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Excluding the Exclusionary Rule: Extending the Rationale of *Hudson v. Michigan* to Evidence Seized During Unauthorized Nighttime Searches

I. INTRODUCTION

In 1914, the United States Supreme Court first introduced the exclusionary rule.¹ Under this rule, evidence obtained pursuant to an unreasonable search and seizure under Fourth Amendment standards cannot be used in subsequent criminal trials.² Since that time, courts struggled to determine when application of the exclusionary rule was the correct remedy for a Fourth Amendment violation. One such struggle concerned the “knock-and-announce” rule, which requires law enforcement officials to announce their identity and purpose before forcibly entering a private residence to execute a warrant.³ Although the Supreme Court held that a violation of the knock-and-announce rule was a factor in determining the reasonableness of a search,⁴ the Court did not clarify whether or not the exclusionary rule should apply to such violations. The result was that some courts suppressed evidence obtained in knock-and-announce violation cases,⁵ while other courts did not.⁶

Finally, in 2006, the Court clarified the issue in *Hudson v. Michigan*.⁷ In *Hudson*, the Court held that because the purposes of the knock-and-announce rule did not include preventing the government from taking evidence described in a valid search warrant,

1. See *Weeks v. United States*, 232 U.S. 383, 398 (1914); see also Shaubin A. Talesh, Note, *Parol Officers and the Exclusionary Rule: Is There Any Deterrent Left?*, 31 CONN. L. REV. 1179, 1182 (1999) (“In *Weeks v. United States*, the Supreme Court first applied the exclusionary rule to criminal proceedings.”).

2. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

3. See *United States v. Dunnock*, 295 F.3d 431, 434 (4th Cir. 2002).

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

5. See, e.g., *United States v. Bruno*, 398 F. Supp. 2d 827, 831–32 (S.D. Tex. 2005); *United States v. Sherman*, 344 F. Supp. 2d 223, 233–34 (D. Me. 2004); *State v. Ramos*, 130 P.3d 1166, 1172 (Idaho Ct. App. 2005); *State v. Anyan*, 104 P.3d 511, 525 (Mont. 2004).

6. See, e.g., *United States v. Sutton*, 336 F.3d 550, 552 (7th Cir. 2003); *Commonwealth v. Wornum*, 656 N.E.2d 579, 581 (Mass. 1995); *People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999).

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

the exclusionary rule was inapplicable to violations of the knock-and-announce requirement.⁸ Although the *Hudson* opinion clarified the applicability of the exclusionary rule to knock-and-announce violations, the applicability of the rule in other contexts remains unclear. One such situation involves nighttime searches. Since the colonial days of this country, the “nighttime search rule” has required that search warrants are to be executed during the daytime rather than at night.⁹ Thus, the question remains whether or not the *Hudson* decision affects the admissibility of evidence obtained during an unauthorized nighttime search.¹⁰

This Comment argues that the rationale announced by the Supreme Court in *Hudson* should be extended to violations of nighttime searches.¹¹ In other words, courts should hold that the exclusionary rule is inapplicable to violations of the nighttime search rule. This Comment reaches this conclusion by comparing the common law history, statutory codification, and—most importantly—the purposes behind the knock-and-announce rule and the nighttime search rule.

Part II of this Comment explores the exclusionary rule, giving a brief history of the Fourth Amendment, discussing early American courts’ grounds for not excluding evidence obtained in illegal searches, and discussing the development of the exclusionary rule through Supreme Court jurisprudence. Part III explores the knock-and-announce rule. This Part gives a history of the knock-and-announce rule in England and early America, discusses the development of the rule through Supreme Court cases, and discusses the background facts and the Supreme Court’s holding in *Hudson*. Part IV discusses nighttime searches, including a discussion of the history of nighttime searches in early America and a brief discussion of case law regarding nighttime searches and the evidence seized in such searches. Part V then applies the holding of *Hudson* to nighttime searches to show that the exclusionary rule should not be

8. *Id.* at 2165.

9. *See* United States *ex rel.* Boyance v. Myers, 398 F.2d 896, 897–98 (3d Cir. 1968).

10. Throughout this Comment, the term “unauthorized nighttime searches” refers to searches executed at night pursuant to a valid search warrant, although the search warrant authorized only a daytime search.

11. This Comment’s analysis is limited to extending the *Hudson* holding to the nighttime search context. An analysis of the “correctness” of the *Hudson* decision is beyond the scope of this Comment.

applied to unauthorized nighttime searches for the same reasons that the Supreme Court held that the exclusionary rule should not be applied to violations of the knock-and-announce rule. This Part reaches this conclusion by comparing the origins, statutory bases, and purposes of the knock-and-announce rule and the nighttime search rule. Finally, Part VI gives a brief conclusion.

II. THE EXCLUSIONARY RULE

The exclusionary rule provides that “evidence uncovered by police in violation of the Fourth Amendment’s prohibition against ‘unreasonable searches and seizures’ is excluded from a defendant’s criminal trial.”¹² The primary purpose of the exclusionary rule is to deter law enforcement officials from conducting searches and seizures that violate the Fourth Amendment rights of citizens.¹³ This Part presents the history of the exclusionary rule. The first Section gives a brief history of the Fourth Amendment and the reasons that the Framers included it in the Bill of Rights. The second Section discusses the application of the Fourth Amendment in early America and shows the early courts’ hesitance to exclude evidence, even if it had been illegally obtained by law enforcement officers. The third Section then discusses the birth of the federal exclusionary rule in the twentieth century and the development of the rule through Supreme Court cases.

A. The Fourth Amendment

The Fourth Amendment assures citizens of “[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”¹⁴ Many legal scholars, as

12. Patrick Tinsley et al., *In Defense of Evidence and Against the Exclusionary Rule: A Libertarian Approach*, 32 S.U. L. REV. 63, 63 (2004) (quoting U.S. CONST. amend. IV); see also *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (“The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion.”). The exclusionary rule was famously summarized in Justice Cardozo’s cynical statement that “[t]he criminal is to go free because the constable has blundered.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

13. *Stone v. Powell*, 428 U.S. 465, 486 (1976) (“The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.”); see also *United States v. Calandra*, 414 U.S. 338, 348 (1974) (stating that the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect”).

14. U.S. CONST. amend. IV. The Fourth Amendment states in full:

well as many courts, attribute the genesis of the Fourth Amendment to two British practices that the colonists despised: the use of general warrants and the use of writs of assistance.¹⁵

General warrants were used mainly in England and were historically used “to search and seize any printing press or papers critical of the King or Parliament.”¹⁶ General warrants “failed to specify who or what was to be searched or seized, allowing governmental officials to . . . search anything” that they wished to search without individualized suspicion.¹⁷

Even more odious to the colonists were the writs of assistance, which were commonly used by British officials in the early American

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

Id.

15. Talesh, *supra* note 1, at 1182 (“[T]he Fourth Amendment’s creation was a reaction to the abuses of the general warrant by England and the writs of assistance in the Colonies.”); *see also* O’Rourke v. City of Norman, 875 F.2d 1465, 1472 (10th Cir. 1989) (“It is axiomatic that the Fourth Amendment was adopted as a direct response to the evils of the general warrants in England and the writs of assistance in the Colonies.”); Devon J. Goodman, Casenote, Hoay v. State, *A Look at the United States Supreme Court’s and Arkansas’s Misapplication of the Exclusionary Rule and Good Faith Exception*, 57 ARK. L. REV. 993, 996–97 (2005) (“The United States Supreme Court recognized that the framers of the United States Constitution gave birth to the Fourth Amendment in memory of the British practice in the American colonies of issuing general warrants which allowed officers to search and seize with virtually no regulation and no requirement of reasonableness.” (citing *Boyd v. United States*, 116 U.S. 616, 625–27 (1886))).

16. Darren K. Sharp, Note, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 DRAKE L. REV. 149, 152 (1997); *see also Boyd*, 116 U.S. at 625–26 (“Prominent and principal among these [abuses] was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel.”).

17. Sharp, *supra* note 16, at 152; *see also* Mark Josephson, Note, *Fourth Amendment—Must Police Knock and Announce Themselves Before Kicking in the Door of a House?*, 86 J. CRIM. L. & CRIMINOLOGY 1229, 1230 (1996) (“General warrants authorized searches for persons or papers not named specifically in the warrant.”). The English parliament declared general warrants illegal in 1776. *O’Rourke*, 875 F.2d at 1473. It was during the Parliament floor debates that William Pitt, Earl of Chatham, made his famous statement:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Id. (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 425 n.1 (7th ed. 1903)).

colonies.¹⁸ Writs of assistance were a type of general warrant, but the writs were more abusive than the general warrants used in England.¹⁹ The British implemented the use of writs of assistance in an effort to discover smuggled goods.²⁰ The writs gave revenue officers complete discretion to search any home at any time for smuggled goods.²¹ James Otis, an American revolutionary, declared the writs of assistance to be “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book” because they put “the liberty of every man in the hands of every petty officer.”²² Thus, it was in response to these abuses by the British Government that the Framers adopted the Fourth Amendment in order to protect the “sanctity of a man’s home and the privacies of life.”²³

B. Lack of Evidentiary Exclusion in Early America

Although the Fourth Amendment grants protection from unreasonable searches and seizures,²⁴ the amendment “provides neither a remedy nor a mechanism for prevention if a violation occurs.”²⁵ From the time of America’s independence until the early twentieth century, courts did not exclude evidence from criminal trials, even if it had been obtained by police during an illegal

18. *O’Rourke*, 875 F.2d at 1473.

