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### They Won't Come Knocking No More: *Hudson v. Michigan* and the Demise of the Knock-and-Announce Rule

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# They Won't Come Knocking No More

## *HUDSON V. MICHIGAN AND THE DEMISE OF THE KNOCK-AND-ANNOUNCE RULE*

The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both federal and state courts have recognized, as did English courts, that the requirement is of the essence of substantive protections which safeguard individual liberty.

*Ker v. California*<sup>1</sup>

### I. INTRODUCTION

A tenet central to the Founders' conception of the Fourth Amendment was the protection of the right to privacy in one's home.<sup>2</sup> Throughout its history the Supreme Court has recognized this purpose by imposing limitations on the ability of law enforcement officials to enter one's home.<sup>3</sup> One such limitation is the knock-and-announce rule. This rule requires police officers to knock and announce their presence and then wait a reasonable amount of time before making a forcible entry when executing a search.<sup>4</sup> A common law principle established well before the Bill of Rights, this rule was incorporated into the reasonableness analysis of Fourth Amendment search-and-seizure law in order to safeguard individuals' rights against unannounced police entry into their homes.<sup>5</sup>

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<sup>1</sup> 374 U.S. 23, 49 (1963) (Brennan, J., concurring).

<sup>2</sup> *Id.* at 51-52. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

<sup>3</sup> *E.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Dunn*, 480 U.S. 294 (1987); *Payton v. New York*, 445 U.S. 573 (1980); *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>4</sup> *See Wilson v. Arkansas*, 514 U.S. 927, 929 (1995).

<sup>5</sup> *See id.* at 934 *infra* Part II.A.

Typically, when the government and police fail to uphold Fourth Amendment protections, the evidence gathered during the unlawful search must be suppressed under the exclusionary rule.<sup>6</sup> In *Hudson v. Michigan*, however, the Supreme Court announced in a 5-4 decision that the exclusionary rule does not apply to evidence obtained when police officers fail to knock and announce, and accordingly, the evidence seized can be used at trial to determine a defendant's guilt.<sup>7</sup>

The Supreme Court's decision in *Hudson* appears to be another step in the weakening of the knock-and-announce rule. In 1995, *Wilson v. Arkansas* made the rule a constitutional command.<sup>8</sup> Since *Wilson*, however, the Court has carved out exceptions that have significantly watered down the rule's impact.<sup>9</sup> By not applying the exclusionary rule to knock-and-announce violations, the *Hudson* majority effectively took away any legal incentive for police officers to conform their actions to what the Court held was constitutionally required in *Wilson*.<sup>10</sup> The Court's decision not to apply the exclusionary rule was largely based on the substantial social costs generated by expanding its use.<sup>11</sup> In reaching its conclusion, the majority reasoned that the increased professionalism of today's police officers effectively deters law enforcement officials from violating the knock-and-announce rule.<sup>12</sup>

This Note contests the Court's conclusion in *Hudson* that the increased professionalism of the police force effectively deters an officer's unlawful behavior. First, it is doubtful that such a trend toward increased professionalism actually exists. On the contrary, the growing involvement of paramilitary units in local police activities have made militaristic police tactics increasingly commonplace.<sup>13</sup> Second, when this trend is

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<sup>6</sup> See *Weeks v. United States*, 232 U.S. 383 (1914).

<sup>7</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

<sup>8</sup> 514 U.S. at 936.

<sup>9</sup> See *United States v. Banks*, 540 U.S. 31, 40 (2003); *Richards v. Wisconsin*, 520 U.S. 385, 390-91 (1997).

<sup>10</sup> See *Hudson*, 547 U.S. at 605 (Breyer, J., dissenting) (discussing how police incentive to comply with knock-and-announce violations has significantly diminished as a result of the majority's holding); see also RADLEY BALKO, CATO INSTITUTE, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA 34 (2006), [http://www.cato.org/pubs/wtpapers/balko\\_whitepaper\\_2006.pdf](http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf).

<sup>11</sup> *Hudson*, 547 U.S. at 594-99; see *infra* text accompanying notes 86-89.

<sup>12</sup> *Id.* at 598-99.

<sup>13</sup> See Peter B. Kraska & Louis J. Cubellis, *Militarizing Mayberry and Beyond: Making Sense of American Paramilitary Policing*, 14 JUST. Q. 607, 618, 622-24 (1997); DIANE CECILIA WEBER, WARRIOR COPS: THE OMINOUS GROWTH OF PARAMILITARISM IN AMERICAN POLICE DEPARTMENTS 11 (1999), <http://www.cato.org/>

considered alongside the fact that *Hudson* provides officers with little incentive to comply with the knock-and-announce guidelines, it is likely that combative police behavior and an increase in wrong-door raids will result.<sup>14</sup> This Note contends that in order to uphold the protections of the knock-and-announce requirement and ensure police discipline, the exclusionary rule must be applied. In support of this argument, this Note looks to the experience of the *Miranda* rule in order to demonstrate the problems that can result when the Court weakens an established requirement to the point that there is no longer any real incentive to comply with its procedures.<sup>15</sup>

Part II of this Note briefly surveys the history of the knock-and-announce rule as it has evolved from its common law origins and highlights the exclusionary rule as it applies to knock-and-announce violations. Part III summarizes the Court's decision in *Hudson v. Michigan*, primarily focusing on the majority's argument that the exclusionary rule should not apply to evidence seized in violation of the knock-and-announce requirement because the substantial social costs generated by the rule's application outweighs the deterrence benefits on police misconduct. Part IV discusses the Court's cost-benefit analysis and suggests that the mechanisms the Court puts forth insufficiently deter police misconduct and instead foster aggressive police tactics and detrimental behavior. Part V compares how police training has responded to the Court's *Miranda* jurisprudence and contends that unless the exclusionary rule is applied to knock-and-announce violations, police officials may encourage officers to bypass knock-and-

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pubs/briefs/bp50.pdf. The term "paramilitary units" is used to describe the militarization of local police forces. Over the last two decades the number of SWAT teams and similar units have proliferated within local police departments, and have been used to carry out routine police functions. This Note will focus on the "no-knock raids" typically employed by these units, and suggest that this harmful tactic will increase due to the Court's decision in *Hudson*. A "no-knock raid" is an unannounced and forced entry into an individual's home when executing a search warrant. BALKO, *supra* note 10, at 3-5.

<sup>14</sup> See BALKO, *supra* note 10, at 34.

<sup>15</sup> See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) [hereinafter Weisselberg, *Saving Miranda*] (arguing that the original vision of *Miranda* has been transformed, and as a result police departments have begun to promote a policy of questioning "outside *Miranda*"). The policy of training officers to question outside *Miranda* became apparent in the late 1990s as officers in California were being taught that as a result of Supreme Court decisions, "it is perfectly acceptable to violate *Miranda* because *Miranda* . . . has no application except to bar certain statements from the prosecution's case-in-chief. Proponents of this new vision tell police that they need not cease interrogating a suspect who has asserted his or her Fifth Amendment rights." *Id.* at 132.

announce guidelines in much the same way they have encouraged officers to question suspects “outside *Miranda*.”

## II. LEGAL BACKGROUND

### A. *The Knock-and-Announce Rule*

Under the Fourth Amendment, police officers must knock and announce their presence when executing a search warrant at an individual’s home.<sup>16</sup> This knock-and-announce rule provides residents an opportunity to willingly open their door before police officers forcibly enter.<sup>17</sup> The rule is designed to protect people’s privacy interests in their home against unreasonable searches and seizures, which is a right central to the Fourth Amendment.<sup>18</sup> In particular, the Supreme Court has set forth three main purposes of the rule: “1) reducing the potential for violence to both the police officers and the occupants of the home into which entry is sought; 2) curbing the needless destruction of property; and 3) protecting the individual’s right to privacy in his or her house.”<sup>19</sup>

The knock-and-announce rule is a common law principle that dates to thirteenth-century England.<sup>20</sup> In 1604, English courts formally established the knock-and-announce requirement in *Semayne’s Case*.<sup>21</sup> Based on the principle that “a man’s house is his castle,” the court recognized the privacy interest an individual has in his or her home and determined that before forcibly entering one’s home, officers should announce their presence and allow the occupant time to open his or her door.<sup>22</sup>

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<sup>16</sup> *United States v. Banks*, 540 U.S. 31, 41 (2003).

<sup>17</sup> *See Wilson v. Arkansas*, 514 U.S. 927, 931 (1995).

<sup>18</sup> U.S. CONST. amend. IV; *see Wilson*, 514 U.S. at 934.

<sup>19</sup> *United States v. Dice*, 200 F.3d 978, 982 (6th Cir. 2000) (holding that evidence obtained in violation of the knock-and-announce rule should be suppressed at trial, regardless of its use to help fight the War on Drugs).

