

COMMENT

United States v. Ankeny: Remedying the Fourth Amendment's Reasonable Manner Requirement

At 5:30 a.m., just before dawn, forty-four police officers converged on Kelly David Ankeny's two-story Portland residence to execute a warrant for his arrest. The officers in charge had spent weeks crafting a plan to arrest Ankeny, a convicted and wanted felon, for assaulting his estranged wife with a firearm. In a matter of seconds, heavily armed police broke down the building's first-floor doors, while others outside fired rubber bullets through the building's second-floor windows, spewing glass into the house and leaving holes in the ceiling and furniture. The first officer who encountered Ankeny pointed a rifle-mounted flashlight in his eyes and ordered him to the ground, just as a second officer blindly tossed a "flash-bang" grenade into the room. The grenade exploded near Ankeny's face, causing first- and second-degree burns. Meanwhile, police entering the second floor threw a flash-bang into an occupied bedroom, setting fire to a mattress and box spring that the police then threw out of a window.¹ After securing the occupants, including a pregnant woman and one-year-old infant, one of the officers sent the following text message: "BIG TIME FUN!! LOTS OF BROKEN GLASS, BAD GUY JUMPED ON THE FLASHBANG, GOOD TIME HAD BY ALL."²

In *United States v. Ankeny*, a divided Ninth Circuit panel declined to suppress the weapons that were discovered in Ankeny's residence and used to charge him with, inter alia, being a felon in possession of firearms. Over Judge Reinhardt's dissent, the majority held that suppression was an inappropriate remedy regardless of whether the search at issue was reasonable under the Fourth Amendment. Drawing on the Supreme Court's recent knock-and-

1. *United States v. Ankeny*, 502 F.3d 829, 832-34 (9th Cir. 2007) (Graber, J.).

2. *Id.* at 846 (Reinhardt, J., dissenting).

announce decision in *Hudson v. Michigan*,³ the *Ankeny* majority held that suppression at trial is never an appropriate remedy in the unusual cases where police carry out otherwise legal searches or seizures in an unreasonable manner. The reason, the court explained, is that the manner in which a search is conducted is not the but-for cause of any evidence ultimately obtained. This Comment supports *Ankeny*'s outcome on different grounds. Instead of relying on causation analysis borrowed from *Hudson*, courts should develop arguments from restorative justice and deterrence to distinguish between scope- and manner-based Fourth Amendment violations. Further, courts should encourage responsible planning of law enforcement operations by finding liability when police fail to take reasonable steps to avoid risks to private persons and their property.

I. THE PROBLEM WITH ANKENY

Ankeny relies on the Supreme Court's first holding in *Hudson v. Michigan*. Both opinions assert that suppression is an inappropriate remedy when the police "would have discovered" the evidence regardless of whether they committed the constitutional violation.⁴ In *Hudson*, the Court deployed this principle to hold that suppression was uncalled for because the knock-and-announce violation in that case was not a "but-for cause of obtaining the evidence."⁵ Even if the police *had* knocked and announced themselves, the Court held, "the police would [still] have executed the warrant they had obtained" and thereby discovered the same evidence.⁶ Similarly, *Ankeny* held that the police "would have" found the incriminating weapons "[e]ven without the use of a flash-bang device, rubber bullets, or any of the other methods that Defendant challenges."⁷ *Ankeny* summed up its counterfactual analysis by holding that "the discovery of the guns was not causally related to the manner of executing the search."⁸

Although *Hudson* portrays its causation analysis in familiar "but-for" terms, the Fourth Amendment principle it asserts—and that *Ankeny* actualizes—is actually quite novel. Normally, illegally obtained evidence can be admitted if

3. 126 S. Ct. 2159 (2006) (holding that suppression is not an appropriate remedy for knock-and-announce violations, despite their unconstitutionality under *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

4. See *Hudson*, 126 S. Ct. at 2164; *Ankeny*, 502 F.3d at 838.

5. 126 S. Ct. at 2164.

6. *Id.*

7. 502 F.3d at 848 (citing *Hudson*, 126 S. Ct. at 2164).