19. *Id.*

20. *Id.*

21. *Boyd*, 116 U.S. at 625; *O’Rourke*, 875 F.2d at 1473; Josephson, *supra* note 17, at 1231 (“The writs authorized customs officials and their subordinates to search anywhere they thought smuggled goods would be hidden and to break open containers suspected of holding smuggled goods.”).

22. *Boyd*, 116 U.S. at 625 (citation omitted).

23. *Id.* at 630; *see also* *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (“[T]he purpose of the Fourth Amendment [was] to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property.”); Goodman, *supra* note 15, at 997 (“Resistance to [general warrants and writs of assistance] and the principle that a man’s house was his castle established the foundation for the Fourth Amendment’s principle that the home should not be invaded by any general authority to search and seize.”).

24. U.S. CONST. amend. IV.

25. Talesh, *supra* note 1, at 1182; *see also* Patrick Alexander, Note, Pennsylvania Board of Probation & Parole v. Scott: *Who Should Swallow the Bitter Pill of the Exclusionary Rule? The Supreme Court Passes the Cup*, 31 LOY. U. CHI. L.J. 69, 69 (1999) (stating that the Fourth Amendment “contains no explicit remedy for violations of a person’s right to be free from unreasonable searches”).

search.²⁶ Courts were only concerned with whether or not the evidence was probative; if the evidence was probative to determine the guilt of the accused, the evidence was admissible, regardless of how it was obtained.²⁷ If the evidence proved the defendant's guilt, the government officials who illegally obtained the evidence had a "complete defense against charges that the search was a violation of the defendant's rights."²⁸ Even the Supreme Court "continued to apply the common law rule that evidence is admissible however obtained" into the early twentieth century.²⁹ Thus, in early American law, there was no remedy available for the defendant who had probative evidence offered against him that the government had confiscated during an illegal search.³⁰

C. The Birth and Development of the Exclusionary Rule

The exclusionary rule was judicially created in 1914 in *Weeks v. United States*.³¹ In *Weeks*, the Supreme Court overruled prior

26. *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 844 (C.C.D. Mass. 1822) (No. 15,551) ("The law deliberates not on the mode, by which [evidence] has come to the possession of the party, but on its value in establishing itself as satisfactory proof."); *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841), *superseded by statute*, MASS. GEN. LAWS ANN. ch. 276, § 2B (West 1964) *as recognized in* *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985) ("If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers seized as evidence, if they were pertinent to the issue . . . [T]he court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question."); *Tinsley et al.*, *supra* note 12, at 64 ("At common law, and continuing for one hundred years after the passage of the Fourth Amendment, evidence of the defendant's guilt was never excluded just because it was obtained illegally.").

27. *Tinsley et al.*, *supra* note 12, at 64 ("The common law excluded evidence that was tainted by unreliability or suspect probative value . . . but probative evidence, regardless of its source, was admissible, since it tended to establish the truth, and, thus, help achieve justice."); *Alexander*, *supra* note 25, at 72 ("[T]hrough the nineteenth century, the improper seizure of evidence did not affect its admissibility.").

28. *Tinsley et al.*, *supra* note 12, at 65; *see also id.* ("[T]he common law not only did not exclude illegally-obtained evidence, but it even allowed that evidence to *retroactively justify* what would otherwise be an illegal search and seizure.").

29. *Id.* (citing *Adams v. New York*, 192 U.S. 585 (1904)).

30. *Alexander*, *supra* note 25, at 72 ("[F]or more than a century after the ratification of the Bill of Rights, neither the Supreme Court nor Congress created any remedy that would prevent unreasonably seized evidence from being admitted at trial.").

31. *Weeks v. United States*, 232 U.S. 383, 398 (1914); *see also* *Talesh*, *supra* note 1, at 1182 ("In *Weeks v. United States*, the Supreme Court first applied the exclusionary rule to criminal proceedings.").

common law jurisprudence and held that “the admission of improperly seized evidence implicate[d] the Fourth Amendment.”³² Specifically, the Court held that a criminal defendant “could, prior to trial, petition for the return of the property secured through an illegal search and seizure by federal officers.”³³ The goal of protecting the integrity of the judiciary was the primary basis for the Court’s decision.³⁴ The Court felt that “it would be implicitly condoning the use of illegally obtained evidence and unconstitutional behavior if it allowed the trial court to admit as evidence private documents . . . when no warrant had been obtained.”³⁵ In support of its holding, the Court stated that violations of citizens’ Fourth Amendment rights caused by unreasonable government searches “should find no sanction in the judgments of the courts.”³⁶ Additionally, the Court reasoned that if there was no judicial remedy for unreasonable government searches, then the protections afforded by the Fourth Amendment “might as well be stricken from the Constitution.”³⁷ Thus, “the exclusionary rule began to take form as the ‘remedy’ that gave meaning to the Fourth Amendment.”³⁸

The *Weeks* decision, however, was limited because it only applied to federal courts.³⁹ State courts were not bound to the exclusionary

32. Alexander, *supra* note 25, at 72 (citing *Weeks*, 232 U.S. at 398).

33. Talesh, *supra* note 1, at 1182 (citing *Weeks*, 232 U.S. at 398).

34. See *Weeks*, 232 U.S. at 391–92; Talesh, *supra* note 1, at 1182 (“The Court claimed that not applying the exclusionary rule to such proceedings would compromise the integrity of the judiciary.”).

35. Talesh, *supra* note 1, at 1182; see *Weeks*, 232 U.S. at 392.

36. *Weeks*, 232 U.S. at 392; see also *id.* at 393 (“The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.”).

37. *Id.* at 393 (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

38. Alexander, *supra* note 25, at 74.

39. See *Weeks*, 232 U.S. at 398; Tinsley et al., *supra* note 12, at 67 (“Originally, the exclusionary rule applied only in cases involving the federal government, because the Fourth Amendment restriction on unreasonable searches and seizures applied only to federal and not to state officers.”); Goodman, *supra* note 15, at 998 (“While the Supreme Court in *Weeks* required exclusion of unconstitutionally seized evidence, it only extended the exclusionary rule to the federal government and its agencies, not to the states.”).

rule, as they were “free to adopt their own rules of evidence.”⁴⁰ Although most states had constitutional provisions similar to the Fourth Amendment, the majority of the states “rejected the exclusionary rule and continued to allow both civil and criminal courts to consider all probative evidence.”⁴¹ States continued to hold that the evidence was still “competent,” even if the police had trespassed without a warrant.⁴² Although evidence that had been illegally obtained by federal officers was not admissible in state courts,⁴³ federal courts were allowed to admit evidence that had been illegally obtained, “so long as it was the result of a search by state police and not federal officials.”⁴⁴ This practice became known as the “silver platter doctrine” because state officers could effect a warrantless search and present the seized evidence to federal officials, who could then use the evidence in the federal prosecution of the defendant.⁴⁵

In 1949, the Court took its first step in forcing the exclusionary rule on the states. In *Wolf v. Colorado*, the Court held that the Fourth Amendment was applicable to the states through the Fourteenth Amendment’s Due Process Clause.⁴⁶ However, *Wolf* did not specifically require the states to adopt the exclusionary rule as the remedy for Fourth Amendment violations.⁴⁷ The Court allowed the states to “decide what practice would work best for them individually in guarding against unreasonable searches and seizures.”⁴⁸ The states

40. Tinsley et al., *supra* note 12, at 67.

41. *Id.* In 1926, the New York Court of Appeals noted that forty-five states had considered the exclusionary rule declared in *Weeks*, and thirty-one of the states had outright rejected it. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

42. *See, e.g., Defore*, 150 N.E. at 586–87 (rejecting the exclusionary rule and holding that a police officer who entered the defendant’s room at a boarding house without a warrant “might have been resisted, or sued for damages, or even prosecuted for oppression,” but the evidence was still admissible in trial).

43. *Rea v. United States*, 350 U.S. 214, 218 (1956).

44. Tinsley et al., *supra* note 12, at 67 (emphasis omitted).

45. Goodman, *supra* note 15, at 999. This “silver platter doctrine” came to an end with the Supreme Court’s decision in *Elkins v. United States*, 364 U.S. 206, 223–24 (1960).