<sup>20</sup> *Miller v. United States*, 357 U.S. 301, 307 (1958) (holding that under 18 U.S.C. § 3109 the police officers violated the rights of the defendant when they knocked and said “police” in a low voice, but did not announce their purpose and their reason for arresting him). Records show that in the 13th Yearbook of Edward IV, it was illegal for a sheriff to forcibly enter a man’s home and arrest him for a suit which involved either debt or trespass. *See id.*

<sup>21</sup> *Semayne’s Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604).

<sup>22</sup> *See Miller*, 357 U.S. at 307-08 (1958); *see also Sabbath v. United States*, 391 U.S. 585, 589 (1968). Based on the principle, “a man’s house is his castle,” the English court believed that, “the house of every one is to him his castle and fortress, as well for his defense against injury and violence, as for his repose.” 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, 80 (2005) (quoting 77 Eng. Rep.

This common law principle, now codified at 18 U.S.C. § 3109, became part of American statutory law when Congress passed the Espionage Act in 1917.<sup>23</sup>

In 1995, the Supreme Court unanimously held in *Wilson v. Arkansas* that the knock-and-announce rule should be considered in the Fourth Amendment's reasonableness analysis of a search or seizure.<sup>24</sup> In reaching its conclusion, the Court surveyed the common law's knock-and-announce requirement and determined that the Framers of the Constitution intended the method used to enter an individual's residence should be a factor when evaluating the reasonableness of a search or seizure.<sup>25</sup> This decision transformed the knock-and-announce rule from a common law or statutory mandate into a constitutional command.<sup>26</sup>

Additionally, the *Wilson* Court recognized that the knock-and-announce requirement is not an inflexible or rigid rule. The Court suggested that there are certain circumstances in which an unannounced entry would be reasonable under the Fourth Amendment.<sup>27</sup> Specifically, the Court determined that the "knock-and-announce requirement could give way 'under circumstances presenting a threat of physical violence' or 'where police officers have reason to believe that the evidence

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194, 195 (K.B. 1603)). Moreover, in recognizing the sacredness of the home, in an English Parliamentary debate, William Pitt, Earl of Chatham, made a powerful statement regarding one's right to privacy in their home:

[T]he 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 many enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement.

*Miller*, 357 U.S. at 307.

<sup>23</sup> *Hudson v. Michigan*, 547 U.S. 586, 589 (2006); see *Miller*, 357 U.S. at 308. Section 3109 of the U.S. Code governs the breaking of doors or windows for entry or exit, stating in relevant part:

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 a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (2000).

<sup>24</sup> *Wilson*, 514 U.S. at 936.

<sup>25</sup> *Id.* at 934.

<sup>26</sup> See *id.* at 936.

<sup>27</sup> *Id.* at 934-36. As the *Wilson* Court stated, "[W]e simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." *Id.* at 936.

would likely be destroyed if advance notice was given.”<sup>28</sup> In *Wilson*, however, the Court refrained from making any bright line rule and asserted that the lower courts would be responsible for assessing when an unannounced entry is reasonable.<sup>29</sup>

Two years later, in *Richards v. Wisconsin*, the Supreme Court carved out exceptions to the requirement that a police officer must knock and announce.<sup>30</sup> In *Richards*, the Court invalidated Wisconsin’s per se rule that a no-knock entry is always justifiable in felony drug cases, yet concluded that certain circumstances warrant a no-knock entry.<sup>31</sup> The Court established that where police have a reasonable suspicion that knocking-and-announcing would be “dangerous or futile” or would “inhibit the effective investigation of the crime by, for example, allowing destruction of the evidence,” then a no-knock entry under the circumstances is lawful.<sup>32</sup> Accordingly, this reasonableness inquiry is to be done on a case-by-case basis, balancing the concerns of law enforcement officials with an individual’s right to privacy in his or her home.<sup>33</sup>

Six years later the Court attempted to clarify some of the ambiguities resulting from *Wilson* and *Richards*.<sup>34</sup> In *United States v. Banks*, the Court determined that in a case where police have knocked-and-announced their presence and have a reasonable belief that destruction of the evidence is possible, fifteen to twenty seconds is a reasonable amount of time to wait before forcibly entering an individual’s home.<sup>35</sup> Recognizing that the purpose of the knock-and-announce rule

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<sup>28</sup> *Richards v. Wisconsin*, 520 U.S. 385, 391 (1997) (quoting *Wilson*, 514 U.S. at 936).

<sup>29</sup> *Wilson*, 514 U.S. at 936.

<sup>30</sup> *Richards*, 520 U.S. 385 (holding that a police officer’s failure to knock and announce would be justifiable if the officer had reasonable suspicion that knocking and announcing would be dangerous or futile or would prohibit an effective investigation).

<sup>31</sup> *Id.* at 394. *E.g.*, *United States v. Dice*, 200 F.3d 978, 983 (6th Cir. 2000) (stating that circumstances in which the knock-and-announce rule is not required include (1) the occupant knows that the police are present and their purpose for being there; (2) the police have a justifiable belief that an individual may be in imminent danger; and (3) the officers have a justifiable belief that the residents in the home are aware of police presence and as a result are trying to escape or discard the evidence).

<sup>32</sup> *Richards*, 520 U.S. at 394. As the Supreme Court recognized, the showing of reasonable suspicion “is not high,” but if challenged, the police must be able to justify their no-knock entry. *Id.* at 394-95.

<sup>33</sup> *Id.*

<sup>34</sup> See *United States v. Banks*, 540 U.S. 31, 33 (2003).

<sup>35</sup> *Id.* at 40. In forming its conclusion, the Court reasoned that “15 to 20 seconds does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.” *Id.*

is to allow a resident to willingly open his or her door, the Court again refrained from making a blanket categorical rule as to the appropriate manner and timing of a police officer's entry.<sup>36</sup> Rather, the Court stated that the reasonableness of an officer's entry should depend on the totality of the circumstances in a given case.<sup>37</sup>

The knock-and-announce rule is embedded in our nation's history. In recognizing its importance in protecting an individual's right to privacy, the Supreme Court made it a constitutional command and part of the reasonableness inquiry of the Fourth Amendment.<sup>38</sup> In *Richardson* and *Banks*, the Court began to carve out exceptions to this requirement. *Hudson* represents the Court's latest, and most troubling, dilution of a once tenacious constitutional rule.<sup>39</sup>

### B. *The Exclusionary Rule*

The exclusionary rule is a judicially created remedy that requires the suppression of evidence obtained in violation of the Fourth Amendment.<sup>40</sup> Any physical or tangible goods, as well as verbal statements, that are gathered pursuant to an unreasonable search or seizure may not be used to prove a defendant's guilt at trial.<sup>41</sup> However, there are exceptions to the exclusionary rule that allow parties to introduce the illegally

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<sup>36</sup> *Id.* at 41. The Court reasoned that, "in a case with no reason to suspect an immediate risk of frustration or futility in waiting at all, the reasonable wait time may well be longer . . . since [police] ought to be more certain the occupant has had time to answer the door." *Id.*

<sup>37</sup> *Id.* at 42.

<sup>38</sup> See *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995).

<sup>39</sup> See *infra* Part V.

<sup>40</sup> *Weeks v. Unites States*, 232 U.S. 383, 392 (1914) (holding that it was a violation of the defendant's Fourth Amendment rights when the government illegally seized letters and papers from defendant which were later used as evidence against him at trial). The Court felt that the letters should have been returned to the defendant and that their use constituted a prejudicial error. *Id.* at 398.

<sup>41</sup> *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) (holding that verbal evidence that was obtained during an unlawful entry and arrest is considered "fruits of the agents unlawful action" and therefore must be suppressed under the exclusionary rule). The Court has determined:

The exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." It "extends as well to the indirect as the direct products" of unconstitutional conduct.

*Segura v. United States*, 468 U.S. 796, 804 (1984) (quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939), and *Wong Sun*, 371 U.S. at 484).



obtained evidence at trial. The Supreme Court has concluded that the use of evidence seized under these exceptions does not violate an individual's Fourth Amendment rights.<sup>42</sup>

The exclusionary rule was first applied to federal prosecutions in *Weeks v. United States*.<sup>43</sup> In *Weeks*, the Supreme Court determined that evidence obtained without a warrant is a violation of an individual's constitutional rights and therefore shall not be admitted at trial.<sup>44</sup> The Court reasoned that to hold otherwise would render the Fourth Amendment ineffective, as it would have "no value . . . [and] might as well be stricken from the Constitution."<sup>45</sup>

Subsequently, the Supreme Court expanded the use of the exclusionary rule in *Mapp v. Ohio* and held it applicable to state courts through the Due Process Clause of the Fourteenth Amendment.<sup>46</sup> The majority's opinion in *Mapp* appears to be supported by two justifications, both of which guided the Court's application of the exclusionary rule in federal trials.<sup>47</sup> First, the Court reasoned that the exclusionary rule would deter police misconduct, and second, the Court believed that the rule's application would uphold judicial integrity.<sup>48</sup> As the *Mapp* majority emphasized, "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional

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<sup>42</sup> See *The Exclusionary Rule*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 186, 186-201 (2006) (discussing the exceptions to the exclusionary rule). For the purposes of this Note, the exceptions to the exclusionary rule do not need to be discussed in detail. However, it is worth noting that several exceptions to the exclusionary rule do exist. These include: the good faith exception established in *United States v. Leon*, 468 U.S. 897 (1984); the attenuation exception, see *Wong Sun*, 371 U.S. 471; the independent source exception, see *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); the inevitable discovery exception, see *Nix v. Williams*, 467 U.S. 431 (1984); and other collateral uses, see, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (where the court made an exception in a habeas corpus proceeding). For more information and cases in which these exceptions can be found, see *The Exclusionary Rule*, *supra*.