8. *Id.*

legally relevant intervening causes, such as voluntary choices, interrupt the causal connection between an illegal search and the acquisition of evidence.⁹ But *Ankeny* did not involve such an attenuated causal link, as the police's entry and search led immediately to the evidence's discovery. Drawing on another exception to the exclusionary rule and on Seventh Circuit case law,¹⁰ the district court in *Ankeny* held that the evidence at issue would inevitably have been discovered through "routine" police procedures.¹¹ This view, though consistent with the causality analysis ultimately offered in *Hudson*, was not supported by the Court's pre-*Hudson* inevitable discovery jurisprudence. In prior cases, the Court required a showing that, in the absence of the illegal search, a later and "wholly independent" legal search would have discovered the same evidence.¹² In *Hudson* and *Ankeny*, by contrast, there was no reason to think that a separate legal search was in the offing. And, of course, the mere possibility that a routine, legal search in principle could have occurred does not suffice to show that such a search was inevitable.¹³

What makes *Ankeny*'s causality analysis and the district court's approach to inevitable discovery problematic is their potential to disrupt a wide range of existing Fourth Amendment precedent. True, the police necessarily had to enter *Ankeny*'s residence to discover the incriminating evidence therein, whereas the illegal aspects or features of the police's actual entry were not similarly necessary. In that sense, the manner of entry was indeed less causally essential to the discovery than the fact of entry. But there are many situations in which suppression is customarily required even though the constitutional violation at issue could have been avoided or would have been avoided if the police had simply employed routine procedures. As Judge Reinhardt and others point out, a literal reading of the causation analysis in *Hudson* or *Ankeny*

9. See *Brown v. Illinois*, 422 U.S. 590 (1975).

10. Three Seventh Circuit cases had relied on the inevitable discovery doctrine to conclude that suppression is an inappropriate response to manner violations, including those related to both flash-bangs and failures to knock and announce. See *United States v. Langford*, 314 F.3d 892 (7th Cir. 2002); *United States v. Folks*, 236 F.3d 384 (7th Cir. 2001); *United States v. Jones*, 214 F.3d 836 (7th Cir. 2000).

11. *United States v. Ankeny*, 358 F. Supp. 2d 998, 1001 (D. Or. 2005) (quoting *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1399 (9th Cir. 1989)), *aff'd*, 502 F.3d 829 (9th Cir. 2007).

12. *Nix v. Williams*, 467 U.S. 431, 442-43 (1984); see also *Hudson*, 126 S. Ct. at 2178-79 (Breyer, J., dissenting); *Segura v. United States*, 468 U.S. 796 (1984).

13. See also *Hudson*, 126 S. Ct. at 2178 (Breyer, J., dissenting); cf. 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4 (Supp. 2007) ("[*Hudson*'s causation analysis is] nothing more than an assertion that 'if we hadn't done it wrong, we would have done it right.' The mere fact that the police could have acquired the evidence in question by complying with the Constitution is hardly a basis for admitting that evidence when in fact it was acquired by violating the Constitution." (emphasis omitted)).

would seem to preclude exclusion whenever police engage in warrantless but warrantable searches—even though the whole point of the warrant requirement is to force the police actually to obtain a warrant, and not just to have valid grounds for obtaining one.¹⁴ At the same time, critics of the exclusionary rule have found hope in the possibility that *Hudson's* causation analysis might be read to curtail the warrant requirement.¹⁵

II. SCOPE AND MANNER VIOLATIONS

Ankeny's decision not to offer suppression as a remedy for excessive or reckless force is uncontroversial among courts.¹⁶ To justify this practice while preserving the logic behind the warrant requirement, courts should eschew *Hudson's* causality analysis and focus instead on a distinction between two types of Fourth Amendment rules. First are “scope constraints.” These rules demarcate the bounds of the government’s investigative authority, that is, the government’s lawful right to search or seize a certain thing.¹⁷ The warrant requirement and its myriad exceptions are the most important scope constraints.¹⁸ To the extent that police investigate beyond what is permitted by

14. See *United States v. Ankeny*, 502 F.3d 829, 848 (9th Cir. 2007) (Reinhardt, J., dissenting); see also *Hudson*, 126 S. Ct. at 2178 (Breyer, J., dissenting); LAFAVE, *supra* note 13, § 11.4 (“[*Hudson's* causation analysis] would, to take the most obvious example, mean that the host of cases holding that evidence acquired without a needed warrant cannot be admitted simply because there was probable cause to get such a warrant would no longer be valid.”).