46. *Wolf v. Colorado*, 338 U.S. 25, 31 (1949), *overruled by* *Mapp v. Ohio*, 376 U.S. 643 (1961); *see also* Alexander, *supra* note 25, at 74 n.45 (“[I]t was not until 1949 that the Supreme Court expressly held that the due process clause of the Fourteenth Amendment imposed the Fourth Amendment limitations on the states.”); Goodman, *supra* note 15, at 998.

47. *See Wolf*, 338 U.S. at 31–33; Alexander, *supra* note 25, at 74–75.

48. Goodman, *supra* note 15, at 998–99 (citing *Wolf*, 338 U.S. at 31–32); *see also* Talesh, *supra* note 1, at 1183 n.23 (“[T]he *Wolf* decision . . . invited states to generate and

could still reject the exclusionary rule and “instead utilize other effective remedies, such as the threat of civil suits or interdepartmental training and discipline, to deter Fourth Amendment violations.”⁴⁹

Twelve years later, however, the Court overruled *Wolf* in *Mapp v. Ohio* and specifically mandated that state courts apply the exclusionary rule as a remedy for Fourth Amendment violations.⁵⁰ The Court stated in its opinion that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”⁵¹ The Court required the adoption of the exclusionary rule because it felt that the alternatives were ineffective.⁵² Thus, the Court “close[d] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct.”⁵³

III. THE KNOCK-AND-ANNOUNCE RULE

The knock-and-announce rule requires law enforcement officials to “knock and announce their presence and authority prior to effecting a non-consensual entry into a dwelling.”⁵⁴ This Part explores the history and development of the knock-and-announce rule. The first Section discusses the rule’s development in early British and American common law. The second Section then explores the rule’s development through Supreme Court cases, focusing specifically on the application of the exclusionary rule to violations of the knock-and-announce rule. The third Section discusses the recent Supreme Court case of *Hudson v. Michigan*, in which the Court overruled its own precedent and held that evidence

develop their own procedures for addressing evidence which violated the Fourth Amendment.”).

49. Alexander, *supra* note 25, at 74–75 (citing *Wolf*, 338 U.S. at 31).

50. *Mapp*, 376 U.S. at 657; *see also* Alexander, *supra* note 25, at 75 (“In 1961 . . . the Court reversed its 1949 decision and held that the Constitution did require the states to adopt the exclusionary rule.”); Talesh, *supra* note 1, at 1183.

51. *Mapp*, 376 U.S. at 655.

52. *See id.* at 652 (stating that “other remedies have been worthless and futile”).

53. *Id.* at 654–55.

54. *United States v. Pelletier*, 469 F.3d 194, 198 (1st Cir. 2006); *see also* *United States v. Dunnock*, 295 F.3d 431, 434 (4th Cir. 2002) (“The knock and announce requirement . . . generally requires police officers entering a dwelling to knock on the door and announce their identity and purpose before attempting forcible entry.”).

should not be excluded when law enforcement officers violate the knock-and-announce rule.⁵⁵

*A. The Knock-and-Announce Rule in English and
Early American History*

The knock-and-announce rule has common law roots that date back over four hundred years.⁵⁶ The common law requirement that police officers knock and announce their presence before forcibly entering a private residence can be traced to the landmark *Semayne's Case* of 1603.⁵⁷ *Semayne's Case* held that

[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it⁵⁸

Although the writ at issue in *Semayne's Case* was a civil writ, the reasoning of the case was adopted in the context of criminal cases in *The Case of Richard Curtis*.⁵⁹ The knock-and-announce requirement of *Semayne's Case* was widely adopted by the English legal scholars of the time,⁶⁰ suggesting that the requirement “was a widespread practice at common law during the Eighteenth Century.”⁶¹

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

56. Charles Patrick Garcia, Note, *The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 687 (1993).

57. *Semayne's Case*, (1603) 77 Eng. Rep. 194 (K.B.); see also Garcia, *supra* note 56, at 687–88 (attributing the genesis of the knock-and-announce rule to *Semayne's Case*).

58. *Semayne's Case*, 77 Eng. Rep. at 195–96.

59. *The Case of Richard Curtis*, (1757) 168 Eng. Rep. 67, 68 (K.B.) (holding that officers serving an arrest warrant could “break open doors, after having demanded admittance and given due notice of their warrant”); see also Josephson, *supra* note 17, at 1236 (noting that the *Case of Richard Curtis* is the “first reported application of the announcement requirement in a criminal case”).

60. See, e.g., 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 116–17 (Profl Books 1971) (1736) (“If a justice of the peace issue a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is

The knock-and-announce rule was adopted in early American case law.⁶² In fact, the rule “was embraced in the United States prior to the ratification of the Constitution.”⁶³ Before the Constitution was ratified, ten states had already passed laws requiring law enforcement officers to announce their purpose prior to forcibly entering a house,⁶⁴ and popular legal manuals noted that announcement was required prior to forcible entry.⁶⁵ After the ratification of the Constitution and the Fourth Amendment, early American cases continued to require announcement before forcible entry was allowed.⁶⁶ Congress codified the common law knock-and-announce rule in 1917 when it passed the Espionage Act.⁶⁷ The statute is currently codified at 18 U.S.C. § 3109 and states that “[t]he officer may break . . . any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance”⁶⁸

B. The Development of the Knock-and-Announce Rule in Supreme Court Jurisprudence: Applying the Exclusionary Rule

The Supreme Court first examined the knock-and-announce rule in 1958 in the case of *Miller v. United States*.⁶⁹ *Miller* involved a warrantless entrance into an apartment that resulted in the arrest of the defendant for violations of federal narcotics laws.⁷⁰ The

refused or neglected to be done, the officer may break open the door to take him”); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 86 (Garland Publ’g 1978) (1721) (“[N]o one can justify the breaking open another’s doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance.” (capitalization altered)).

61. Josephson, *supra* note 17, at 1236.

62. Garcia, *supra* note 56, at 689.

63. Josephson, *supra* note 17, at 1237.

64. *Id.*

65. *Id.*

66. *Id.* at 1238; *see also* Randall S. Bethune, Comment, *The Exclusionary Rule and the Knock-and-Announce Violation: Unreasonable Remedy for Otherwise Reasonable Search Warrant Execution*, 22 WHITTIER L. REV. 879, 881 (2001) (“The principle of knock-and-announce was part of early American common law.”).

67. Espionage Act of 1917, ch. 30, Tit. XI, § 8–9, 40 Stat. 217, 228–29 (codified at 18 U.S.C. § 3109 (2000)); Josephson, *supra* note 17, at 1239.

68. 18 U.S.C. § 3109.

69. *Miller v. United States*, 357 U.S. 301 (1958); *see also* Josephson, *supra* note 17, at 1242.

70. *Miller*, 357 U.S. at 302–03.

defendant argued that the arrest—and the resulting search of his apartment—was unlawful because the police did not give notice of their authority and purpose before they forced their way into the apartment.⁷¹ The Court began its decision by noting that the knock-and-announce rule is “deeply rooted in our heritage and should not be given grudging application.”⁷² The Court then applied the rule and held that the defendant “could not be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose.”⁷³ Thus, because the police had invaded the apartment without giving notice, the Court concluded that “the arrest was unlawful, and the evidence seized should have been suppressed.”⁷⁴ Although the Court applied the exclusionary rule in this case, it “did not apply a constitutional standard” for doing so.⁷⁵

The Court next visited the knock-and-announce rule in *Ker v. California*.⁷⁶ *Ker* is the first Supreme Court case in which the Court specifically addressed the constitutional considerations of the knock-and-announce rule.⁷⁷ The *Ker* Court was split four-to-four on the issue of whether an unannounced police entry was reasonable under Fourth Amendment standards.⁷⁸ In his plurality opinion, Justice Brennan stated that “[e]ven if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant”⁷⁹ Thus, the constitutional implications of the

71. *Id.* at 305.

72. *Id.* at 313.

73. *Id.*

74. *Id.* at 313–14.

75. Bethune, *supra* note 66, at 881–82.

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

77. Bethune, *supra* note 66, at 882; *see also* Garcia, *supra* note 56, at 693 (“The Supreme Court recognized the constitutional dimension of the ‘knock and announce’ rule in *Ker v. California*.”).