<sup>43</sup> *Weeks*, 232 U.S. at 392.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 393.

<sup>46</sup> *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961) (holding that evidence obtained based on the police's illegal warrantless entry can not be admissible in state courts). *Mapp* signified the overruling of *Wolf v. Colorado*, where twelve years prior the Supreme Court refused to extend the exclusionary rule to states. *Id.* at 654-55; see also *Wolf v. Colorado*, 338 U.S. 25, 25-26 (1949) (holding that Due Process of the law does not automatically mean that the first eight Amendments of the Constitution are incorporated into Fourteenth Amendment; here the Court did not believe that the federal exclusionary rule should be applied to the states).

<sup>47</sup> See *Mapp*, 367 U.S. 643, 657-59; see also *Stone*, 428 U.S. at 484-85.

<sup>48</sup> See *Mapp*, 367 U.S. at 658-59; see also *Stone*, 428 U.S. at 484-85. Additionally, these two principles appeared to first be laid out pre-*Mapp*, in *Elkins v. United States*, when the Court applied the exclusionary rule in federal trials. *Id.* at 484.

guaranty in the only effectively available way—by removing the incentive to disregard it.”<sup>49</sup> Moreover, the Court noted the importance of preserving judicial integrity, asserting that “nothing can destroy a government more quickly than its failure to observe its own laws . . . . ‘If the government becomes a law breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.’”<sup>50</sup> Accordingly, these guiding principles supported the Court’s reasoning that when evidence is obtained in violation of the Fourth Amendment, it should be suppressed at both the federal and state level.<sup>51</sup>

In the 1974 case *United States v. Calandra*, the Supreme Court clarified that the main purpose of the exclusionary rule is to deter future unlawful police misconduct.<sup>52</sup> As the *Calandra* majority stated, “[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally *through its deterrent effect*, rather than a personal constitutional right of the party aggrieved.”<sup>53</sup> As a deterrence mechanism, the exclusionary rule is not intended for individual deterrence and rehabilitation but, in contrast, focuses on institutional deterrence aimed at correcting the future conduct of the police force as a whole.<sup>54</sup> Furthermore, the Court determined that the exclusionary rule is not applicable in all cases where evidence is illegally obtained.<sup>55</sup> Rather, a balancing test must be conducted to see if the

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<sup>49</sup> *Mapp*, 367 U.S. at 656 (quoting *Elkins v. United States*, 364, U.S. 206, 217 (1960)).

<sup>50</sup> *Id.* at 659 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).

<sup>51</sup> *Id.* at 655, 660.

<sup>52</sup> *United States v. Calandra*, 414 U.S. 338, 347 (1974) (holding that evidence that was seized outside the scope of the warrant at the defendant’s place of business does not qualify him to refuse to testify in grand jury proceedings on the grounds that the evidence was obtained unlawfully and should be suppressed in accordance with the exclusionary rule). The Court’s decision in *Calandra* appears to be grounded in the precedent of *Elkins v. United States*. *Id.* at 347; *see also Elkins*, 364 U.S. at 217.

<sup>53</sup> *Calandra*, 414 U.S. at 348 (emphasis added) (explaining how the purpose of the exclusionary rule is not to remedy the injury to privacy that resulted from an illegal search, but rather to prevent future police misconduct). Additionally, in supporting the main objective of police deterrence, the Court suggested, “that the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.” *Id.*

<sup>54</sup> *United States v. Leon*, 468 U.S. 897, 917 (1984) (holding that although the evidence was obtained illegally, the officers acted in reasonable reliance on a search warrant and therefore the evidence need not be suppressed at trial). Additionally, *Leon* established the Good Faith exception to the exclusionary rule. *Id.* at 922-23.

<sup>55</sup> *Calandra*, 414 U.S. at 348.

deterrence benefit of applying the exclusionary rule outweighs the costs generated by its use.<sup>56</sup> The Court indicated that costs of the exclusionary rule include the possibility that the guilty go free or, at the very least, that defendants will use the error to plea bargain for a reduced sentence.<sup>57</sup> On the other hand, as effective deterrence mechanisms focus on creating incentives to prevent police misconduct, the Court determined that the exclusionary rule's deterrence benefits should be applied when "the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."<sup>58</sup> Therefore, by suppressing evidence gained as a result of officer's unlawful behavior, the Court encourages a "greater degree of care toward the rights of an accused."<sup>59</sup>

Thus, with respect to preventing future police misconduct, the exclusionary rule's deterrence mechanism is crucial in safeguarding an individual's constitutional rights. This Note suggests that it is this focus on institutional deterrence that makes the exclusionary rule the only viable and effective remedy for knock-and-announce violations.<sup>60</sup> Because other deterrence mechanisms have proven ineffective, it is only through the procedural incentives of the exclusionary rule that police behavior will be rectified.<sup>61</sup>

### III. *HUDSON V. MICHIGAN*

In a 5-4 decision, the U.S. Supreme Court held that evidence obtained in violation of the knock-and-announce rule is admissible at trial and can be used to prove a defendant's guilt.<sup>62</sup> In reaching this conclusion, the Court failed to extend the exclusionary rule, a doctrine that orders that evidence seized in violation of the Fourth Amendment be suppressed at trial.<sup>63</sup> In *Hudson*, Michigan police officers obtained a warrant permitting the search of defendant Brooker T. Hudson's home

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<sup>56</sup> See *id.*; see also *Leon*, 468 U.S. at 906-07 (*Leon* contains an in-depth analysis of the cost-benefit analysis. The *Calandra* case establishes that a balancing test is necessary to determine when the exclusionary rule is an appropriate remedy and it requires that the costs and benefits must be weighed.).

<sup>57</sup> *Leon*, 468 U.S. at 907.

<sup>58</sup> *Id.* at 919 (quoting *United States v. Peltier* 422 U.S. 531, 539 (1975)).

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* Part V.

<sup>61</sup> See *infra* Part V.

<sup>62</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

<sup>63</sup> *Id.*

for drugs and firearms.<sup>64</sup> Upon executing the warrant on August 27, 1998, the police arrived at Hudson's door and announced their presence but did not knock.<sup>65</sup> The officers then waited only three to five seconds before opening Hudson's unlocked door and entering his home.<sup>66</sup> Inside police recovered drugs, including cocaine rocks found in Hudson's pocket, and a loaded gun that police discovered between the cushion and armrest of the chair in which Hudson was seated.<sup>67</sup> Consequently, police charged Hudson with unlawful drug and firearm possession in violation of Michigan state law.<sup>68</sup>

Hudson subsequently moved to suppress the evidence.<sup>69</sup> He argued that the police's premature entry did not comply with the knock-and-announce rule and, therefore, violated his Fourth Amendment rights.<sup>70</sup> The trial court granted Hudson's motion to suppress the evidence, but the Michigan Court of Appeals reversed the decision upon interlocutory review.<sup>71</sup> In making this determination, the Michigan Court of Appeals followed Michigan Supreme Court precedent and concluded that suppression was not the appropriate remedy when police gathered evidence in violation of the knock-and-announce rule but pursuant to a valid search warrant.<sup>72</sup> Subsequently, the Michigan Supreme Court denied leave to appeal, and Hudson was convicted of drug possession and sentenced to eighteen months probation.<sup>73</sup> Following his conviction, Hudson renewed his Fourth Amendment claim on appeal, but the Michigan Court of Appeals affirmed his conviction.<sup>74</sup> Thereafter, the Michigan Supreme Court once again denied review, and on January 27, 2005, the U.S. Supreme Court granted certiorari.<sup>75</sup> The question before the Court was whether the exclusionary rule applied to evidence that police obtained in violation of the

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<sup>64</sup> *Id.* at 588.

<sup>65</sup> Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Respondent at 2, *Hudson*, 547 U.S. 586 (No. 04-1360) [hereinafter CJLF Brief].