15. See Akhil Reed Amar, *The Battle of Hudson Heights*, SLATE, June 16, 2006, <http://www.slate.com/id/2143983> (“With *Hudson* now on the books . . . the government can argue . . . as follows: ‘The cops *could have* easily gotten a warrant and surely *would have* done so, had they only better understood often-complex court doctrine.’”). Notably, Amar’s highly influential Fourth Amendment scholarship developed *Hudson*-like but-for causation analysis to argue against applying the exclusionary rule to warrant violations. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 794 (1994) [hereinafter Amar, *Fourth Amendment First Principles*] (“The police could easily have obtained a warrant before the search, so the illegality is not a but-for cause of the introduction of the knife into evidence.”).

16. See *supra* note 10.

17. Additional prohibitions on uses of force constituting coercive and other interrogations emanate from suspects’ rights to due process and counsel and against self-incrimination.

18. Not every violation of the warrant requirement constitutes a scope violation. For example, *New York v. Harris*, 495 U.S. 14, 20 (1990), declined to suppress incriminating statements made after an in-house arrest without a warrant, holding that the warrant requirement for in-house arrests protects only the integrity of the home and not the liberty of its occupants. *Id.* In other words, while the police lacked legal authority to search Harris’s house, they did have legal authority to arrest Harris, see *id.* at 18 (“Harris was not unlawfully in custody . . .”), and so committed no scope violation in questioning him.

the warrant requirement and its exceptions, they exceed their legal authority.¹⁹ By contrast, other Fourth Amendment rules constrain the means by which the police can exercise their legitimate investigative authority.²⁰ These limitations are “manner constraints.” They are exemplified by the general prohibition against excessive uses of force, which bars unjustifiably harmful means of executing otherwise valid searches and seizures.²¹ In sum, scope constraints pertain to intrusion and confiscation and manner constraints to injury and destruction. Together, these guarantees defend “[t]he right of the people to be secure in their persons, houses, papers, and effects.”²²

At least two judicially acknowledged justifications for the exclusionary rule do not apply in the context of manner violations.²³ First, when suppression is directed toward manner violations, it is not restorative in the sense sometimes recognized by the Supreme Court.²⁴ For example, if a police officer arbitrarily searches a passerby’s bag, then the discovery of the bag’s contents might advantage the police in prosecuting that individual. Yet this discovery would lie outside the scope of the police’s investigatory authority.²⁵ Suppression disgorges the police of this unlawful evidentiary advantage, at least vis-à-vis

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19. See *Horton v. California*, 496 U.S. 128, 140 (1990) (“If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.”).
 20. See *United States v. Ramirez*, 523 U.S. 65, 71 (1998); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *Dalia v. United States*, 441 U.S. 238, 258 (1979).
 21. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989).
 22. U.S. CONST. amend. IV.
 23. This claim broadens *Ankeny* and *Hudson* in at least two ways. First, it militates against suppression so long as police act within an exception to the warrant requirement, even if they lack a warrant. Cf. *Hudson v. Michigan*, 126 S. Ct. 2159, 2165 (2006) (“Until a valid warrant has issued, citizens are entitled to shield ‘their persons, houses, papers, and effects’ from the government’s scrutiny.” (citations omitted)); *id.* at 2171 (Kennedy, J., concurring) (“In this case the relevant evidence was discovered . . . because of a subsequent search pursuant to a lawful warrant.”). Second, it avoids relying on the sometimes artificial distinction between entry and search. Cf. *id.* at 2170 (“[A]n impermissible manner of entry does not necessarily trigger the exclusionary rule[.]”); *id.* at 2177 (Breyer, J., dissenting).
 24. See *Nix v. Williams*, 467 U.S. 431, 443 (1984) (explaining that suppression ensures that the prosecution is not “put in a better position than it would have been in if no illegality had transpired”); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (asking whether illegal evidence “has been come at by exploitation of . . . illegality” (internal quotation marks omitted) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (1959))).
 25. On the restorative approach, the ultimate acquisition of investigative authority can cure scope violations. See *Nix*, 467 U.S. at 443 (explaining that the inevitable discovery exception to the exclusionary rule “ensures that the prosecution is not put in a worse position simply because of some earlier police error or misconduct”). But see *Segura v. United States*, 468 U.S. 796, 815 (1984) (justifying the very similar independent source exception to the exclusionary rule in terms of but-for causation).