78. Josephson, *supra* note 17, at 1244.

79. *Ker*, 374 U.S. at 47 (Brennan, J., plurality opinion). This statement was subject to exceptions:

- (1) where the persons within already know of the officers’ authority and purpose, or
- (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or
- (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Id.

knock-and-announce rule remained unclear. “[C]ommentators believed that the Court had constitutionalized the knock-and-announce rule. However, courts split as to whether the knock-and-announce rule was constitutionally mandated.”⁸⁰

Finally, in a unanimous decision in *Wilson v. Arkansas*,⁸¹ the Court squarely addressed the question of “whether an unannounced entry by police armed with a search warrant violates the Fourth Amendment.”⁸² The Court began its opinion by noting that in evaluating the scope of Fourth Amendment protection, it looks “to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing.”⁸³ After reviewing the common law history of the knock-and-announce rule, the Court concluded that the “Framers of the Fourth Amendment thought that the method of an officer’s entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.”⁸⁴ Thus, the Court held that “in some circumstances an officer’s unannounced entry into a home might be unreasonable under the Fourth Amendment.”⁸⁵ However, the Court failed to address what these circumstances were, and instead “[left] to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment.”⁸⁶ Additionally, the Court did not consider the State’s argument that the Constitution does not require the exclusion of evidence seized following the unannounced entry of the officers effecting the search.⁸⁷ The effect of this ruling was that state courts split on the question of what was the correct remedy for violations of the knock-and-announce rule.⁸⁸ Was it suppression of the evidence or something else? This question was resolved in *Hudson v. Michigan*,⁸⁹ discussed in the next Section.

80. Josephson, *supra* note 17, at 1246.

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

82. Josephson, *supra* note 17, at 1229.

83. *Wilson*, 514 U.S. at 931.

84. *Id.* at 934.

85. *Id.*

86. *Id.* at 936.

87. *See id.* at 937 n.4; *see also* Josephson, *supra* note 17, at 1251.

88. *See supra* notes 5–6.

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

C. Hudson v. Michigan: Detaching the Exclusionary Rule

In *Hudson v. Michigan*, the Supreme Court faced the issue of “whether violation of the ‘knock-and-announce’ rule requires the suppression of all evidence found in the search.”⁹⁰ In a 5-4 decision, the Court held that application of the exclusionary rule to violations of the knock-and-announce rule was unjustified.⁹¹ This Section discusses the facts and procedural history of *Hudson*, followed by a discussion of the Court’s majority opinion.

1. Facts and lower court holdings

Police obtained a search warrant to search Booker Hudson’s home for both drugs and firearms.⁹² When the police executed the warrant, they announced their entrance, but only waited three to five seconds before forcibly entering the home.⁹³ As a result of the search, the police found a large quantity of drugs in the home.⁹⁴ Additionally, cocaine rocks were found in Hudson’s pocket, and a loaded gun was found next to where Hudson was sitting.⁹⁵ Based on the results of the search, Hudson was charged with unlawful drug possession and unlawful firearm possession under Michigan law.⁹⁶

Hudson moved the trial court to suppress all of the evidence found during the search based on the argument that the police had violated his Fourth Amendment rights by not waiting long enough after their announcement before forcing entry into the home.⁹⁷ The State conceded that the police’s entry violated the knock-and-announce rule, but argued that suppression was not the correct remedy.⁹⁸ The state trial court granted the suppression motion and dismissed the charges; however, the Michigan Court of Appeals reversed, holding that “suppression is inappropriate” for a knock-and-announce violation.⁹⁹ The court based its holding on *People v.*

90. *Id.* at 2162.

91. *Id.* at 2168.

92. *Id.* at 2162.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 2163.

99. *Id.* at 2162.

Stevens, a 1999 Michigan Supreme Court case that held that a violation of the knock-and-announce rule did not require suppression of evidence because the evidence “would have been inevitably discovered.”¹⁰⁰ The Michigan Supreme Court denied review of the case,¹⁰¹ but the United States Supreme Court granted certiorari in 2005.¹⁰²

2. Supreme Court holding

The Court began its opinion by noting that the knock-and-announce requirement “is an ancient one.”¹⁰³ Following a brief synopsis of its case law concerning the knock-and-announce rule and its relation to the Fourth Amendment, the Court acknowledged that the rule announced in *Wilson* “is not easily applied.”¹⁰⁴ This was followed by a brief discussion of the exclusionary rule, which the Court noted “has always been our last resort, not our first impulse.”¹⁰⁵ The Court also noted that the exclusionary rule “generates ‘substantial social costs.’”¹⁰⁶ The Court asserted that the police’s illegal 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.”¹⁰⁷

A major portion of the opinion focused on purposes of—or, in the Court’s language, “the interests protected” by—the knock-and-announce rule.¹⁰⁸ The first interest noted by the Court is “the protection of human life and limb.”¹⁰⁹ The rule protects this interest because “an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”¹¹⁰ The second interest is the “protection of property.”¹¹¹ The Court noted that the knock-and-

100. *People v. Stevens*, 597 N.W.2d 53, 62 (Mich. 1999).

101. *Hudson*, 126 S. Ct. at 2162.

102. *Hudson v. Michigan*, 125 S. Ct. 2964 (2005) (mem.).

103. *Hudson*, 126 S. Ct. at 2162.

104. *Id.*

105. *Id.* at 2163.

106. *Id.* at (quoting *United States v. Leon*, 468 U.S. 897, 907 (1984)).

107. *Id.* at 2164.

108. *Id.* at 2165.

109. *Id.*

110. *Id.*

111. *Id.*

announce rule “gives individuals ‘the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.’”¹¹² The final interest protected by the knock-and-announce rule is the “privacy and dignity that can be destroyed by a sudden entrance.”¹¹³ The announcement requirement “gives residents the ‘opportunity to prepare themselves for’ the entry of the police.”¹¹⁴ In other words, it gives the individual time to “pull on clothes or get out of bed.”¹¹⁵

The Court then noted the interest that the knock-and-announce rule has never protected: “one’s interest in preventing the government from seeing or taking evidence described in a warrant.”¹¹⁶ The Court concluded that the exclusionary rule was “inapplicable” because “the interests that *were* violated in this case have nothing to do with the seizure of the evidence.”¹¹⁷ The Court’s ultimate holding in the case was that “the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal”; therefore, “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.”¹¹⁸

The issue of whether or not to exclude evidence obtained during a search in which police fail to follow the knock-and-announce rule is now settled law. The *Hudson* Court made it clear that the suppression of evidence is not the appropriate remedy for violations of the knock-and-announce rule. Nevertheless, the appropriate remedy for other search violations, such as violations of the nighttime search rule, remains unresolved.

IV. NIGHTTIME SEARCHES

The general rule regarding the execution of search warrants is that they should be executed during the daytime rather than the nighttime.¹¹⁹ It is widely recognized that nighttime searches inflict a

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

113. *Id.*

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

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

116. *Id.*

117. *Id.*

118. *Id.* at 2168.

119. See 79 C.J.S. *Searches* § 266 (2006) (“Nighttime execution must be the exception and not the rule.” (citing *State v. Habbena*, 372 N.W.2d 450 (S.D. 1985))); see also *State v. Lindner*, 592 P.2d 852, 857 (Idaho 1979) (“Historically, there has been a strong aversion to

greater invasion of privacy than do daytime searches.¹²⁰ However, courts vary in their interpretation of the correct remedy if police effect an unauthorized nighttime search. This Part explores the history and development of law relating to nighttime searches. The first Section discusses the early history of the nighttime search rule. The second Section discusses recent jurisprudence regarding nighttime searches, including the Supreme Court decision in *Gooding v. United States*.¹²¹

A. Nighttime Searches in Early American History

Even prior to the adoption of the Fourth Amendment, “there was a strong aversion to nighttime searches” in early American common law.¹²² It appears that it was an early common law principle to limit search warrants to the daytime.¹²³ The general warrants issued in England forbade nighttime searches,¹²⁴ and “[e]ven the Writs of Assistance, more odious and abusive than the general

nighttime searches.”); *State v. Brock*, 653 P.2d 543, 545 (Or. 1982) (“The most obvious and fundamental policy of the statute [requiring daytime searches unless the issuing judge specifically authorizes a nighttime search] is a legislative determination that execution of search warrants during the day is to be normal and that nighttime searches are to be exceptional.”).

The definition of “nighttime” depends upon the jurisdiction. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3917 (2006) (between 10:00 p.m. and 6:30 a.m.); DEL. CODE ANN. tit. 11, § 2308 (2006) (between 10:00 p.m. and 6:00 a.m.); MINN. STAT. § 626.14 (2006) (between 8:00 p.m. and 7:00 a.m.).

120. *See, e.g.*, 1 CRIMINAL PRACTICE MANUAL § 24:7 (2006) [hereinafter CRIMINAL PRACTICE] (“Most jurisdictions recognize that nighttime entry involves a significantly greater invasion of privacy than its daytime counterpart.”); *see also Lindner*, 592 P.2d at 857 (“[E]ntry into an occupied dwelling in the middle of the night is clearly a greater invasion of privacy than entry executed during the daytime.”); *State v. Lien*, 265 N.W.2d 833, 839–40 (Minn. 1978) (“[A] nighttime search of a home involves a much greater intrusion upon privacy and is presumably more alarming than an ordinary daytime search of a home.” (citing *State v. Stephenson*, 245 N.W.2d 621 (Minn. 1976))); *State v. Schmeets*, 278 N.W.2d 401, 410 (N.D. 1979) (“Courts have long recognized that nighttime searches constitute greater intrusions on privacy than do daytime searches.”).