<sup>66</sup> *Hudson*, 547 U.S. at 588.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Hudson*, 547 U.S. at 589. *See* *People v. Stevens*, 597 N.W.2d 53, 64 (1999) (holding that the exclusionary rule does not apply to evidence obtained in violation of the knock-and-announce requirement).

<sup>73</sup> CJLF Brief, *supra* note 65, at 2; *see also Hudson*, 547 U.S. at 589.

<sup>74</sup> *Hudson*, 547 U.S. at 589.

<sup>75</sup> CJLF Brief, *supra* note 65, at 2.

knock-and-announce rule, and therefore was required to be suppressed at trial.<sup>76</sup> Justice Scalia, in writing the opinion for the Court, declared that evidence seized in violation of the knock-and-announce rule need not be suppressed.<sup>77</sup>

Although the majority opinion contains four separate discussions, this Note will focus on the Court's argument that the substantial costs generated by applying the exclusionary rule outweigh its deterrence benefits.<sup>78</sup> The Court's opinion began by acknowledging that the knock-and-announce rule stems from common law principles and is now a command of the Fourth Amendment.<sup>79</sup> In relying on case law that has shaped both the exclusionary rule and the knock-and-announce rule, the Court explained why this type of violation does not warrant suppression.

First, Justice Scalia addressed the causation argument that suggests a court can admit evidence at trial that would not have been discovered "but-for" police misconduct if the causal connection between the misconduct and seizing of the evidence is notably attenuated.<sup>80</sup> Following this principle, Scalia suggested that the exclusion of evidence should not occur automatically, even though a constitutional violation was the but-for cause of obtaining the evidence.<sup>81</sup> Accordingly, Scalia believed that even if there is a direct causal connection between the evidence obtained and the illegal entry, the evidence should only be suppressed when suppression would directly remedy the constitutional interests violated. In *Hudson*, Scalia determined that the officers' illegal entry by failing to knock and announce was not a but-for cause of obtaining the evidence because police would have ultimately seized the evidence pursuant to the execution of a search warrant.<sup>82</sup> As Scalia noted, "Whether that preliminary misstep had occurred *or not*, the police would have executed the

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<sup>76</sup> *Hudson*, 547 U.S. at 590.

<sup>77</sup> *Id.* at 594.

<sup>78</sup> *See id.* at 594-600.

<sup>79</sup> *See id.* at 589; *see also* *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (holding that whether an officer followed the knock-and-announce rule forms part of the reasonableness inquiry as to whether a search is valid under the Fourth Amendment).

<sup>80</sup> *Hudson*, 547 U.S. at 592-94; *see also* *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) (holding that verbal evidence seized in violation of an unlawful entry and arrest is considered "fruits" of the agents' unlawful action" and therefore must be suppressed under the exclusionary rule).

<sup>81</sup> *Hudson*, 547 U.S. at 592-93.

<sup>82</sup> *Id.*

warrant they had obtained, and would have discovered the guns and drugs inside the house.”<sup>83</sup> Moreover, Scalia asserted that the exclusionary rule is not designed to safeguard evidence from the government<sup>84</sup> and stated, “Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.”<sup>85</sup>

Second, Scalia noted that the exclusionary rule is only applied when the deterrence benefits outweigh the social costs generated by its application.<sup>86</sup> Here, Scalia found that the social costs of applying the exclusionary rule were substantial and significantly outweighed the deterrence effects on police misconduct.<sup>87</sup> Scalia alleged that the social costs of applying the exclusionary rule were twofold. First, it would allow criminals go free because evidence of their guilt was suppressed.<sup>88</sup> Second, it would produce a flood of cases where individuals would claim that either officers violated the knock-and-announce rule or that the various exceptions that permit officers not to knock were inapplicable.<sup>89</sup> In contrast, Scalia suggested that the deterrence benefits of preventing police officer misconduct would be nominal and that other remedies were available to ensure police acted responsibly.<sup>90</sup> In particular, Scalia noted both the availability of civil rights suits against police officers under 42 U.S.C. § 1983 as well as the “internal discipline” and “increasing professionalism” of police forces.<sup>91</sup>

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<sup>83</sup> *Id.* at 592 (emphasis added).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 594 (emphasis added).

<sup>86</sup> *Id.*; see also *United States v. Leon*, 468 U.S. 897, 907-08 (1984) (stating that the exclusionary rule should be applied when the effect of deterring police misconduct outweighs the social costs generated by applying the rule).

<sup>87</sup> *Hudson*, 547 U.S. at 595.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 595-96.

<sup>90</sup> *Id.* at 596-99.

<sup>91</sup> *Id.* Section 1983 of the U.S. Code provides citizens a cause of action:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable

In relying on the availability of civil remedies against police officers, the majority concluded that the potential threat of being confronted with a civil rights suit for officer misconduct would significantly deter law enforcement officials from violating knock-and-announce guidelines.<sup>92</sup> The majority rejected the notion that courts do not award significant damages in civil-right suits against law enforcement officials.<sup>93</sup> Rather, the Court reasoned that Congress has made it easier to bring such suits by approving attorney fees in civil rights proceedings and that lawyers are now more disposed to taking on these types of cases.<sup>94</sup> Additionally, the Court found that the internal discipline of today's police forces will ensure that officers abide by the guidelines set out in the knock-and-announce requirement and respect individuals' constitutional rights when executing search warrants at their homes.<sup>95</sup> As Scalia noted, there are "[n]umerous sources . . . now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline."<sup>96</sup>

Lastly, Scalia discussed how the Court's holding in *Hudson* is consistent with pre-existing law governing the rules

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exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

<sup>92</sup> *Hudson*, 547 U.S. at 596-97.

<sup>93</sup> *Id.* at 597-98.

<sup>94</sup> *Id.*; see also 42 U.S.C. § 1988(b). Section 1988(b) authorizes attorney fees in the following circumstances:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1988(b) (2000). Moreover, the Court asserted that because cases are settled, it may appear that the lower courts are not going forward with civil rights suits against officers. *Hudson*, 547 U.S. at 598.

<sup>95</sup> *Hudson*, 547 U.S. at 598-99.

<sup>96</sup> *Id.* at 599.

of suppression.<sup>97</sup> Scalia focused on the cases *Segura v. United States*,<sup>98</sup> *New York v. Harris*,<sup>99</sup> and *United States v. Ramirez*<sup>100</sup> to support his conclusion. Like *Hudson*, *Segura v. United States* also involved an illegal entry.<sup>101</sup> In *Segura*, the officers did not have a search warrant, did not knock, and did not receive permission to enter the defendant's apartment.<sup>102</sup> Due to delays in obtaining a warrant, police had to wait nineteen hours inside Segura's apartment until they received a valid warrant and could lawfully conduct a search.<sup>103</sup> The Supreme Court denied Segura's motion to suppress the evidence gathered, and held that the grounds on which the warrant was granted did not relate in any way to the police's illegal entry.<sup>104</sup> Accordingly, the Court found that there was an independent source for the warrant under which the evidence was obtained, and therefore suppression of the evidence was not required.<sup>105</sup> Scalia concluded that if the evidence obtained as a result of the

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<sup>97</sup> See *id.* at 599-602.

<sup>98</sup> 468 U.S. 796 (1984).

<sup>99</sup> 495 U.S. 14 (1990).

<sup>100</sup> 523 U.S. 65 (1998).

<sup>101</sup> *Segura*, 468 U.S. at 798.

<sup>102</sup> *Id.* at 800.

<sup>103</sup> *Id.* at 801.

<sup>104</sup> *Id.* at 814.