the violated suspect.²⁶ By contrast, suppression in response to manner violations deprives the police of evidence to which they had a legal right. Imagine a lawful search incident to arrest in which the officer unlawfully shoves a suspect to the ground. Even if the shove caused incriminating evidence to slip out of the suspect's pocket—and even if that evidence would have been overlooked but for the shove—the officer would not have obtained any forbidden information or accrued an illegal prosecutorial advantage. True, the suspect may have endured serious physical and dignitary harms, but those injuries can be remedied—and, in our legal system, normally are remedied—through money damages alone.²⁷

Second, suppression lacks a special deterrent value in connection with manner as opposed to scope violations. Absent a suppression threat, investigators might be tempted to skirt constitutional niceties when their paramount goal is to obtain a criminal conviction, whatever the cost. Suppression for scope violations specially deters such operations in that it removes the unique incentive to break the law in order to obtain incriminating evidence.²⁸ But manner violations, which occur when police collect evidence that lies within their investigative authority, are unlikely to be motivated by the desire to collect otherwise unattainable evidence, or even by the desire to collect evidence at all. Thus, the impetus for engaging in manner violations is divorced from any evidence ultimately obtained, and the deterrent effect of suppressing such evidence stems entirely from the ex post costs it imposes on police. Civil damages are (at least in principle) capable of replicating this general deterrent effect.²⁹ Indeed, civil liability is an especially potent deterrent in this context. Because manner violations involve injury or destruction, they

26. See *Rakas v. Illinois*, 439 U.S. 128 (1978) (allowing suppression only for persons whose Fourth Amendment rights were violated); see also Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 296 (1998) (defending *Rakas* on the basis that suppression's "purpose is only to restore the person wronged to his rightful position").

27. See *infra* note 31.

28. See *Elkins v. United States*, 364 U.S. 206, 217 (1960) (holding that the purpose of the exclusionary rule is "not to repair" but "to deter—to compel respect for the constitutional guaranty . . . by removing the incentive to disregard it"); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1267 (1983).

29. To be sure, suppression for manner violations would also provide a powerful, if more socially harmful, general deterrent. Cf. Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 957 (1983) ("[F]or the threat of suppression to impose any costs on the police, the evidence in question must have been available to the police by constitutionally permissible conduct.").

are more likely than scope violations to yield measurable harms³⁰ and substantial damages, even from normally unsympathetic juries.³¹

Suppression does have one clear advantage: it avoids qualified immunity. Suppression-related litigation has propelled issues of scope to the forefront of Fourth Amendment case law and commentary, while issues pertaining to manner remain underdeveloped.³² Perversely, the manner requirement's relative obscurity inhibits its further doctrinal development.³³ Because case law on manner violations is sparse, even litigants who can demonstrate manner violations may have difficulty showing that the police violated "clearly established" law,³⁴ as required to overcome government officials' qualified immunity and collect damages or attorney's fees.³⁵ The result may be that potentially doctrine-clarifying suits are never filed in the first place. Even *Hudson* evinced concern that qualified immunity might leave Fourth