121. *Gooding v. United States*, 416 U.S. 430 (1974).

122. *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968); *see also* CRIMINAL PRACTICE, *supra* note 120, § 24:7 (“[A]t common law, prior to the adoption of the Bill of Rights, there was a strong aversion to nighttime searches.”).

123. 79 C.J.S *Searches* § 265 (2006).

124. *O’Rourke v. City of Norman*, 875 F.2d 1465, 1473 (10th Cir. 1989) (citing 2 HALE, PLEAS OF THE CROWN 113 (Stokes & Ingersoll eds. 1847)). For a discussion of general warrants, *see supra* notes 15–17 and accompanying text.

warrants, permitted searches of dwellings only in the daytime.”¹²⁵ Early American revulsion of nighttime searches of private homes is evidenced by the first Congress passing two laws forbidding the practice.¹²⁶ The sentiment shared by early Americans was that the “[n]ight-time search was the evil in its most obnoxious form.”¹²⁷

B. Supreme Court Jurisprudence: Gooding v. United States

The United States Supreme Court has never directly addressed the issue of whether or not nighttime search violations implicate the Fourth Amendment—as it did with knock-and-announce violations in *Wilson v. Arkansas* and its progeny¹²⁸—thus, there is no Supreme Court guidance on whether or not the exclusionary rule should be applied to nighttime search violations. The closest the Court has come to addressing the issue was in the case of *Gooding v. United States*.¹²⁹ In *Gooding*, a criminal defendant argued that “evidence offered against him at his trial should have been suppressed because it was seized at nighttime in violation of governing statutory provisions.”¹³⁰ The defendant did not, however, argue that the nighttime search violated the Fourth Amendment.¹³¹ Thus, the Court resolved the case on statutory grounds and did not specifically address the possible Fourth Amendment ramifications.¹³²

125. *O'Rourke*, 875 F.2d at 1473; *see also Boyance*, 398 F.2d at 898 (“Even the odious ‘writs of assistance’ which outraged colonial America permitted search of dwellings only in the daytime.”). For a discussion of writs of assistance, *see supra* notes 18–22 and accompanying text.

126. *O'Rourke*, 875 F.2d at 1473 (citing Act of July 31, 1789, ch. 5, § 24, 1 Stat. 43 and Act of March 3, 1791, ch. 15, § 29, 1 Stat. 206).

127. *Monroe v. Pape*, 365 U.S. 167, 210 (1961).

128. *See supra* Part III.B.

129. *Gooding v. United States*, 416 U.S. 430 (1974); *see also* George E. Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89, 101–02 (1982) (“The closest the [United States Supreme] Court came to addressing the time of search issue was in *Gooding v. United States*, which involved the execution of a search warrant.”).

130. *Gooding*, 416 U.S. at 431; *see also* Dix, *supra* note 129, at 102 (“*Gooding* argued only that the issuance of the warrant did not comply with the applicable statutory provisions regarding nighttime warrants.”).

131. Dix, *supra* note 129, at 102.

132. *See Gooding*, 416 U.S. at 458; *see also* Paul Morris, Case Note, *Fouse v. State: The Arkansas Nighttime Search Rule—Helping Make Arkansas the Country’s Number One Producer of Methamphetamine*, 53 ARK. L. REV. 965, 972 (2000) (“[T]he Court disposed of the case on statutory grounds and never specifically addressed the constitutionality issue . . .”).

Nevertheless, Justice Marshall took the opportunity in his dissenting opinion to discuss the constitutional considerations. Justice Marshall stated that, in his opinion, “there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night.”¹³³

The idea of the police unnecessarily forcing their way into the home in the middle of the night . . . rousing the residents out of their beds, and forcing them to stand by in indignity in their night clothes while the police rummage through their belongings does indeed smack of a “‘police state’ lacking in the respect for . . . the right of privacy dictated by the U.S. Constitution.”¹³⁴

Justice Marshall felt that a nighttime search was a “severe intrusion upon privacy”¹³⁵ and therefore required “a greater justification.”¹³⁶ Thus, it was Justice Marshall’s contention that the nighttime search required “some additional justification . . . over and above the ordinary showing of probable cause”¹³⁷ because “increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches.”¹³⁸

Although the majority opinion in *Gooding* did not address the constitutional considerations relating to the Fourth Amendment,¹³⁹ the case “has been interpreted by other courts to say that the time of search does not enter into a Fourth Amendment analysis.”¹⁴⁰ Several courts have held that nighttime searches have a “constitutional

133. *Gooding*, 416 U.S. at 462 (Marshall, J., dissenting).

134. *Id.* (quoting S. REP. NO. 91-538, at 12 (1969)).

135. *Id.* at 463 (“[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home.” (quoting *Jones v. United States*, 357 U.S. 493, 498 (1958))).

136. *Id.* at 464 (quoting Brief for United States at 14, *Gooding*, 416 U.S. 430 (No. 72-6902)).

137. *Id.* at 462.

138. *Id.* at 464.

139. Dix, *supra* note 129, at 104 (“The opinion of the [*Gooding*] Court evinces no sensitivity to or acknowledgment of constitutional considerations.”); *id.* at 105 (“*Gooding* demonstrated an almost total lack of sensitivity to potential fourth amendment significance of the timing of a search.”).

140. Morris, *supra* note 132, at 973; see also CRIMINAL PRACTICE, *supra* note 120, § 24:7 (“The Supreme Court has made it clear that the factor of a nighttime search is related to the reasonableness analysis under the Fourth Amendment.”).

dimension”¹⁴¹ and that the issue of a nighttime search is “sensitively related to the reasonableness issue” of the Fourth Amendment.¹⁴² However, other courts have held that a nighttime search of a private residence raises only statutory—and not constitutional—implications.¹⁴³ Thus, while some courts have excluded evidence obtained during an unauthorized nighttime search,¹⁴⁴ other courts have found various ways to avoid applying the exclusionary rule.¹⁴⁵

141. *See, e.g.*, *State v. Lien*, 265 N.W.2d 833, 839 (Minn. 1978), *overruled in part on other grounds* by *Richards v. Wisconsin*, 520 U.S. 385 (1997) (“Although the general rule against nighttime searches is statutory, it may also have a constitutional dimension.”).

142. *States v. Gibbons*, 607 F.2d 1320, 1326 (10th Cir. 1979); *see also* *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968) (“The time of a police search of an occupied family home may be a significant factor in determining whether, in a Fourth Amendment sense, the search is ‘unreasonable.’”); *State v. Lindner*, 592 P.2d 852, 857 (Idaho 1979) (“Searches of private dwellings executed during the nighttime take on additional constitutional significance.”); *State v. Garcia*, 45 P.3d 900, 904 (N.M. 2002) (“Many jurisdictions recognize that the decision to execute a search warrant at night may implicate constitutional rights.”).

143. *See, e.g.*, *United States v. Searp*, 586 F.2d 1117, 1124 (6th Cir. 1978) (“[T]he particular procedures mandated before a night search may be conducted are not part of the fourth amendment”); *Commonwealth v. Grimshaw*, 595 N.E.2d 302, 304 (Mass. 1992) (“Many courts have specifically or by implication rejected the claim that the nighttime search limitation has any basis in either State or the Federal Constitutions.”).

144. *See, e.g.*, *State v. Wilson*, 540 P.2d 1268, 1269 (Ariz. Ct. App. 1975) (“[T]he lack of a showing by the state to justify the nighttime search forces us to say that the motion [to suppress evidence] should have been granted.”); *State v. Dalrymple*, 458 P.2d 96, 98 (N.M. 1969) (“We conclude that a nighttime search is not authorized in the absence of appropriate direction contained in the warrant and consequently the searches involved here were illegal and unreasonable and the motion to suppress should have been granted.”); *State v. Fields*, 691 N.W.2d 233, 238 (N.D. 2005) (“We conclude the search was unreasonable because probable cause for the nighttime warrant . . . did not exist. The evidence obtained as a result of the unwarranted nighttime search must be suppressed.”).

Arkansas courts have seemed especially inclined to suppress evidence obtained in unauthorized nighttime searches. *See, e.g.*, *Fouse v. State*, 989 S.W.2d 146 (Ark. 1999); *Richardson v. State*, 863 S.W.2d 572 (Ark. 1993); *Garner v. State*, 820 S.W.2d 446 (Ark. 1991); *State v. Martinez*, 811 S.W.2d 319 (Ark. 1991); *Hall v. State*, 789 S.W.2d 456 (Ark. 1990); *State v. Broadway*, 599 S.W.2d 721 (Ark. 1980); *Dodson v. State*, 199 S.W.3d 115 (Ark. Ct. App. 2004); *Ramey v. State*, 863 S.W.2d 839 (Ark. Ct. App. 1993). For a criticism of Arkansas’s stance on nighttime searches, see generally *Morris*, *supra* note 132.