<sup>105</sup> *Id.* at 816. In *Segura*, the Court stated that "the exclusionary rule has no application [where] the Government learned of the evidence from an independent source." *Id.* at 805 (1984) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (alteration in original)). Accordingly, *Silverthorne* describes the usage of the independent source doctrine:

The essence of a provision forbidding the acquisition of evidence in a certain way is not merely evidence so required shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

*Silverthorne Lumber Co.*, 251 U.S. at 392. Additionally, in *Segura*, the search warrant was based upon the testimony of Rivudalla-Vidal who told agents that he had bought cocaine from Segura that day and had plans to meet with the defendant later that evening to receive an additional supply. See *Segura*, 468 U.S. at 800. The Court deemed the illegality of the initial entry irrelevant by applying the "but-for" causation test. The Court relied on precedent stating that "evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' cause of the discovery of the evidence." *Id.* at 815. Accordingly, the Court determined that because "[t]he illegal entry into the petitioner's apartment did not contribute in any way to discovery of the evidence seized under warrant; it is clear, therefore, that not even the threshold 'but for' requirement was met in this case." *Id.*



illegal entry in *Segura* was not suppressed, then it would be “bizarre to treat more harshly the evidence in this case.”<sup>106</sup>

In *New York v. Harris*, the police arrested Harris in his home without a warrant.<sup>107</sup> This illegal arrest, however, did not require the suppression of an incriminating statement Harris had made at the station house.<sup>108</sup> In *Harris*, the Supreme Court determined that the statement made at the station house was not a result of the defendant’s being in “unlawful custody.”<sup>109</sup> Accordingly, although he had made the statement after a warrantless and non-consensual entry into the defendant’s home, the exclusionary rule did not bar it.<sup>110</sup> In comparison, Scalia stated, “While acquisition of the gun and drugs [in *Hudson*] was the product of a search pursuant to warrant, it was not the fruit of the fact that the entry was not preceded by knock and announce.”<sup>111</sup>

Lastly, in *United States v. Ramirez*, the Court found that although unnecessary destruction to property may trigger a Fourth Amendment violation, the circumstances of *Ramirez* did not produce such a result.<sup>112</sup> The Court did note, however, that if the police’s destruction of property was unreasonable, a causation test would be applied to determine if there was a causal relationship between the property damage and the evidence obtained, which would justify suppression.<sup>113</sup> In citing *Ramirez*, Scalia asked, “[W]hat clearer expression could there be of the proposition that an impermissible manner of entry does not necessarily trigger the exclusionary rule?”<sup>114</sup>

Justice Kennedy’s concurrence supported two major claims of the majority’s opinion: (1) the knock-and-announce rule does not meet the causation requirement that limits the application of the exclusionary rule; and (2) civil suits and the

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<sup>106</sup> *Hudson v. Michigan*, 547 U.S. 586, 600 (2006).

<sup>107</sup> *Id.* at 601.

<sup>108</sup> *Id.* The incriminating statement in question was a written inculpatory statement signed by Harris after he was arrested and taken to the station house. *New York v. Harris*, 495 U.S. 14, 16 (1990).

<sup>109</sup> *Harris*, 495 U.S. at 19.

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Hudson*, 547 U.S. at 601.

<sup>112</sup> *Id.* at 602. In *Ramirez*, police entered the defendant’s home pursuant to a “no-knock warrant.” Upon being informed that the defendant had guns and drugs in his garage, the police believed the best method of entry would be to break a window in the garage and exhibit their guns to try and deter the defendant from attempting to use his weapons. *United States v. Ramirez*, 523 U.S. 65, 68-69 (2006).

<sup>113</sup> *Hudson*, 547 U.S. at 602.

<sup>114</sup> *Id.*

internal discipline of police officers serve as effective deterrence remedies for knock-and-announce violations.<sup>115</sup> Furthermore, Kennedy asserted that the knock-and-announce rule is still very much the law and if the Court's decision led to a "widespread pattern of violations . . . and particularly if those violations were committed against persons who lacked the means or voice to mount effective protest,"<sup>116</sup> that the Court's decision in *Hudson* would have to be revisited.<sup>117</sup> Justice Kennedy, however, did not agree with the majority's reliance on *Segura* and *Harris*.<sup>118</sup>

Justice Breyer wrote a powerful dissent asserting that not only did the majority's decision take away the incentive to follow the knock-and-announce requirement, but it did so without any support from past precedent.<sup>119</sup> First, Breyer believed that the majority should have applied the exclusionary rule, and he stated that the Court's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection."<sup>120</sup> Second, Breyer criticized the majority's reliance on civil suits and internal discipline as effective deterrence methods for knock-and-announce violations.<sup>121</sup> He noted that the majority failed to cite any cases where a plaintiff has received substantial monetary damages for knock-and-announce violations.<sup>122</sup> Moreover, he reasoned

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<sup>115</sup> *Id.* at 602-03 (Kennedy, J., concurring).

<sup>116</sup> *Id.* at 604.

<sup>117</sup> *See id.*

<sup>118</sup> *Id.* In his concurrence, Justice Kennedy simply states, "[W]hile I am not convinced that *Segura v. United States* and *New York v. Harris* have as much relevance here as Justice Scalia appears to conclude, the Court's holding is fully supported by Parts I through III of its opinion. I accordingly join those Parts and concur in judgment." *Id.*

<sup>119</sup> *Hudson*, 547 U.S. at 604-05 (Breyer, J., dissenting). Additionally, in supporting his opinion that the majority departed from past precedent, Breyer included in the appendix the decisions of all the Fourth Amendment cases that the Supreme Court has decided since the exclusionary rule was established. *See id.* at 630-32. Breyer apparently used these cases to emphasize that, notwithstanding the established exceptions to the exclusionary rule, "in every case involving evidence seized during an illegal search of a home (federally since *Weeks*, nationally since *Mapp*) the Court, with the exceptions mentioned, has either explicitly or implicitly upheld (or required) the suppression of the evidence." *Id.* at 613. For discussions of the exceptions mentioned, see *id.* at 611-14.

<sup>120</sup> *Id.* at 605.

<sup>121</sup> *Id.* at 608-14.

<sup>122</sup> *Id.* at 610-11. Breyer notes:

To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law. To argue that there may be few civil suits because violations may produce nothing "more than nominal injury" is

that the qualified immunity defense available to police officers makes it difficult for individuals to bring suits against them, and thus, civil claims are not an adequate replacement for the exclusionary rule.<sup>123</sup> Third, Breyer rejected the Court's but-for analysis, finding that the evidence obtained in *Hudson* resulted from the police's illegal entry into Hudson's home.<sup>124</sup> As Breyer argued, "it is not true that, had the illegal entry not occurred, 'police would have discovered the guns and drugs inside the house.' Without that unlawful entry they would have not been inside the house; so there would have been no discovery."<sup>125</sup> Fourth, Breyer emphasized the fact that the knock-and-announce rule is designed to safeguard an individual's privacy in his or her home from government intrusion.<sup>126</sup> He believed that the majority's opinion consequently undermined this right, which is central to the Fourth Amendment.<sup>127</sup> Finally, Breyer

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to confirm, not to deny, the inability of civil suits to deter violations. And to argue without evidence . . . that civil suits may provide deterrence because claims *may* "have been settled" is perhaps to search in desperation for an argument. Rather, the majority, as it candidly admits, has simply "assumed" that "[a]s far as [it] know[s], civil liability is an effective deterrent," a support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law.

*Id.* at 611 (emphasis added) (alteration in original) (citations omitted).

<sup>123</sup> *Id.* at 610. The defense of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The rationale of the qualified immunity defense has two prongs: "[I]t allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation." *Pounds v. Griepenstroh*, 970 F.2d 338, 340 (7th Cir. 1992) (alteration in original). Thus, in determining if an officer is entitled to the qualified immunity defense, the court must make a two part inquiry. First, do the plaintiff's allegations establish a violation of a constitutional right, and second, was the constitutional right clearly established at the time of the injury? Kathryn R. Urbonya, *Selected Fourth Amendment Issues in Section 1983 Litigation*, in 2 14TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 67, 101 (Hon. George C. Pratt & Martin A. Schwartz eds., 1988). This two prong test is an objective standard that assumes liability if a reasonable officer would have or should have known, given the same circumstances and the law at the time, that his or her actions were violating a clearly established law. *See id.* If a court finds that the qualified immunity defense applies, officers are saved from the burdens of litigation and do not have to stand trial. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001).

<sup>124</sup> *Hudson*, 547 U.S. at 615 (Breyer, J., dissenting).

<sup>125</sup> *Id.* at 618 (quoting Justice Scalia, *id.* at 592 (majority opinion)).

<sup>126</sup> *Id.* at 620-21.

<sup>127</sup> *Id.* Supporting his conclusions, Breyer cited a Court decision from this year (2006) which emphasized the longstanding importance that the Court has placed on an individual's privacy interests in regards to their home. As Breyer asserted, "[J]ust this

rejected the majority's application of *Segura*, *Harris*, and *Ramirez*, and found they did not lend support to the proposition that suppression is unwarranted when a knock-and-announce violation occurs.<sup>128</sup>

#### IV. WHAT DETERRENCE? AN EXAMINATION OF THE INCREASED PROFESSIONALISM AND DISCIPLINE OF TODAY'S POLICE FORCES

In 1963, Justice Brennan warned of the risks of weakening the knock-and-announce rule:

[P]ractical hazards of law enforcement militate strongly against any relaxation of the requirement of awareness. First, cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed . . . [t]hat possibility is itself a good reason for holding a tight rein against judicial approval of unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright, or embarrassment attendant upon an unannounced police intrusion. Second, the requirement of awareness also serves to minimize the hazards of the officers' dangerous calling.<sup>129</sup>

It appears that Brennan's message is even more pertinent today, as paramilitary units have become increasingly involved in local police activity.<sup>130</sup> The majority in *Hudson* found that the

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term we have reiterated that 'it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.'" *Id.* at 621 (quoting *Georgia v. Randolph*, 547 U.S. 103, 115 (2006)).