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30. Manner violations avoid "valuation problems" associated with the abstract value of a privacy invasion. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 899-901 (1991).
 31. Unfortunately, "[t]here is general agreement on the ineffectiveness of tort actions under current law. The reasons most commonly cited are inadequate damages, immunity defenses, individual liability, juror prejudice, and lack of representation." Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 18 (2001) (citations omitted). Yet even Dripps finds hope in the context of manner violations: "Tort suits for unconstitutional police homicides under *Tennessee v. Garner* have had a significant deterrent impact. The difference between search-and-seizure suits and homicide suits shows that given substantial damages, the tort remedy can deter police misconduct." *Id.* (citations omitted).
 32. See William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y 443, 449-50 (1997) ("Damages cases and suppression hearings do not share equal billing in Fourth Amendment litigation: there are many times more of the latter than of the former. . . . The result is a bias toward rules limiting evidence gathering as opposed to the other sorts of things police might do that one would want to regulate, such as striking people or shooting at them.").
 33. See generally *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001) (requiring courts to rule on the constitutionality of the alleged conduct—and thereby create clearly established law—before dismissing a case for qualified immunity).
 34. See 2 S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* § 8:21, at 105 (4th ed. 2007) ("[C]ases where the law was so clearly settled that the finding of a constitutional violation would mean that the defendant loses on qualified immunity . . . will be relatively rare in the Fourth Amendment . . . excessive force setting because of the very fact-specific nature of these issues."); see also *Estate of Bing v. City of Whitehall*, 456 F.3d 555, 571 (6th Cir. 2006) (collecting seven cases on the use of flash-bangs before finding an immunized manner violation where a flash-bang foreseeably started a fire that killed the suspect and burned down his home).
 35. See *Hewitt v. Helms*, 482 U.S. 755 (1987) (holding that a finding of qualified immunity rules out attorney's fees under 42 U.S.C. § 1988 (2000), even if the court hearing the request for qualified immunity agrees that plaintiffs have alleged a constitutional violation).

Amendment rights underenforced.³⁶ Nevertheless, manner-based suits are being filed, favorable judgments are sometimes obtained, and increasingly clear case law is being developed. To foster this progress, courts reviewing alleged manner violations should be especially attentive to the normal rule that qualified immunity can be lost even if there is no case law directly on point.³⁷

III. THE INJURY-AVOIDANCE RULE

Denying the suppression remedy does not make manner violations any less important. On the contrary, taking suppression off the table may render judges more willing to find manner violations in the first place—and not just because courts may sometimes overlook Fourth Amendment violations in order to avoid having to impose the exclusionary rule.³⁸ Because current doctrine does not clearly differentiate between scope and manner rules, courts sometimes weigh the fact that the police acted within their investigatory authority against the potentially improper manner in which they executed that authority.³⁹ In other words, courts cite the lack of a scope violation as evidence that there was no manner violation, either. *Ankeny* itself exhibits this move, as the court notes under its “Manner of Entry” analysis that “the search did not exceed the scope of the warrant, which weighs in favor of a conclusion of reasonableness.”⁴⁰ Yet a search can be “unreasonable” under the Fourth Amendment either because of its scope or because of its manner of execution (or both).⁴¹ Courts should respect these distinct sources of unconstitutionality by analyzing them independently.

36. See *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006) (noting that civil suits are a fitting response to knock-and-announce violations in part because “the lower courts are allowing colorable knock-and-announce suits to go forward, unimpeded by assertions of qualified immunity”).

37. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); see also *San Jose Charter of Hell’s Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974-75 (9th Cir. 2005) (holding that government actors are “not entitled to qualified immunity ‘simply because there [is] no case on all fours prohibiting [this] particular manifestation of unconstitutional conduct’” (alterations in original) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1274-75 (9th Cir. 2001))).

38. See, e.g., Amar, *Fourth Amendment First Principles*, *supra* note 15, at 799; Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 112 (2002).

39. See, e.g., *Hell’s Angels Motorcycle Club*, 402 F.3d at 972 (denying qualified immunity in a Fourth Amendment civil action in part because “the authority to seize indicia evidence . . . did not justify the level of intrusion and excessive property damage that occurred during the search”).

40. *United States v. Ankeny*, 502 F.3d 829, 836 (9th Cir. 2007).

41. See, e.g., *Hummel-Jones v. Strobe*, 25 F.3d 647 (8th Cir. 1994).

The Supreme Court's main statement on manner violations is the axiomatic precept that judges must weigh "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."⁴² Applying this rule, *Tennessee v. Garner* held that the need to detain fleeing suspects does not justify shooting such suspects in the back.⁴³ The Court's analysis is akin to the cost-benefit analyses common in tort law, but with an important difference: whereas the "nature and quality" test is concerned only with the net effects of an actual police action, tort law is also concerned with the efficiency of potential precautionary measures.⁴⁴ For example, a company whose products yield more injury than benefit would plainly be liable under a tort-law analogue to the "nature and quality" rule. But tort law would also find liability if a company failed to install a precautionary device whose social benefits would have exceeded its price. Thus, viewing manner violations in light of tort law suggests that the existing "nature and quality" test should be complemented by subtler and potentially more demanding liability rules.

