* required for an award of profits under § 1114), under our precedents a showing of actual confusion is not necessary to obtain a recovery of profits"); Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger USA, Inc., 80 F.3d 749, 753 (2d Cir. 1996) (holding that plaintiff's inability to prove actual confusion "does not preclude [plaintiff] from recovering an accounting of [the defendant's] profits"); Maier Brewing Co. v. Fleischman Distilling Corp., 390 F.2d 117, 123 (9th Cir. 1968) (holding that an accounting of profits is appropriate where infringement is deliberate and willful, even if the trademark owner is unable to prove any damages from infringement); Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 397 (2d Cir. 1965) (holding that a showing of diverted sales is not a prerequisite to an award of profits).

all of the profits that are attributable to sales of merchandise that bears the infringing mark. Rather, the plaintiff usually is awarded only the profits from sales that would not have occurred but for the infringer's use of the infringing mark.³³¹ In other words, the plaintiff usually is awarded only those profits that are attributable to the advantage conferred by the use of the infringing mark. The same principle appears to be at work in cases involving copyright infringement and breach of fiduciary duty. In actions for copyright infringement, the author of the copyrighted work usually will be permitted to recover only "those profits which result from its exploitation,"³³² not all the profits attributable to the sale of the work in which the copyrighted material appears. Likewise, in actions based on breach of fiduciary duty, the plaintiff usually will be entitled to recover only that portion of the defendant's profits that is attributable to the advantage conferred by the breach.³³³

It would overstate the point considerably, though, to say that the courts in restitution cases apply a causal-relevance rule that is a counterpart of the risk rule.³³⁴ In the restitution cases, the touchstone of the courts' analysis is the deterrent objective of the disgorgement remedy. The question posed by the courts in these cases is not whether the wrongdoing is "causally relevant" to a particular piece of the wrongdoer's gains. Rather, the question posed is the more fundamental one: whether the disgorgement of a particular piece of the wrongdoer's gains is necessary to remove the incentive to wrongdoing in future cases.³³⁵ To the extent that the outcomes in these cases reflect causal-

³³¹ Thus, in *Texas Pig Stands v. Hard Rock Café International*, 951 F.2d 684 (5th Cir. 1992), where the Hard Rock Café was held to have infringed the plaintiff's trademark in the term "pig sandwich," the court denied the plaintiff any recovery for profits after finding that "Hard Rock would have sold just as many pig sandwiches by any other name . . . and there is no basis for inferring that any of the profits received by [Hard Rock] from the sale of pig sandwiches are attributable to the infringement." *Id.* at 696 (citation omitted).

³³² *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 48 (2d Cir. 1939); *see also Bonner v. Dawson*, 404 F.3d 290, 294 (4th Cir. 2005) (holding that an architect had established that profits generated by the lease of an infringing structure were causally connected to the infringement of his building design); *Polar Bear Prods. v. Timex Corp.*, 384 F.3d 700, 703 (9th Cir. 2004) (holding that plaintiff failed to discharge its burden of proving that indirect profits resulted from a licensee's infringements of copyright); *Motorvations Inc. v. M&M Inc.*, 59 U.S.P.Q.2d 1847, 1851 (D. Utah 2001) (holding that a plaintiff bears the burden of proving a causal connection between the profits and the infringement); *Rainey v. Wayne State Univ.*, 26 F. Supp. 2d 963, 972 (E.D. Mich. 1998) (holding that plaintiff failed to introduce "any credible evidence from which fact finder could apportion profits attributable to the infringement").

³³³ *See Leigh v. Engle*, 727 F.2d 113, 137-38 (7th Cir. 1984).

³³⁴ *See Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 38 (1st Cir. 2002) (remarking that "[m]echanical rules are of little aid" in determining the portion of the defendant's profits to be awarded to the plaintiff in a trademark-infringement action).