145. *See, e.g.*, *United States v. Maholy*, 1 F.3d 718, 721 (8th Cir. 1993) (“We need not reach the question whether the nighttime authorization in the warrant was in fact reasonable under the Fourth Amendment because we find that even if the nighttime search violated the Fourth Amendment, the fruits of the search were admissible under [the *Leon* good faith exception.]”); *United States v. Twenty-two Thousand, Two Hundred Seven Dollars (\$22,287.00)*, U.S. Currency, 709 F.2d 442, 448 (6th Cir. 1983) (“[I]f this warrant was in fact served after 10 p.m., it was very shortly thereafter and because, in our view, under the circumstances presented here the exclusionary rule should not be applied even if it was served shortly after the termination of ‘daytime’”); *United States v. Searp*, 586 F.2d 1117, 1122

V. APPLYING *HUDSON* TO NIGHTTIME SEARCHES

Because the knock-and-announce rule and the nighttime search rule are very similar, the Court's holding from *Hudson v. Michigan* should be extended to nighttime search violations. In other words, if the exclusionary rule is not the correct remedy for violations of the knock-and-announce rule, then it is not the correct remedy for violations of the nighttime search rule either. This Part compares the two rules to show why the holding of *Hudson* should be extended to violations of the nighttime search rule. The first Section compares the early history of the rules and shows that unannounced entries and nighttime searches were both disfavored by founding Americans. The second Section compares the current statutory framework of the two rules and shows the similarities between the operation of both rules under statutory authority. The third Section compares the purposes of the rules, focusing specifically on the protection of interests enumerated in the *Hudson* decision. The final Section summarizes the comparisons and concludes that based on the similarities between the common law history, statutory codification, and purposes of the two rules, the *Hudson* decision should also apply to violations of the nighttime search rule.

A. Comparing the Early Histories

There is a strong correlation between the early common law histories of the knock-and-announce rule and the nighttime search rule. One similarity is that both rules were part of American common

(6th Cir. 1978) (“In this case, the defendant’s interests have not been violated, though the procedures were not observed.”); *Lien*, 265 N.W.2d at 835 (“[W]e hold that the unjustified granting of permission for a nighttime execution of the warrant was a statutory violation which under the circumstances does not mandate exclusion of the evidence seized.”); *State v. Goodwin*, 686 N.W.2d 40, 44 (Minn. Ct. App. 2004) (“We conclude that, while executing a warrant less than two minutes before the applicable time for commencement of the search warrant constitutes a statutory violation, the early execution is a de minimis violation and does not justify suppression of the fruits of the search as a remedy.”); *Garcia*, 45 P.3d at 906 (holding that there was no Fourth Amendment violation, and therefore suppression was not required, because “the nighttime search . . . was conducted upon people who were observed to be active in the nighttime”); *State v. Brock*, 653 P.2d 543, 547 (Or. 1982) (“It does not follow that evidence seized in execution of the search warrant must be suppressed. . . . The evidence could validly be seized in the daytime, and it could validly have been seized at night if the judge had found the kind of circumstances for authorizing a nighttime seizure . . .”).

law even before the Fourth Amendment was ratified.¹⁴⁶ This similarity is important because the Supreme Court has stated that in determining whether or not a search and seizure is reasonable, “[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.”¹⁴⁷ In fact, both rules applied to the general warrants and writs of assistance that prompted the colonists to adopt the Fourth Amendment protection against unreasonable searches and seizures.¹⁴⁸ Thus, even the most odious warrants in colonial times were executed with announcement and were only executed during the daytime. Additionally, both rules were adopted into early American law, either by courts adopting the common law¹⁴⁹ or by statutes codifying the common law.¹⁵⁰ Thus, by comparing the early histories of the two rules, it is clear that both were important common law rules that existed prior to the ratification of the Fourth Amendment and both were more formally adopted into law very early in America’s history.

B. Comparing the Statutory Framework

Several jurisdictions have enacted legislation related to the knock-and-announce rule¹⁵¹ and the nighttime search rule.¹⁵² Such

146. See CRIMINAL PRACTICE, *supra* note 120, § 24:7 (“[A]t common law, prior to the adoption of the Bill of Rights, there was a strong aversion to nighttime searches.”); Josephson, *supra* note 17, at 1237 (stating that the knock-and-announce rule “was embraced in the United States prior to the ratification of the Constitution”).

147. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

148. See *Ker v. California*, 374 U.S. 23, 52 (1963) (Brennan, J., plurality opinion) (“[S]ervice of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission.”); *O’Rourke v. City of Norman*, 875 F.2d 1465, 1473 (10th Cir. 1989) (stating that the general warrants in England forbade nighttime searches and that “[e]ven the Writs of Assistance, more odious and abusive than the general warrants, permitted searches of dwellings only in the daytime”).

149. *Garcia*, *supra* note 56, at 689 (“Early American case law adopted the view that forcible entry into a home was lawful only after notice.”).

150. See *United States ex rel. Boyance v. Myers*, 398 F.2d 896, 897 (3d Cir. 1968) (“During the early years of the republic this common-law tradition [of prohibiting nighttime searches] was embodied in two statutes passed by our first Congress that authorized only daytime searches.” (citations omitted)).

151. See, e.g., ALA. CODE § 15-5-9 (LexisNexis 1995) (“To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance.”); CAL. PENAL CODE § 1531 (West 2000) (“The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his

statutes are often quite similar in that they require the executing officers to follow the knock-and-announce rule and the nighttime search rule, unless the issuing judge finds reasonable cause to “break the rules.” To demonstrate these similarities, this Section compares the Utah statutes that codify the knock-and-announce rule and the nighttime search rule.

Section 77-23-210 of the Utah Code includes the announcement requirement.¹⁵³ This Section states that police cannot use force to enter premises when executing a search warrant unless “after notice of [the officer’s] authority and purpose, there is no response or he is not admitted with reasonable promptness.”¹⁵⁴ However, an issuing magistrate can issue a “no-knock warrant” if the magistrate finds that “the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.”¹⁵⁵ Thus, under Utah law, an officer must follow the knock-and-announce rule unless the issuing judge finds that there is reasonable cause for the officer to execute the warrant without knocking and announcing.

Section 77-23-205 of the Utah Code includes the nighttime search rule.¹⁵⁶ This Section states that “[t]he magistrate shall insert a direction in the warrant that it be served in the daytime.”¹⁵⁷ However, the issuing magistrate can issue a nighttime search warrant if “the affidavits or oral testimony state a reasonable cause to believe

authority and purpose, he is refused admittance.”); FLA. STAT. ANN. § 933.09 (West 2001) (“The officer may break open any outer door, inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if after due notice of the officer’s authority and purpose he or she is refused admittance to said house or access to anything therein.”).

152. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3917 (2001) (“Upon a showing of good cause therefor, the magistrate may, in his discretion insert a direction in the warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant may be served only in the daytime.”); CAL. PENAL CODE § 1533 (“Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m.”); FLA. STAT. § 933.10 (“A search warrant issued under this chapter may, if expressly authorized in such warrant by the judge, be executed by being served either in the daytime or in the nighttime, as the exigencies of the occasion may demand or require.”).

153. UTAH CODE ANN. § 77-23-210 (West 2004).

154. *Id.* § 77-23-210(1).

155. *Id.* § 77-23-210(2).

156. *Id.* § 77-23-205.

157. *Id.* § 77-23-205(1). “Daytime” under Utah law is defined as “the hours beginning at 6 a.m. and ending at 10 p.m.” *Id.* § 77-23-201(1).

a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged, altered, or for other good reason.”¹⁵⁸ Therefore, under Utah law, a search warrant must be issued during the daytime unless the issuing judge finds that there is reasonable cause for the warrant to be executed at night.

The similarities between the statutory codifications of the knock-and-announce rule and the nighttime search rule are thus readily apparent. Both statutes require executing officers to obey the respective rule contained in the statute, unless the issuing magistrate finds reasonable proof that evidence would be destroyed or the officers’ safety would be jeopardized. In these situations, both statutes allow the magistrate to include an exception in the warrant, thereby allowing the officers to either enter the residence without announcement or serve the warrant at night.¹⁵⁹

C. Comparing the Purposes

In *Hudson*, the Court discussed three purposes of the knock-and-announce rule in an effort to show that applying the exclusionary rule was inapplicable to protecting these interests.¹⁶⁰ Two of these purposes—protection from violence and protection of privacy and dignity—have also been cited extensively by courts as purposes of the nighttime search rule. The third purpose cited by *Hudson*—protection of property—has not been cited by courts as a purpose of the nighttime search rule; however, the protection of property can be legitimately viewed as a purpose of the nighttime search rule. This Section discusses the three protections afforded by the knock-and-announce rule, as pronounced in *Hudson*, and compares courts’ statements regarding these protections in both the knock-and-announce and nighttime search contexts.