As a starting point, courts should adopt a general rule of injury avoidance: when the police have control over the time and place of executing a given search, the Fourth Amendment requires that they take reasonable steps to minimize risks and injuries to private persons and their property. When evaluating police efforts at reasonable injury-avoidance, courts might assess the likelihood that suspects are guilty and dangerous, and place a premium on the interests of nonsuspects. The rule avoids several potential pitfalls. First, it recognizes both that normal police operations involve reasonable risks and also that the police must be decisive when reacting to exigent circumstances.⁴⁵ Second, it affords no legal advantage to police who initially have control over the time and place of executing a search, but whose rash actions artificially create emergencies. Third, the injury-avoidance rule for civil liability is compatible with the Supreme Court's rejection of the more stringent "least-intrusive-means" test for suppression.⁴⁶ Far from raising "insuperable barriers to the exercise of virtually all search-and-seizure powers,"⁴⁷ the injury

42. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also* *United States v. Place*, 462 U.S. 696, 703 (1983).

43. 471 U.S. 1, 7 (1985).

44. *See, e.g.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 333-36 (4th ed. 2004).

45. *See, e.g.*, *Graham*, 490 U.S. at 397 (noting that the Fourth Amendment must recognize that police are "often forced to make split-second judgments"); *Phillips v. James*, 422 F.3d 1075, 1084 (10th Cir. 2005).

46. *See* *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

47. *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976)).

avoidance rule would create a legal incentive for police to design reasonable plans in light of the available alternatives.⁴⁸ This incentive is particularly important given the trend in modern law enforcement toward relying on paramilitary forces—like the Special Emergency Reaction Team in *Ankeny*—for increasingly routine police activities.⁴⁹

CONCLUSION

Ankeny affords an ideal case for judges and juries to apply the injury avoidance rule, as the police postponed and planned their search of Ankeny's residence for well over a month. The police intent on arresting Ankeny knew that he was a convicted and wanted felon and had good reason to believe that he was armed, prone to violence, and residing with a prison associate.⁵⁰ The police therefore had the legal right to enter Ankeny's home and determine whether or not he was in possession of firearms. Accordingly, no evidence resulting from this search should be suppressed. On the other hand, the police also knew that there was no exigency compelling quick arrest, that innocent bystanders (including an infant and a pregnant woman) shared Ankeny's residence, and that their planned manner of entry—particularly the indiscriminate use of flash-bang grenades and rubber bullets—posed serious risks to the inhabitants' persons and property.⁵¹ Although the police did consider some alternatives, the *Ankeny* majority concluded that, based on the record available on appeal, “[i]t is not clear that the officers took all appropriate and available measures to reduce the risk of injury.”⁵² Whether these facts ultimately vindicate the extraordinary operation reviewed in *Ankeny* is, as the court suggests, a “close” question.⁵³ But it is one that a civil suit for damages is

48. Courts reviewing police raids similar to those in *Ankeny* have already noted the constitutional importance of reasonable plans. See, e.g., *San Jose Charter of Hell's Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 977 (9th Cir. 2005); *Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004); *Commonwealth v. Garner*, 672 N.E.2d 510, 515 (Mass. 1996). But see *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (“[P]re-seizure conduct is not subject to Fourth Amendment scrutiny.”).

49. Criticism has come from both the left and the right. See CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 111–38 (1999); DIANE CECILIA WEBER, CATO INST., *WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS* (1999).

50. *United States v. Ankeny*, 502 F.3d 829, 832–34 (9th Cir. 2007).

51. *Id.*

52. *Id.* at 837.

53. *Id.* at 836.

capable of answering, through an adversarial inquiry into the alternative tactical opportunities available and the police's reasons for rejecting them.

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