³³⁵ *See Int'l Star Class Yacht Racing Ass'n*, 146 F.3d at 72; *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210, 1223 (8th Cir. 1976); *see also Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 941 (7th Cir. 1989) (recognizing that "[t]he trial court's primary function is to

relevance limitations, it is only because causal-relevance concerns – concerns about the relationship between the wrongdoer’s gains and the kind of gains generally associated with a particular kind of wrongdoing – have a natural part to play in the resolution of the underlying question of incentives.³³⁶

Accordingly, causal relevance often will yield to other factors in the calculation of the appropriate deterrent sanction. For example, in *Truck Equipment Service Co. v. Fruehauf Corp.*,³³⁷ the Eighth Circuit required the defendant to relinquish all of its profits from sales of an infringing semi-trailer, even though only twenty percent of these profits were attributable to the unlawful aspect of the sales, i.e., the infringement of the trademark.³³⁸ The court’s holding was based on its conclusion that “[t]he award of only twenty percent of [the defendant’s] profits is clearly inadequate to ensure that similar conduct will not reoccur in the future.”³³⁹ So although courts in restitution cases *do* invoke concerns about causal relevance in analyzing the causal relationship between wrongdoing and profits, these concerns are subsidiary to the question whether the disgorgement of a particular piece of the wrongdoer’s profits is necessary to remove the incentive to engage in future wrongdoing.³⁴⁰ The answer to *this* question will hinge not just on causal relevance, but on other factors too, including, e.g., the fact that the real victim of infringement,

make violations of the Lanham Act unprofitable to the infringing party”); *Playboy Enters. v. Baccarat Clothing Co.*, 692 F.2d 1272, 1274 (9th Cir. 1982) (same).

³³⁶ To illustrate, in an ordinary case the disgorgement of gains that are attributable to, say, the infringement of a trademark will be necessary to remove the incentive to future violations. This will not be true, however, where the gain is not derived from the sort of advantage generally associated with trademark infringement. If, for example, a defendant’s infringement of the plaintiff’s trademark were to attract publicity, which in turn lured a major investor who was impressed by the infringer’s moxie, the deterrent objective of the disgorgement remedy probably would not require the disgorgement of profits attributable to the infusion of cash from the investor. Though these profits are, strictly speaking, attributable to the infringement, they do not flow from a realization of the advantages that generally make infringement profitable. Given the infrequency with which trademark infringement attracts investors, there is no reason to suppose that the possibility of attracting investors would provide an incentive to future infringers. Causal relevance matters here because it determines what sanction is necessary to achieve deterrence.

³³⁷ 536 F.2d 1210 (8th Cir. 1976).

³³⁸ *Id.* at 1222-23.

³³⁹ *Id.* at 1223.

³⁴⁰ *See id.*; *see also* *Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 37-38 (1st Cir. 2002) (rejecting defendant’s claim that profits awarded to plaintiff should be limited to those attributable to infringement itself, rather than the full amount of profits derived from sale of infringing product); *Int’l Star Class Yacht Racing Ass’n*, 146 F.3d at 72 (recognizing that deterrence of future misconduct sometimes will require the disgorgement of all profits attributable to sales of an infringing product, rather than just those profits attributable to infringement itself).

the ultimate purchaser, “almost never brings suit,” even in cases of blatant deception.³⁴¹

There is a good reason, finally, why the courts in this setting are less dependant on strict “rules” of causal relevance than are the courts in tort and criminal cases. In criminal law and torts, the policy reasons why the law assigns importance to causal relevance – and to causation generally – are at best very complicated and at worst beyond understanding. As a result, it would be extraordinarily burdensome for the courts to undertake in every tort and criminal case to determine whether, as a policy matter, the interests underlying the requirement of causation justify treating the victim’s harm as “caused” by the defendant’s wrongdoing.³⁴² But the opposite is true in the restitution cases, where the interests served by the causal relevance requirement – and by causation generally – lie close to the surface. It makes sense, then, that the courts in these cases, instead of invoking independent rules of causal relevance, would address directly the policy question in whose service the subsidiary question of causal relevance arises: to what degree is disgorgement of profits necessary for the sake of removing the incentive to engage in future misconduct?

In summary, because the risk rule’s function is merely to ensure that the connection between wrongdoing and *harm* is of a particular kind, it is not an appropriate limitation on causal analysis where causation defines the relationship between wrongdoing and *profits*. What is demanded by way of “causal relevance” in the law of restitution is, at most, merely that the wrongdoer’s profits flow from a realization of the advantage conferred by the unlawful activity. Moreover, even this principle is subsidiary to the requirement that the disgorgement of profits adequately remove the incentive to engage in similar wrongdoing in the future.

D. *Causal Relevance in the Law of Search and Seizure*

What is true of restitution is true of the exclusionary sanction as well. The exclusionary rule, like the restitutionary remedy, contains a threshold requirement that the gains to be “disgorged” bear a but-for causal relationship to the unlawful conduct.³⁴³ Beyond this, however, the analysis of the causal

³⁴¹ *Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co.*, 349 F.2d 389, 396 (2d Cir. 1965).