<sup>128</sup> See *id.* at 624-28. In rejection of *Segura v. United States*, Breyer reasoned that the majority erred in its application of the "independent source doctrine." *Id.* at 625-26. He found that, in *Hudson*, "[t]he search that produced the relevant evidence here is the very search that the knock-and-announce violation rendered unlawful. There simply is no 'independent source.'" *Id.* at 625. Furthermore, Breyer found the facts of *New York v. Harris* inconsistent with *Hudson*. *Id.* at 626. In *Harris*, the parties agreed that any incriminating evidence that was obtained in Harris' home as a result of his arrest should be excluded. *Id.* at 627. Thus, the only question at trial was whether the written statement made by Harris at the stationhouse was subject to suppression. *Id.* In *Hudson*, on the other hand, the evidence was obtained after the police did not knock and announce. *Id.* at 628. Breyer contends that "[t]he officers' failure to knock and announce rendered the entire search unlawful, and that unlawful search led to the discovery of the evidence in petitioner's home." *Id.* (citation omitted). Lastly, Breyer distinguished *Hudson* from *United States v. Ramirez* by stating that the entry in *Hudson* was illegal, in contrast to that in *Ramirez*, which was not. *Id.* at 628.

<sup>129</sup> *Ker v. California*, 374 U.S. 23, 57-58 (1963) (Brennan, J., concurring).

<sup>130</sup> See BALKO, *supra* note 10 (discussing the increasing militarism of civilian police officers and the substitution of SWAT team raids for common police work); see also Kraska & Cubellis, *supra* note 13, at 623 (discussing the growth of small local paramilitary police units with the local police force); Steven G. Brandl, *Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OHIO ST. J. CRIM. L. 133, 145-48 (2003) (discussing the history of policing and

potential deterrence benefits that would result from applying the exclusionary rule to knock-and-announce violations did not outweigh the social costs generated by its use.<sup>131</sup> In justifying this conclusion, the majority emphasized that the increased professionalism of law enforcement officials serves to deter police misconduct and guarantee that officers adhere to governing procedures.<sup>132</sup> In particular, the majority noted a “new emphasis on internal police discipline,”<sup>133</sup> reflected by “increasing evidence that police forces across the United States take the constitutional rights of citizens seriously. There have been ‘wide-ranging reforms in education, training and supervision of police officers.’”<sup>134</sup> This Note argues that the increased internal discipline of today’s police force advocated by the Court is not as evident as the majority suggests.<sup>135</sup>

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the current militarization of the police force); David B. Kopel & Paul M. Blackman, *Can Soldiers Be Peace Officers? The Waco Disaster and Militarization of American Law Enforcement*, 30 AKRON L. REV., 619, 649-50 (1997) (discussing the increased militarization of the police force).

<sup>131</sup> *Hudson*, 547 U.S. at 594. In *Mapp v. Ohio* the Court chose to extend the exclusionary rule to the states, recognizing the importance of having effective deterrent means to prevent police misconduct and uphold individuals’ constitutional rights. 367 U.S. 648, 660 (1961). In *Mapp*, the Court affirmed the assertion that “[t]he 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.” *Id.* at 648 (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1916)). Furthermore, the Court in *Mapp* stated that post *Weeks*, “This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words.’” *Id.* (emphasis added) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)). Accordingly, in *Wilson v. Arkansas* the knock-and-announce rule became constitutionally mandated that police officers must follow to ensure an individual’s Fourth Amendment rights. *See* 514 U.S. at 937. Thus, it appears that the Court in *Hudson* not only went against the reasoning of *Mapp*, but applied deterrence mechanisms that appear ineffective. *Hudson*, 547 U.S. at 609-10 (Breyer, J., dissenting).

<sup>132</sup> *Hudson*, 547 U.S. at 598.

<sup>133</sup> *Id.* at 599 (quoting SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 51 (1993)).

<sup>134</sup> *Id.*

<sup>135</sup> *See* Sewell Chan, *Mayor’s Report Finds a Safe and Healthy City, But One with Troubles, Too*, N.Y. TIMES, Sept. 15, 2006, at B3. For example, findings for New York City’s Mayor’s Management Report for 2006 indicated that there were 7,373 civilian complaints against police officers for the year. This was a 16% increase from 2005, when 6,358 complaints were filed. *See* Graham Rayman, *Cops in the Clear/Ex-Investigators: Board Policy Absolves Police in Bad Raid*, NEWSDAY, June 9, 2003, at A3. Additionally, in New York City a Civilian Complaint Review Board was established in 1993 to recommend sanctions on misconduct that is reported by the public. *Id.* The agency receives a significant number of complaints regarding no-knock raids, and interviews with former Review Board investigators reveal that no-knock complaints have been a problem for some time. *Id.* Moreover, it was reported that “where

The difference in function between civilian law enforcement officials and the military is rooted in our country's history.<sup>136</sup> Whereas the military's primary function was to protect our country from external enemies, law enforcement officials were charged with keeping domestic peace.<sup>137</sup> Today, the line that separates the military and local police departments has been blurred as police officers execute a more militaristic style of law enforcement.<sup>138</sup> This is a consequence of Special Weapons and Tactics ("SWAT") teams or similar paramilitary units<sup>139</sup> playing a more active role in addressing local community problems.<sup>140</sup> As a result, local police forces

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investigators tried to raise the issue, they encountered resistance from supervisors who believed such an inquiry was outside agency jurisdiction . . . ." *Id.* If civilians are told to report to the Review Board and the Review Board is given little power to enact change, what is the proper recourse if internal sanctions are not being—and possibly cannot be—given?

<sup>136</sup> See Kopel & Blackman, *supra* note 130, at 649-55.

<sup>137</sup> *Id.* In discussing the problems of the military in law enforcement functions, Col. Charles J. Dunlap noted, "military training is aimed at killing people and breaking things . . . [p]olice forces, on the other hand take an entirely different approach. They have to exercise the studied restraint that a judicial process requires; they gather evidence and arrest 'suspects' . . . [t]hese are two different views of the world." BALKO, *supra* note 10 (quoting Col. Charles J. Dunlap Jr., *The Thick Green Line: The Growing Involvement of Military Forces in Domestic Law Enforcement*, MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM at 35).

<sup>138</sup> WEBER, *supra* note 13, at 11.

<sup>139</sup> Other names for paramilitary units include: "Special Response Team (SRT), Emergency Response Team (ERT), Special Emergency Response Teams (SERT), Emergency Services Unit (ESU) . . ." Karan R. Singh, Note, *Trending the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 680 (2001).

<sup>140</sup> See *supra* note 130; see also Kopel & Blackman, *supra* note 130, at 649-55. The military has not always been permitted to take part in police functions. WEBER, *supra* note 13, at 2-5. At first, the Posse Comitatus Act of 1878 was designed by Congress to prevent the intrusion of the military in civilian law enforcement affairs, and as amended in 1994, provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

Brandl, *supra* note 130, at 146-47. Over time, this act was subsequently amended to include a variety of exceptions where it is proper for the military to aid the local police force. Specifically, in 1981 the "war on drugs" exception established that military personnel can be used in executing a search warrant at an individual's home in pursuit of illegal contraband. As Congress was going through the process of amending the Posse Comitatus Act, military officials did try to warn of the harmful side effects that would result. The deputy assistant secretary for drug policy, Stephen G. Olmstead, argued to a U.S. Senate subcommittee that "[o]ne of [America's] greatest strengths is that the military is responsive to civilian authority and that we do not allow the Army, Navy, and the Marines and the Air Force to be a police force. History is replete with countries that allow that to happen. *Disaster is the result.*" BALKO, *supra* note 10, at 16 (emphasis added) (alteration in original) (quoting Stephen G. Olmstead in George C.

are now conducting no-knock, military-style raids when carrying out search warrants.<sup>141</sup> Moreover, statistics reflect that a rise in the use of these paramilitary units corresponds with an escalation of unnecessary violence and wrong-door raids.<sup>142</sup> Accordingly, it appears the police discipline and professionalism emphasized by the Court in *Hudson* is failing to limit this aggressive and violent behavior.

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Wilson, Agencies Intensify Battle to Secure Key Roles In Anti Drug Effort, WASH. POST, Apr. 28, 1987). Nonetheless, the amendment was made and the military was permitted to take part in local police enforcement that involved the seizing of contraband.

Accordingly, although paramilitary units were first established in the 1960s in Los Angeles, it was not until the 1980s that these units gained momentum. Prior to the 1980s, paramilitary units were used only in the most volatile and high risk environments, such as hijackings or hostage situations. At this time, SWAT units consisted of small teams which greatly resembled police officers, only they had slightly better equipment. As the country became increasingly concerned about the proliferation of drugs since the 1970s, statistics show a corresponding rise in the use of these paramilitary units.