158. *Id.*

159. As previously mentioned, these statutory similarities are not unique to Utah. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-3915, 13-3916 (2001) (requiring executing officers to announce their authority and purpose before entering, unless the magistrate has “authorized an unannounced entry”); *id.* § 13-3917 (requiring executing officers to serve search warrants during the daytime, unless the magistrate has included a nighttime search direction in the warrant); N.D. CENT. CODE § 29-29-08 (2006) (allowing executing officers to enter unannounced if the issuing magistrate inserts a direction into the warrant allowing unannounced entry); N.D. R. CRIM. P. 41(c)(1)(E) (requiring executing officers to serve the search warrant during the daytime, unless the magistrate finds reasonable cause for the warrant to be executed at night).

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

I. Protection from violence

One interest protected by the knock-and-announce rule, according to the *Hudson* Court, is “the protection of human life and limb.”¹⁶¹ The Court noted that the knock-and-announce rule helps to prevent violence because “an unannounced entry may provoke violence in supposed self-defense by the surprised resident.”¹⁶² The Court had previously mentioned this purpose in *Sabbath v. United States* when it noted that one facet of the rule is “to safeguard officers, who might be mistaken, upon an unannounced intrusion into a home, for someone with no right to be there.”¹⁶³

Other courts have also held that the prevention of violence is one of the primary reasons behind the knock-and-announce rule.¹⁶⁴ An unannounced entry is “conducive to violent confrontations between the occupant and individuals who enter his home without proper notice.”¹⁶⁵ Announcement offers safety to both the residents of the home as well as to the police executing the warrant.¹⁶⁶ The rule protects the residents of the home from unnecessary violence by police and “reduces the risk [of injury] to innocent persons who may be in the house at the time of the search.”¹⁶⁷ It also protects police from the violence of a resident reacting in self-defense.¹⁶⁸

161. *Id.*

162. *Id.*

163. *Sabbath v. United States*, 391 U.S. 585, 589 (1968).

164. *See, e.g.*, *State v. Cardenas*, 47 P.3d 127, 133 (Wash. 2002) (stating that one purpose of the rule is “to reduce potential violence, which might arise from an unannounced entry”).

165. *Duke v. Superior Court*, 461 P.2d 628, 633 (Cal. 1969).

166. *Commonwealth v. Crompton*, 682 A.2d 286, 288 (Pa. 1996) (“The purpose of the knock and announce rule is to prevent violence and physical injury to the police and occupants”); *State v. Perry*, 178 S.W.3d 739, 745 (Tenn. Crim. App. 2005) (“[T]he rule provides a form of protection from violence and assures the safety and security of both the occupants of the dwelling and the officers executing the search warrant.”).

167. *Josephson*, *supra* note 17, at 1234.

168. *See Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001) (stating that one reason why police are required to knock and announce is to “decrease the potential for a violent response when a search is executed”); *State v. Sakellson*, 379 N.W.2d 779, 782 (N.D. 1985) (“[A]n unannounced entry by officers increases the potential for violence by provoking defensive measures a surprised occupant would otherwise not have taken had he known that the officers possessed a warrant to search his home.”); *see also Josephson*, *supra* note 17, at 1234 (“Unannounced entries put the officers involved at risk of being shot by frightened homeowners.”).

The protection from violence has also historically been cited as a purpose of the prohibition against nighttime searches.¹⁶⁹ “The rule against unauthorized nighttime searches is . . . designed to protect against the tumult and turmoil that attends entry of residences in the dead of night.”¹⁷⁰ The Oregon Supreme Court has stated that “[t]he invasion of private premises in the small hours of the night smacks of totalitarian methods and is more likely to create the terror that precipitates gun battles.”¹⁷¹ Several courts have noted that a nighttime invasion increases the likelihood of violence because an invasion of the home is more alarming at night than during the day.¹⁷² Nighttime searches cause “abrupt intrusions on sleeping residents in the dark,”¹⁷³ thereby increasing the likelihood of a violent reaction from those inside the home.¹⁷⁴

As with the knock-and-announce rule, the nighttime search rule protects both residents and police.¹⁷⁵ It protects residents because “[f]ree from the scrutiny of potential witnesses and provided with the cover of darkness, police officers may be tempted to use unnecessary violence against the subject.”¹⁷⁶ It also protects police because “[p]erceiving that it is more difficult to protect oneself from

169. Even in pre-colonial England, the purpose of preventing violence was cited as a reason for the prohibition of nighttime searches. See COOLEY, *supra* note 17, at 430 (“It is fit that such warrants to search do express that search be made in the daytime; and though I do not say they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretence of searches made in the night, robberies and burglaries have been committed, and at best it creates a great disturbance.” (quoting Lord Hale in his treatise *Pleas of the Crown*)).

170. CRIMINAL PRACTICE, *supra* note 120, § 24:7.

171. *State v. Brock*, 653 P.2d 543, 545 (Or. 1982); see also *id.* (“[T]he purpose of the statute is to avoid the possibility of terror and gunplay which may arise from forcible nighttime entries . . .”).

172. See *United States v. Smith*, 340 F. Supp. 1023, 1029 (D. Conn. 1972) (“A knock at the door is more alarming in the middle of the night, and it is no less so because the officer knocking has a search warrant.”); *Brock*, 653 P.2d at 547 (stating that the rule “is concerned with minimizing the heightened risks and apprehensions associated with a nighttime intrusion into the home”).

173. *United States v. Young*, 877 F.2d 1099, 1104 (1st Cir. 1989).

174. See Claudia G. Catalano, Annotation, *Propriety of Execution of Search Warrant at Nighttime*, 41 A.L.R.5th 171, 233 (1996) (“Persons awakened from sleep may be confused and overreact to an intrusion at night for this reason.”).

175. *Id.* (“[N]ighttime searches pose a greater danger to both the subject of the search and law enforcement officials.”); see also *Commonwealth v. Grimshaw*, 595 N.E.2d 302, 304 (Mass. 1992) (stating that nighttime search warrants are disfavored because “nighttime police intrusion . . . endanger[s] the police and slumbering citizens”).

176. Catalano, *supra* note 174, at 233.

harm at night, or suffering from a more diffused fear of the dark, the subject of the search may experience an increased level of discomfort or apprehension and overreact to nighttime entry.”¹⁷⁷

2. *Protection of privacy and dignity*

Another interest protected by the knock-and-announce rule, as enumerated by the *Hudson* Court, is the protection of “those elements of privacy and dignity that can be destroyed by a sudden entrance.”¹⁷⁸ In *Miller v. United States*, the Court noted that the knock-and-announce rule embodies “the reverence of the law for the individual’s right of privacy in his house.”¹⁷⁹ Although the residents of the home do not have the right to refuse entrance to police officers armed with a valid warrant, “the occupants of a house to be searched have a privacy interest in activities not subject to the warrant.”¹⁸⁰ “Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.”¹⁸¹

Other federal and state courts have also listed the protection of privacy as one of the primary purposes of the knock-and-announce rule.¹⁸² The Fifth Circuit has stated that the knock-and-announce rule “protect[s] people from unnecessary intrusion into their private activities.”¹⁸³ The Seventh Circuit noted that “[o]ne purpose of the rule is to protect the privacy of the occupants and to give them an opportunity to prepare for the agents’ entry.”¹⁸⁴ The Minnesota Supreme Court stated that “the purpose of the knock-and-announce rule is to . . . protect against unnecessary shock and embarrassment.”¹⁸⁵ Legal commentators have also recognized the

177. *Id.*

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

179. *Miller v. United States*, 357 U.S. 301, 313 (1958).

180. Josephson, *supra* note 17, at 1235.

181. *Ker v. California*, 374 U.S. 23, 57 (1963) (Brennan, J., plurality opinion).

182. *See, e.g.*, *State v. Sumpter*, 563 S.E.2d 60, 61 (N.C. Ct. App. 2002) (stating that a purpose of the knock-and-announce requirement is “to protect people from unnecessary intrusion into their private activities” (quoting *State v. Harris*, 551 S.E.2d 499, 506 (N.C. Ct. App. 2001))); *State v. Perry*, 178 S.W.3d 739, 745 (Tenn. Crim. App. 2005) (“[T]he rule protects the privacy of the occupant living in the dwelling.”); *State v. Cardenas*, 47 P.3d 127, 133 (Wash. 2002) (stating that one purpose of the knock-and-announce requirement in Washington law is “to protect an occupant’s right to privacy”).

183. *United States v. Sagaribay*, 982 F.2d 906, 909 (5th Cir. 1993).

184. *Green v. Butler*, 420 F.3d 689, 698 (7th Cir. 2005).