³⁴² *But cf.* MODEL PENAL CODE § 2.03(2)(b) (1985) (addressing the problem of causal proximity by requiring juries in criminal cases to decide whether the actual result “is not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability” (alteration in original)).

³⁴³ *Compare Segura v. United States*, 468 U.S. 796, 815 (1984) (stating that “evidence will not be excluded as ‘fruit’ [of an unlawful act] unless the illegality is at least the ‘but for’ cause of the discovery of the evidence”), with *Int’l Star Class Yacht Racing Ass’n*, 146 F.3d at 72 (recognizing that profits will not be subject to disgorgement in a trademark

relationship between the illegality and the government's gains is less a question of fact than a question of policy. The finer points of the causal analysis – the assessment of causal proximity and of causal relevance – are “conducted with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus.”³⁴⁴ So when courts undertake to determine whether a particular piece of the government's evidence bears a sufficiently close causal relationship to the government's wrongdoing to justify exclusion, the focus is not on applying fixed rules of causal relevance or causal proximity. Rather, the analysis is focused on “the extent to which the basic purpose of the exclusionary rule” – the deterrence of police misconduct – “will be advanced by its application” in any particular case.³⁴⁵

Causal-relevance concerns naturally will play a role in resolving this policy question. Recall, first, that causal-relevance concerns take a different form in this setting than they take in the tort and criminal cases. What matters here is not the relationship between the victim's harm and the conduct's potential for harm, but the relationship between the wrongdoer's gains and the conduct's potential for gain. One would expect the cases to show, then, that the availability of the exclusionary sanction will depend in part on the degree to which the evidence obtained during the unlawful search or seizure came about through a realization of the sort of “profit potential” generally associated with the illegality. And, in fact, that is exactly what the cases show: the answer to the critical question – whether exclusion is necessary to deter wrongdoing – sometimes will hinge on the degree to which “the police officers foresaw the challenged evidence as a probable product of their illegality.”³⁴⁶

The operation of these causal-relevance concerns is perhaps most clearly evident in cases where the “evidence” to be suppressed is a new crime that was committed by the defendant in response to an unlawful search or seizure.³⁴⁷ Cases often arise in which an officer makes an unlawful search or seizure, and the suspect in response tries surreptitiously to dispose of contraband, or tries to bribe or assault the officer.³⁴⁸ In these cases, the police misconduct clearly is a but-for cause of the new crime, and also of any evidence of the new crime. So the courts, in resolving these cases, are forced to reckon with the finer points in the causal analysis – causal proximity and causal relevance.³⁴⁹

What the courts generally *say* in resolving these cases is that the admissibility of the evidence hinges on the degree to which the defendant's

infringement action unless the profits are, at the very least, causally attributable to the defendant's unlawful sales of the infringing product).

³⁴⁴ *Brown v. Illinois*, 422 U.S. 590, 612 (1975) (Powell, J., concurring in part).

³⁴⁵ *United States v. Ceccolini*, 435 U.S. 268, 276 (1968).

³⁴⁶ Comment, *Fruit of the Poisonous Tree – A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1148-49 (1967).

³⁴⁷ See 6 LAFAVE, *supra* note 204, at 376.

³⁴⁸ *Id.*

³⁴⁹ See *Commonwealth v. Saia*, 360 N.E.2d 329, 332 (Mass. 1977).

new crimes are “independent acts, of his own volition.”³⁵⁰ When the defendant’s new crime is an attempt to bribe or assault the officer, for example, the courts often will say that the defendant’s actions were sufficiently “independent” and “volitional” to dissipate the taint.³⁵¹ In contrast, when the new crime is an attempt to dispose of contraband, the courts often will say, in effect, that the defendants’ actions were “not truly their own, but were coerced or precipitated by the illegal police conduct.”³⁵² As Professor LaFave and others have pointed out, however, the courts’ avowed rationale for these decisions is untenable: a suspect’s attempt to dispose of evidence is no less an “independent” or “volitional” act than is her attempt to bribe or assault the officer.³⁵³

What really distinguishes the two categories of cases is not causal proximity but causal relevance. What really distinguishes the two categories of cases, in other words, is the degree to which the suspect’s response to the police misconduct is unusual or unexpected.³⁵⁴ When the suspect’s response to the unlawful search or seizure is “common and predictable” – as it is when a suspect tries to dispose of drugs during an unlawful stop – disgorgement of this “profit” will be necessary to remove the incentive for police to engage in similar wrongdoing in the future.³⁵⁵ In contrast, when the suspect’s response

³⁵⁰ *People v. Puglisi*, 380 N.Y.S.2d 221, 222 (N.Y. App. Div. 1976); *see also* *Commonwealth v. King*, 449 N.E.2d 1217, 1225 (Mass. 1983).