<sup>141</sup> See generally BALKO, *supra* note 10.

<sup>142</sup> See generally *id.*; see also *The Sultans of SWAT*, THE ECONOMIST, Oct. 2, 1999, (discussing the growth of SWAT teams and violence within the local police force). A study conducted by Peter Kraska on paramilitary units reflects their proliferation in today's civil law enforcement agencies: Today, 77% of police departments surveyed have paramilitary units, which is approximately a 48% increase since 1985. Kraska & Cubellis, *supra* note 13, at 620. In 1996, Kraska and his colleague Victor Kappeler conducted a study of police departments that patrol cities of 50,000 or more citizens, and found that almost 90% of the police departments surveyed had paramilitary units, compared to about 59% in 1982. Brandl, *supra* note 130, at 147 (548 agencies responded to the survey, a 79% response rate). Moreover, Kraska and Kappeler documented the rise in call outs, or deployments, of these units and found that the number increased from thirteen call outs per unit in 1980 to fifty-three per unit in 1995. *Id.* A call out or deployment of a unit is used in a variety of circumstances including: "barricaded persons, hostages, terrorists, civil disturbances, and the serving of a high-risk search and arrest warrant. [This] data does not include activities related to proactive patrol work by PPU's [or paramilitary units.]" Kraska & Cubellis, *supra* note 13, at 614. What was even more startling was that 75% of the call outs were for the execution of a search warrant, which typically took the form of a "no-knock" raid. Lastly, the study indicated that over the last twenty-five years, the use of SWAT team units for proactive patrol has increased nearly 300%. *Id.*

Additionally, Kraska conducted a study with Louis Cubellis to determine the increased use of paramilitary units among smaller police departments where there were approximately 25,000 to 50,000 citizens within each jurisdiction. Kraska & Cubellis, *supra* note 13, at 611-12 (The study included 473 police departments, which is a response rate of 72%. Additionally, there was an average of sixty-two police officers in each department.). These smaller jurisdictions indicated an even greater rise in the use of SWAT teams or similar agencies, as the number of paramilitary or similar units rose 157% between 1985 and 1995. *Id.* at 613. Additionally, the number of call outs increased from four and a half per year for each department in 1985, to over twelve by 1995. *Id.* at 614. Furthermore, similar to the larger police departments surveyed, 66% of the call outs were for warrant services, which typically took the form of a no-knock raid. This indicated a 342% increase between 1985 and 1995 in the use of paramilitary units to execute search warrants. *Id.* at 615.

### A. *What Are Paramilitary Units?*

Paramilitary units are prestigious departments within the local police force with a sub culture all their own.<sup>143</sup> Police officers desire to be a part of these units because the type of work these units perform is seen as exciting, high status, dangerous, and bolstering of male camaraderie.<sup>144</sup> Paramilitary units are typically equipped in “black or urban camouflage BDUs (battle dress uniforms), lace-up combat boots, full-body armor, Kevlar helmets, and ninja-style hoods.”<sup>145</sup> Additionally, the Department of Defense has armed these men and women with sophisticated military hardware<sup>146</sup> including: “submachine guns, tactical shotguns, sniper rifles, percussion grenades, CS and OC gas (tear and pepper gas), surveillance equipment, and fortified personnel carriers.”<sup>147</sup> Furthermore, these units function as “special military operation teams” that demand strict discipline and rigorous internal enforcement.<sup>148</sup> In fact, elite military divisions, such as the Army Rangers and Navy Seals, commonly train paramilitary units and expose them to tactical and specialized military procedures.<sup>149</sup>

The military weaponry and advanced technology that accompany paramilitary units have placed officers in a warrior-like mindset that is responsible for the militaristic attitude

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<sup>143</sup> Kraska & Cubellis, *supra* note 13, at 623.

<sup>144</sup> *Id.* When observing the attitudes of police officers in paramilitary units, it becomes apparent that officers are attracted to the intense, high risk environment that is common in these units. In conducting his research, Peter Kraska interviewed two military reserve officers who were responsible for training civilian law enforcement personnel. These men stated that:

This shit [the creation of paramilitary units] is going on all over. Why serve an arrest warrant to some crack dealer with a .38? . . . With full armor, the right shit [pointing to a small case that contained a nine-millimeter Glock], and training, you can kick ass and have fun . . . *Most of these guys just like to play war; they get a rush out of search-and-destroy missions instead of the bullshit they do regularly.*

BALKO, *supra* note 10, at 17-18 (emphasis added) (alteration in original) (quoting Peter Kraska, *Playing War*, in MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM at 143).

<sup>145</sup> Kraska & Cubellis, *supra* note 13, at 610-11.

<sup>146</sup> WEBER, *supra* note 13, at 7. For example, in 1997 alone, the Pentagon distributed 1.2 million pieces of military equipment to civilian police forces. BALKO, *supra* note 10, at 8.

<sup>147</sup> Kraska & Cubellis, *supra* note 13, at 611.

<sup>148</sup> *Id.* at 610.

<sup>149</sup> *See id.*



that is becoming more apparent in today's police force.<sup>150</sup> As one commentator notes, the use of these units advances an "over emphasis on the crime-fighting function of police work and promotes a warlike approach to crime and drug problems."<sup>151</sup> For example, consider the typical method a paramilitary unit employs in executing a search warrant. In most cases, a "no-knock" raid occurs, in which police officers forcibly enter an individual's home without announcing their presence.<sup>152</sup> Outfitted in military styled uniforms, multiple three-officer teams make a "dynamic entry"<sup>153</sup> by using a battering ram, explosives, or similar device to forcibly break down a civilian's door.<sup>154</sup> Upon entering, officers may dispense flashbang concussion grenades, break a window or possibly release a chemical spray to create a diversion.<sup>155</sup> Additionally, officers are equipped with ammunition, such as automatic submachine guns, assault rifles, or 9-mm shotguns, to create fear and ensure compliance.<sup>156</sup> These tactics, which turn police officers into "soldiers," produce grave consequences because "[t]he sharing of training and technology by the military and law enforcement agencies has produced a . . . mindset of the warrior . . . simply not appropriate for the civilian police officer charged with enforcing the law."<sup>157</sup> Accordingly, officers forget that they are not

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<sup>150</sup> WEBER, *supra* note 13, at 10. See Kraska & Cubellis, *supra* note 13, at 610-11, 619.

<sup>151</sup> Kraska & Cubellis, *supra* note 13, at 609. Additionally, as "[d]epartmental SWAT teams have accepted the military as a model for their behavior and outlook . . . American streets are viewed as the 'front' and American citizens as the 'enemy.'" WEBER, *supra* note 13, at 10.

<sup>152</sup> See BALKO, *supra* note 10, at 3-4. These no-knock raids can be pursuant to a no-knock warrant which many jurisdictions administer. *Id.*

<sup>153</sup> The name "dynamic entry" is used due to the force and instantaneous matter of entry. Singh, *supra* note 139, at 682. Note that pursuant to *Richards v. Wisconsin*, a no-knock raid is lawful only if exigent circumstances are present. 520 U.S. 385, 394 (1997).

<sup>154</sup> William Booth, *Exploding Number of SWAT Teams Sets Off Alarms; Critics See Growing Role of Heavily Armed Police Units as 'Militarization' of Law Enforcement*, WASH. POST, June 17, 1997, at A1 (discussing the rise of SWAT teams among local police departments); see Michael J. Bulzomi, *Knock and Announce: A Fourth Amendment Standard*, FBI LAW ENFORCEMENT BULL. (May 1997), available at <http://www.fbi.gov/publications/leb/1997/may976.htm> (discussing how law enforcement agencies can conduct "no-knock" entries in compliance with the Constitution). In cases where doors are reinforced shut, they may be removed by chaining the door to a tow truck that effectively yanks the door off. Singh, *supra* note 139, at 682.

<sup>155</sup> See Booth, *supra* note 154.

<sup>156</sup> See BALKO, *supra* note 10, at 14.

<sup>157</sup> WEBER, *supra* note 13, at 10. See BALKO, *supra* note 10, at 15. Balko argues that "[g]iven that civilian police now tote military equipment, get military training, and embrace military culture and values, it shouldn't be surprising when

challenging an enemy, but rather, citizens who are entitled to protection of their constitutional rights.<sup>158</sup>

*B. A Consequence of Paramilitary Units: The Rise in Wrong-Door Raids*

The consequences of civilian police officers acting like military personnel are untoward for both the citizens whose rights are impeded and for the officers themselves.<sup>159</sup> The rise in the number of paramilitary units has led to an increase in “wrong-door raids,” which, as the name indicates, are forced, sometimes militaristic, entries perpetrated against innocent individuals due to police mistakes in executing a search warrant.<sup>160</sup> Wrong-door raids are most commonly the result of misinformation by a police informant who exchanges confidential information for money or a reduced sentence in his or her own case.<sup>161</sup> It is hard to determine just how many wrong-door

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officers begin to act like soldiers, treat civilians like combatants and tread on private property as if it were part of a battlefield.” *Id.*

<sup>158</sup> Weber, *supra* note 13, at 10.