185. *Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001).

privacy purpose of the knock-and-announce rule, as evidenced by the statement of one commentator that the rule “guards individual dignity” by giving the occupant of the home “a brief period of time to compose oneself and prepare for an intrusion into the home.”¹⁸⁶

The protection of privacy and dignity has also often been cited as an interest protected by the nighttime search rule.¹⁸⁷ It is widely recognized by both courts and legal commentators that nighttime searches inflict a greater invasion of privacy than do daytime searches.¹⁸⁸ The Second Circuit has noted that nighttime searches are discouraged because of the “peculiar abrasiveness of official intrusions at such periods.”¹⁸⁹ A nighttime search is even more likely to result in a violation of privacy and dignity than a daytime search because “[a] search at night is more likely than a daytime search to interrupt the activities of a personal nature more commonly scheduled at that time.”¹⁹⁰ This increased risk of violation of privacy and dignity at night can also be inferred from the Supreme Court’s statement in *Richards v. Wisconsin* that “[t]he brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.”¹⁹¹

186. E. Martin Estrada, *A Toothless Tiger in the Constitutional Jungle: The “Knock and Announce Rule” and the Sacred Castle Door*, 16 U. FLA. J.L. & PUB. POL’Y 77, 86 (2005) (citing *Richards v. Wisconsin*, 520 U.S. 385, 392 n.5 (1997)).

187. *See, e.g.*, *Jones v. United States*, 357 U.S. 493, 498 (1958) (“[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home”); *Commonwealth v. Grimshaw*, 595 N.E.2d 302, 304 (Mass. 1992) (“The underlying rationale [of the prohibition of nighttime searches] was that nighttime police intrusion posed a great threat to privacy [and] violated the sanctity of home”); *State v. Schmeets*, 278 N.W.2d 401, 410 (N.D. 1979) (“The purpose of [North Dakota’s nighttime search statute] is to protect citizens from being subjected to the trauma of unwarranted nighttime searches.”).

188. *See, e.g.*, *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006) (“[E]ntry into a residence in the middle of the night is a greater invasion of residential privacy than entry during the daytime.” (quoting *State v. Winchell*, 363 N.W.2d 747, 750 (Minn. 1985))); *see also supra* note 120.

189. *United States v. Ravich*, 421 F.2d 1196, 1201 (2d Cir. 1970).

190. Catalano, *supra* note 174, at 233.

191. *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997) (discussing the reasons for the knock-and-announce rule).

3. Protection of property

The *Hudson* Court stated that a third interest protected by the knock-and-announce rule was the “protection of property.”¹⁹² The Court noted that the rule protected the property of the homeowner because if police announce their identity and purpose, the homeowner is given the opportunity to open the door and allow the police to enter rather than the police breaking down the door or otherwise damaging the home.¹⁹³ The Court had previously recognized this purpose in *Richards v. Wisconsin*, in which the Court noted that an individual should “be provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.”¹⁹⁴ Additionally, in *Wilson v. Arkansas*, the Court stated that the knock-and-announce rule was “justified in part by the belief that announcement generally would avoid ‘the destruction or breaking of any house . . . by which great damage and inconvenience might ensue’”¹⁹⁵

Other courts, as well as legal commentators, have also noted the purpose of protecting property.¹⁹⁶ For example, the New York Court of Appeals noted that announcement “serves the purpose of providing the person with an opportunity to respond to the demand for admittance, thus obviating the need for forcible entry.”¹⁹⁷ Thus, “the rule prevents needless destruction of property.”¹⁹⁸ “[R]equiring police to knock-and-announce before forcibly entering a residence protects the homeowner’s property interests. A person should be given the opportunity to voluntarily submit to a search before having his property damaged.”¹⁹⁹

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

193. *Id.*

194. *Richards*, 520 U.S. at 393 n.5.

195. *Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995) (quoting *Semayne’s Case*, (1603) 77 Eng. Rep. 194, 196 (K.B.)).

196. *See, e.g.*, *United States v. Sagaribay*, 982 F.2d 906, 909 (5th Cir. 1993) (stating that the announcement rule of 18 U.S.C. § 3109 serves the purpose of “preventing unnecessary destruction of private property”); *State v. Harada*, 41 P.3d 174, 184 (Haw. 2002) (stating that one purpose of the rule is “to prevent unnecessary property damage”); *Commonwealth v. Morgan*, 534 A.2d 1054, 1056 (Pa. 1987) (“The purpose of this ‘knock and announce’ rule is . . . to prevent property damage resulting from forced entry.”).

197. *People v. Payton*, 380 N.E.2d 224, 231 (N.Y. 1978).

198. *State v. Perry*, 178 S.W.3d 739, 745 (Tenn. Crim. App. 2005).

199. *Josephson*, *supra* note 17, at 1235 (footnote omitted).

No courts have mentioned the protection of property as a purpose of the nighttime search rule. Nevertheless, protection of property can be viewed as a valid purpose of the prohibition of nighttime searches. Case law and statutes allow executing officers to break open windows or doors to effect a search warrant if they are not admitted after a “reasonable time.”²⁰⁰ When police knock on the door of a home during the daytime, there is a good chance that someone in the home will be awake and can respond to the knock within a reasonable time, thereby obviating the need for the police to break down the door. At night, however, it is less likely that police will get a timely response from the residents, even if those same persons would have answered without delay during the daytime. The reason for the delay is obvious: people who are awakened from their sleep at night respond slower than people who are already awake during the daytime. It may be argued that the reasonableness standard requires police to wait longer at night than during the daytime. Nevertheless, courts have found very short periods of time—even as short as five seconds—to be reasonable wait times before forceful entry is made in searches conducted during late night and early morning hours that could be “nighttime hours” based on the jurisdiction.²⁰¹

200. *See, e.g.*, IOWA CODE ANN. § 808.6 (West 2003) (requiring executing officers to announce their authority and purpose, but permitting the officers to break into a structure if their “admittance has not been immediately authorized”); PA. R. CRIM. P. 207(B), (C) (requiring an executing officer to wait for “a reasonable period of time” before forcibly entering the premises); *United States v. Banks*, 540 U.S. 31, 33, 38–39 (2003) (holding that police officers acted properly when they broke open the door of an apartment with a battering ram only fifteen to twenty seconds after knocking and announcing, regardless of the fact that the resident was in the shower at the time and did not hear the knock); *United States v. Leichtnam*, 948 F.2d 370, 372–74 (7th Cir. 1991) (holding that police officers, who were attempting to execute a search warrant at 6:00 a.m., had acted properly when they smashed through the front door with a battering ram approximately one minute after knocking and announcing). For a general discussion on the requirement that officers wait a “reasonable time” before entering with force, see 68 AM. JUR. 2D *Searches and Seizures* §§ 243–44 (2000 & Supp. 2006).

201. *See, e.g.*, *United States v. Johnson*, No. 98-3183, 2000 WL 712385, at *4 (6th Cir. May 24, 2000) (holding that a five-second wait before forcibly entering an apartment, during a search warrant execution at 7:00 a.m., was reasonable); *United States v. Knapp*, 1 F.3d 1026, 1030–31 (10th Cir. 1993), *cited in* *Randall v. State*, 793 So. 2d 59, 60 (Fla. Dist. Ct. App. 2001) (holding that police officers waited a reasonable time when they broke down a door with a battering ram after waiting only ten to twelve seconds when attempting to execute a search warrant late at night). *But see Randall*, 793 So. 2d at 60 (holding that a ten-second wait during a warrant execution between 6:00 and 7:00 a.m. did not satisfy the knock-and-announce requirement).

D. Summary of Comparisons

The comparisons of the two rules contained in the previous Sections underscore the argument that the rationale of *Hudson* should be extended to nighttime search violations. In *Hudson* and the knock-and-announce cases that preceded it, the Supreme Court looked to the early common law history, the statutory requirements, and the purposes of the knock-and-announce rule in order to determine if an unannounced search violated the Fourth Amendment and, as a consequence, whether or not the evidence should be excluded from subsequent criminal trials. Because the nighttime search rule shares these same characteristics with the knock-and-announce rule, the rationale of *Hudson* should be extended to violations of the nighttime search rule. Thus, because of the similarities between the two rules, the exclusionary rule should not be used as a remedy for violations of either rule.

VI. CONCLUSION

Although the exclusionary rule has been in existence in United States jurisprudence for almost one hundred years, courts are still struggling to decide when suppression of evidence is the correct remedy for Fourth Amendment violations. The Supreme Court added some clarification when it held in *Hudson v. Michigan* that the exclusionary rule is inapplicable when police violate the knock-and-announce rule. However, the propriety of using the exclusionary rule in other contexts remains unclear, including the question of whether or not suppression of evidence is the correct remedy for violations of the nighttime search rule. Because the common law history, the statutory codification, and the purposes of the two rules are virtually identical, the *Hudson* holding should be extended to nighttime search violations. Thus, evidence obtained by police during an unauthorized nighttime search should not be suppressed in criminal trials based on Fourth Amendment challenges to admissibility.

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