³⁵¹ *See, e.g., People v. Pagliari*, 365 N.E.2d 72, 76-77 (Ill. App. 1977) (holding that “defendant’s deliberate and unsolicited attempts to bribe Officers Stech and Garcia were sufficiently acts of free will to purge the taint of any police misconduct”); *King*, 449 N.E.2d at 1225 (holding that evidence obtained after a suspect assaulted a police officer in response to an unlawful seizure was admissible because the assault “broke the chain of causation and dissipated the taint of the prior illegality”); *Puglisi*, 380 N.Y.S.2d at 223 (holding that the defendant’s attempt to bribe police was sufficiently an act of free will to be admissible, despite the fact that the attempt was made in response to unlawful arrest).

³⁵² *See State v. Schrecengost*, 6 P.3d 403, 406 (Idaho Ct. App. 2000) (summarizing cases where courts have deemed evidence of a new crime inadmissible as the fruit of police misconduct).

³⁵³ 6 LAFAVE, *supra* note 204, at 376; *see also* Robert Pitler, “*The Fruit of the Poisonous Tree*” *Revisited and Shepardized*, 56 CAL. L. REV. 579, 598 (1968); Note, *Constitutional Law: Search and Seizure: Admissibility of Testimony of Crime Voluntarily Committed in Officer’s Presence*, 8 UCLA L. REV. 454, 457 (1961).

³⁵⁴ 6 LAFAVE, *supra* note 204, at 377-78 (“Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches Bribery attempts, by comparison, are so infrequent and unpredictable that admission of evidence of such criminal activity in a particular case is not likely to encourage future illegal arrests and searches in order to accomplish the same result.”).

³⁵⁵ *Id.* at 377; *see also State v. Balduc*, 514 N.W.2d 607, 611-12 (Minn. Ct. App. 1994) (holding that evidence of defendant’s effort to dispose of marijuana plants during an unlawful search was subject to suppression; recognizing that efforts to dispose of evidence are “predictable and common” and “foreseeable as a consequence of the illegal search”).

to the unlawful search or seizure is unusual or unexpected – as it is when the suspect assaults or tries to bribe the officer – disgorgement is not necessary, since the prospect of future, similar responses is unlikely to provide any substantial incentive to police wrongdoing.³⁵⁶ This is just another way of saying, though, that what distinguishes the two kinds of cases is the degree to which the new crime represents a realization of an advantage the police might have hoped to obtain from their unlawful conduct.

This approach to causal relevance – in which the focus is on the advantages associated with the misconduct, rather than on the risks associated with the misconduct – also produces the right result in the cases that were the subject of the *reductio* in Part III. Consider, first, the case where police search without adequate grounds, e.g., without probable cause. Though the possibility that contraband or evidence of wrongdoing will be uncovered is not among the *risks* that make groundless searches wrongful, it plainly is among the *potential gains* associated with groundless searches. Thus, the suppression of evidence obtained during groundless searches is necessary to eliminate the incentive for police to engage in such searches.

The analysis is somewhat harder in the case where police violate the warrant requirement despite having probable cause to search. From one perspective, the evidence discovered during the warrantless search seems like a realization of the advantages associated with violations of the warrant requirement; the reason why police conduct warrantless searches is to discover evidence. From another perspective, though, the only real advantage associated with the warrantless search in this case is the time saved by the police in eliminating a trip to the courthouse; the police did, after all, have probable cause to search, so they could have obtained a warrant in advance. And the time saved by the police usually will have nothing to do with the fact that the search uncovered evidence. In this situation, then, shifting the focus of the causal-relevance inquiry from the *risks* associated with the misconduct to its *potential advantages* seems only to have led us into a conceptual difficulty.

This difficulty evaporates, however, if we conduct the inquiry as it is supposed to be conducted – “with the deterrent purpose of the Fourth Amendment exclusionary rule sharply in focus.”³⁵⁷ Again, in neither the restitution cases nor the Fourth Amendment cases do the courts apply a rule that is a strict counterpart of either the risk rule or the wrongful-aspect variant. Rather, the courts rely on causal-relevance considerations only insofar as those considerations help to resolve the more fundamental question whether disgorgement of a particular piece of the wrongdoer’s “profits” is required for

³⁵⁶ 6 LAFAVE, *supra* note 204, at 377; *cf.* United States v. Pryor, 32 F.3d 1192, 1196 (7th Cir. 1994) (reasoning that new crimes committed in response to an unlawful search or seizure generally are not subject to suppression, since “[p]olice do not detain people hoping that they will commit new crimes in their presence; that is not a promising investigative technique, when illegal detention exposes the police to awards of damages”).

³⁵⁷ Brown v. Illinois, 422 U.S. 590, 612 (1975) (Powell, J., concurring in part).

the sake of deterrence. If we fall back to this more fundamental question, it quickly becomes clear that evidence obtained during warrantless searches must be excluded regardless of whether the search is based on probable cause. If evidence obtained during warrantless searches is admissible so long as the search is based on probable cause, then the police will have little, if any, incentive to comply with the warrant requirement before searching.

This result is confirmed by the restitution cases, in which a nearly identical dilemma arises. In cases involving copyright or trademark infringement, it will sometimes be possible to conclude that the infringer could, for a certain price, have purchased in advance a license to use the protected material.³⁵⁸ Where that is true, the infringer will have a viable argument that her only wrong lay in foregoing the purchase of a license, and that the only real “profit” she acquired by this wrong was the money that would have gone toward the purchase of a license. Courts have recognized, though, that under these circumstances the disgorgement of the license fee would not adequately deter future misconduct:

The reasoning behind [disgorgement of profits in this setting] is clear: it makes the infringer realize that it is cheaper to buy than to steal. A basic tort theory of damages, awarding only the plaintiff’s injury, would allow for cases of “efficient infringement,” i.e., situations where the profit exceeded the licensing fee, leaving infringers indifferent as to whether they paid up front or paid in court. By stripping the infringer not only of the licensing fee but also of the profit generated as a result of the use of the infringed item, the law makes clear that there is no gain to be made from taking someone else’s intellectual property without their consent.³⁵⁹

Just so, the longstanding rule that a “court’s postsearch validation of probable cause will not render the evidence admissible”³⁶⁰ makes clear that there is no gain to be made by ignoring the warrant requirement. This longstanding rule, like so much else in the Fourth Amendment cases and in the restitution cases, is consistent with the idea that causal relevance plays a different role where causation defines the required relationship between wrongdoing and gains.

³⁵⁸ For example, in *Christopher Phelps & Assocs., Inc. v. Galloway*, 477 F.3d 128, 135 (4th Cir. 2007), the evidence at trial showed that the plaintiff would have charged the defendant \$20,000 if the defendant had purchased from the plaintiff the right to use the copyrighted architectural plans.

³⁵⁹ *Walker v. Forbes, Inc.*, 28 F.3d 409, 412 (4th Cir. 1994); see also *Christopher Phelps*, 477 F.3d at 142 (explaining that copyright law permits a plaintiff to recover profits from the unlicensed use of the copyrighted material, “which might be immensely greater than the price of a license”); *Unique Sports Prods., Inc. v. Wilson Sporting Goods Co.*, No. 1:05-CV-1816-JEC, 2007 WL 764411, at *7 (N.D. Ga. Mar. 9, 2007) (“Why would any company bother to negotiate and pay for a license to use Sampras’s name or likeness, or any other celebrity for that matter, if it can do so for free and at very little risk?”).

³⁶⁰ *Powell v. Nevada*, 511 U.S. 79, 85 n.* (1994).

E. *Causal Relevance in Harris and Hudson*

What, then, would an appropriate application of causal-relevance principles have looked like in *Harris* and *Hudson*? As a first step, the Court would have determined where the potential gains from the government's wrongdoing lay. Once it determined where the potential gains lay, the Court would have used this information to help it determine in what situations the disgorgement of the government's gains would be necessary to eliminate the incentive to engage in similar wrongdoing in the future. As it happens, the Court did exactly this in both *Harris* and *Hudson*, albeit only after first mistakenly applying the risk rule.³⁶¹ In both *Harris* and *Hudson*, the Court's application of the risk rule was followed by a wholly separate analysis of the relevant incentives, and this separate analysis of the incentives was informed by a reckoning of the potential advantages of the wrongdoing.

In *Harris*, the Court appeared tacitly to acknowledge that the potential advantages associated with *Payton* violations include the opportunity to take the suspect to the police station for questioning, as the police had done in *Harris*'s case.³⁶² Accordingly, the Court also tacitly acknowledged that, by declining to require suppression of statements made at the police station following a *Payton* violation, it was creating at least a slight incentive for the police to violate *Payton*.³⁶³ But it concluded that this slight incentive ultimately would not affect the conduct of the police, for two reasons.³⁶⁴ First of all, the police still would be required to disgorge profits derived from the two principal advantages associated with *Payton* violations, namely, the opportunity to view the contents of the home and the opportunity to obtain statements in the home.³⁶⁵ Second, the Court's holding in *Harris* was limited to cases where the police have probable cause to arrest the suspect and so *could* obtain a warrant.³⁶⁶ This means that the officer who is tempted to enter unlawfully by the prospect of being able to question the arrestee later at the police station will almost certainly realize that she has a better option. If she obtains an arrest warrant, then she stands to gain not only the opportunity to question the suspect at the station, but the opportunity to gather physical evidence inside the home and the opportunity to elicit incriminating statements inside the home. Thus, "[i]t is doubtful that the desire to secure a statement from a criminal suspect [outside the home] would motivate [the police] to violate *Payton*."³⁶⁷

³⁶¹ See *Hudson v. Michigan*, 126 S. Ct. 2159, 2166-67 (2006); *New York v. Harris*, 495 U.S. 14, 20-21 (1990).

³⁶² *Harris*, 495 U.S. at 20.

³⁶³ *Id.*

³⁶⁴ *Id.* at 20-21.

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 21.

In *Hudson* too, the Court's risk-rule analysis was followed by an analysis of the incentives created by its decision.³⁶⁸ The Court said that the only benefits the police can hope to obtain by violating the knock-and-announce requirement are "the prevention of destruction of evidence and the avoidance of life-threatening resistance."³⁶⁹ But cases will be rare, the Court said, where the prospect of obtaining either of these benefits will create a substantial incentive to violate the rule.³⁷⁰ If the police have even a "reasonable suspicion" that knocking and announcing will lead either to the destruction of evidence or to life-threatening resistance, then they are relieved of their duty to knock and announce.³⁷¹ In the Court's view, then, the police will have a substantial incentive to violate the knock-and-announce requirement only in those cases where they're relieved of complying with it anyway.³⁷² The Court's analysis of the incentives did not end there; the Court also addressed the efficacy of civil remedies and internal discipline in deterring violations of the knock-and-announce rule.³⁷³ In the end, it concluded that "the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial."³⁷⁴

Harris and *Hudson* nicely demonstrate the difference between the two forms of causal relevance, one of which is focused on the *risks* associated with the particular form of police misconduct, and the other of which is focused on the *advantages* associated with the police misconduct. Though the possibility that a guilty suspect will be arrested and later confess at the police station is definitely not among the risks that make *Payton* violations wrongful, the opportunity to arrest the defendant and take him to the stationhouse for questioning is nevertheless one of the advantages the police obtain by violating *Payton*. Likewise, though the possibility that a suspect will be prevented from destroying evidence is not among the risks that make unannounced entries wrongful, it is nevertheless one of the advantages the police obtain by violating the knock-and-announce rule. In both *Hudson* and *Harris*, the Court, after first mistakenly trying to trace the result to a realization of the risk that made the police conduct wrongful, then conducted a *separate* analysis in which it rightly focused on the gains to be obtained from the wrongdoing.

This is not to say, of course, that the Court reached the right results in *Harris* and *Hudson*. This Article doesn't answer that question. My point here is only that in both *Harris* and *Hudson* the Court's mistaken invocation of the risk rule is neatly juxtaposed with a wholly appropriate analysis of the potential gains associated with the police misconduct and of their relationship

³⁶⁸ *Hudson v. Michigan*, 126 S. Ct. 2159, 2166-68 (2006).

³⁶⁹ *Id.* at 2166.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *See id.*

³⁷³ *Id.* at 2166-68.

³⁷⁴ *Id.* at 2168.

to the incentives created by Court's decision. Thus, even the *Hudson* and *Harris* decisions indirectly confirm the thesis that causal relevance means something different in the search-and-seizure cases than it means in the tort and criminal cases.

CONCLUSION

So far, scholarly criticism of the *Hudson* decision has focused primarily on the second ground for the Court's decision – its balancing of the social costs and benefits of excluding evidence derived from knock-and-announce violations.³⁷⁵ One commentator has argued, for example, that the Court should have ended its analysis after concluding “that there was no causal link between the violation and the discovery of evidence”; that the Court's real error lay in “going beyond causation to an analysis of the costs and benefits of exclusion that is generally applicable to all Fourth Amendment violations.”³⁷⁶ This criticism is in keeping with a long line of criticism that perceives danger in any straightforward balancing of the costs and benefits of suppression. It would be better, argue these critics, if the Court were to focus “more on principled, rather than pragmatic grounds for the exclusionary rule.”³⁷⁷

I disagree. The real danger in the *Hudson* decision, and in the *Harris* decision too, lies in the apparently “principled” features of the Court's analysis. The real danger is that the Court's subtle reconceptualization of the causal analysis will enable the Court, in future cases, to eviscerate the exclusionary rule without ever openly reckoning with the social consequences

³⁷⁵ See, e.g., Gerald Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 777-78 (2006) (arguing that the Court's balancing “appl[ies] well beyond violation of the ‘knock-and-announce rule’”); John Castiglione, *Hudson and Sampson: The Roberts Court Confronts Privacy, Dignity, and the Fourth Amendment*, 68 LA. L. REV. 63, 93 (2007) (identifying the “[t]wo main grounds of criticism” of *Hudson* as, first, “the majority's insistence that civil remedies will adequately protect an individual's right” under the knock-and-announce rule and, second, the majority's use of “a social cost versus deterrent benefit balancing test that will in theory almost never result in the application of the exclusionary rule”); Erwin Chemerinsky, *An Overview of the October 2005 Supreme Court Term*, 22 TOURO L. REV. 873, 879 (2007); Case Comment, *Fourth Amendment – Exclusionary Rule – “Knock and Announce” Violations*, 120 HARV. L. REV. 173, 175 (2006) (“Because the majority's assertion that the costs of exclusion outweigh the benefits in this context is applicable to the exclusionary rule more broadly, the Court may rely on *Hudson* in the future to eliminate the rule altogether.”); Benjamin J. Robinson, Case Comment, *Constitutional Law: Suppressing the Exclusionary Rule*, 59 FLA. L. REV. 475, 480-85 (2007) (describing problems relating to courts' cost-benefit analyses).

³⁷⁶ Case Comment, *Fourth Amendment – Exclusionary Rule – “Knock and Announce” Violations*, *supra* note 375, at 178.

³⁷⁷ JOSHUA DRESSLER & GEORGE THOMAS, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 459 (3d ed. 2006) (summarizing some academic criticism of the exclusionary rule).

of doing so. It is easy to identify what is wrong with the Court's claim – in the second, pragmatic part of its opinion – that civil-rights damages actions will create an effective deterrent to knock-and-announce violations.³⁷⁸ It is far more difficult to unravel the Court's seemingly principled assertion that “the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence,”³⁷⁹ or its assertion that the violation of Hudson's interests “ha[d] nothing to do with the seizure of the evidence.”³⁸⁰

I hope this Article has at least shown how the unraveling of the Court's reasoning might begin. The first step in understanding the Court's causal analysis is to recognize that its two critical features – which in *Hudson* took the form (1) of a determination that the violation of Hudson's interests “ha[d] nothing to do with the seizure of the evidence”³⁸¹ and (2) of a determination that the “illegal *manner* of entry was *not* a but-for cause of obtaining the evidence”³⁸² – both reflect the application of strict causal-relevance limitations like those applied in tort and substantive-criminal law. Once these causal-relevance limitations are exposed for what they are, it is relatively easy to see that thoroughgoing application of these limitations would eviscerate the exclusionary rule. And it is relatively easy to see, too, why these limitations on the causal analysis – though perhaps appropriate in tort and criminal law, where causation defines the required relationship between wrongdoing and harm – have no place in the law of search and seizure, where causation merely defines the required relationship between wrongdoing and profits.

³⁷⁸ *Hudson*, 126 S. Ct. 2159, 2165-68 (claiming that the few number of civil cases with large damage awards does not reflect the actual number of civil cases).

³⁷⁹ *Id.* at 2164.

³⁸⁰ *Id.* at 2165.

³⁸¹ *Id.*

³⁸² *Id.* at 2164.