<sup>159</sup> See *supra* Part IV.A.

<sup>160</sup> BALKO, *supra* note 10, at 26-29. See *supra* note 129 and accompanying text. It appears that as early as 1962, in *Ker v. California*, the Supreme Court recognized that the relaxation of the knock-and-announce rule can lead to mistaken raids.

<sup>161</sup> BALKO, *supra* note 10, at 21-25. Reports of recent wrong-door raids include the following: On September 12, 1996, seventy-year-old Ana Roman returned to her home to find police, with their guns pointed at the heads of her family, conducting a raid based on an informant’s false tip. Melissa Grace, *Raid-Snafu Trial to Open Suit Blames Cops for Women’s Death 6 Yrs. Later*, DAILY NEWS, suburban sec., June 1, 2004, at 3. As a result, Roman had a heart attack and spent two weeks in the cardiac unit of Lutheran Medical Center. *Id.* On June 25, 2003, police and FBI agents “broke down the door to an apartment of a frail man, Timothy Brockman, threw a stun grenade inside—setting a carpet on fire—then ordered him out of bed, and handcuffed him as he lay face down.” Jim Dwyer, *Police Raid Gone Awry: A Muddled Path to the Wrong-door*, N.Y. TIMES, June 29, 2003, at B27. The police and federal agents failed to discover that an informant had identified the wrong apartment in a housing complex. *Id.* A wrong-door raid took place at the apartment of Rosanna Samuel on the morning of May 24, 2001 as a result of mistaken information by an informant. Graham Rayman, *Raid That Changed Her Life*, NEWSDAY, June 29, 2003, at A2. Samuel was eating breakfast when officers “pried her apartment’s door from its hinges, dropped in a flash grenade that emitted a bright light and loud noise and burst in.” *Id.* Samuel, a heavyset woman, had trouble getting to the ground, so police removed her legs from under her. Samuel sustained bruises to her face, knees and elbows and was admitted to Kings County Hospital for treatment. *Id.* On February 27, 1998, police mistakenly raided the apartment of Shaunsia Patterson, who was eight months pregnant and living with her two- and three-year-old children. Bob Herbert, *In America, Reprise of Terror*, N.Y. TIMES, Mar. 12, 1998, at A27. Patterson’s fifteen-year-old sister was also home at the time. *Id.* The police entered her apartment in teams with their guns drawn, after a loud boom brought her door down. *Id.* Although visibly pregnant, Patterson stated they “threw me face down on the floor and handcuffed me behind my back . . . one of the cops stepped on the side of my face and pressed my face into the floor.” *Id.* She could

raids have occurred, as police do not always keep track of their mistakes and homeowners do not consistently come forward.<sup>162</sup> One study suggests, however, that almost 200 wrong-door cases have been reported in the last fifteen years, which resulted in at least forty innocent deaths.<sup>163</sup> Police officials have rationalized these mistaken raids as an unavoidable outcome of the “war on drugs.”<sup>164</sup>

One significant consequence of wrong-door raids is that unnecessary violence may ensue between police officers and homeowners.<sup>165</sup> SWAT team raids often occur in the early morning or late evening when occupants are asleep.<sup>166</sup> Moreover, officers typically do not knock and announce their presence, and diversionary tactics make it difficult for a homeowner to affirm who is at the door.<sup>167</sup> Consequently, when

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not ask cops why they were there, because whenever she spoke, they told her to “Shut the [expletive] up!” *Id.* They destroyed her house in search of drugs, verbally abused her, kept her and her sister handcuffed for more than two hours, and never even showed her a warrant. *Id.*

<sup>162</sup> BALKO, *supra* note 10, at 28. In 1999, then Attorney General Janet Reno even affirmed that although the 1994 Crime Control Act required the federal government to compile information on police shootings and use of non-deadly forces, there was no law requiring that local police agencies hand over this information. *Id.*

<sup>163</sup> Radley Balko & Joel Berger, *Wrong Door*, WALL ST. J., Sept. 2, 2006; *see also Sure Let's Open the Door for SWAT Teams*, OAKLAND TRIB., June 22, 2006, Sports Turn at 2.

<sup>164</sup> BALKO, *supra* note 10, at 21-26, 29. Reports of such justifications include the following: After a couple was hospitalized as a result of the police's forcibly entry of their home thinking it was a methamphetamine laboratory, Police Chief Darryl Whaley said “[O]bviously, a mistake was made and it is regrettable . . . [b]ut I stand by my officers.” Associated Press, *Elderly Couple Hurt in Raid On Wrong House by Horn Lake Police*, CLARION-LEDGER (Jackson, Miss.), Mar. 23, 2006. Whaley believed “they acted correctly and followed procedures when they entered [the couple's] home.” *Id.* In Crown Heights, Brooklyn, N.Y., police mistakenly raided the apartment of Basil Shorter and his family. Michael Cooper, *Scared Family Says Police Raided the Wrong Home*, N.Y. TIMES, May 8, 1998, at B1. The police “broke down the door . . . tossed a stun grenade into the front hall and handcuffed everyone inside, including a mentally retarded 18-year-old girl who was taking a shower.” *Id.* Police asserted, however, that they did nothing wrong in following an informant's tip that led them to the wrong apartment. *Id.*

<sup>165</sup> BALKO, *supra* note 10, at 19-20.

<sup>166</sup> *Id.* at 19. These early morning or late evening raids contribute to violence because homeowners are more likely to think the police intrusion is a burglar attempting to rob their home. *See infra* notes 168-169.

<sup>167</sup> BALKO, *supra* note 10, at 19-20. It appears that the Supreme Court is aware of the possibility that residents may act in self-defense when an unannounced entry occurs. The Court stated that one of the main purposes of the knock-and-announce rule is “protection of life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident.” *Hudson v. Michigan*, 547 U.S. 586, 594 (2006); *see also Miller v. United States*, 357 U.S. 301, 313 n.12 (1958) (“Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder.”).

police officers burst into an individual's home the officers may be mistaken for robbers. A shoot-out then may transpire between the homeowner and officer as an individual reaches for his or her gun in an act of self-defense.<sup>168</sup> As a result, innocent lives of both civilians and police officers are put at risk.<sup>169</sup>

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<sup>168</sup> BALKO, *supra* note 10. The following two examples illustrate instances where a resident thought police officers searching his or her home were intruders and fired at them in self-protection, leading the police to return fire. Lewis Cauthorne reportedly thought that a police search of her home for drugs was a burglary, and Cauthorne fired at four officers in an act of self-protection. Allison Klein, *Courtroom Showman, a Champion of Defense*, BALT. SUN, Nov. 23, 2002 at 1A. Police fired back, but luckily, no one was fatally injured. *Id.* In another case, police raided Ellis Elliot's Bronx, N.Y., apartment based on information from a mistaken informant. Kit R. Roane, *Bronx Man Recounts Abuse by Police in Mistaken Raid*, N.Y. TIMES, Mar. 4, 1998, at B5. The raid occurred at eight a.m. when Elliot was sleeping. *Id.* Not knowing who was at the door, Elliot grabbed his gun, told whoever was at the door to move away and when they did not, he fired his gun. *Id.* Elliot alleges that nine police officers fired back twenty-six bullets into his apartment, destroyed his home, screamed racial epithets at him and beat him. *Id.* As a result, Elliot sued the city. Peter Noel, *NYPD Storm Troopers*, VILLAGE VOICE, May 16, 2000, at 27.

<sup>169</sup> BALKO, *supra* note 10, at 19-29. The following occurrences depict the unfortunate fatalities that can occur as a result of wrong-door raids. On March 25, 1994, a wrong-door raid took place at the home of Rev. Accelyne Williams. Robyn E. Blumner, *Court Signals Loosening of the Last Reins of Police*, ST. PETERSBURG TIMES, June 25, 2006, at 4. As a result of incorrect information given by an informant, thirteen members of the Boston SWAT team forcibly entered Williams's apartment. *Id.* Williams, age seventy-five, subsequently died of a heart attack after struggling with the SWAT team members. *Id.* On March 26, 2001, police executed a warrant at a duplex building. Jerry Mitchell, *Was There Justice For*, CLARION-LEDGER (Jackson, Miss.), Mar. 5, 2006, at A1. The warrant listed the name of Jamie Smith, who occupied one apartment, but not Cory Maye, who occupied the other. *Id.* Police alleged that they knocked and announced their presence, but received no answer and then broke down the door. *Id.* Maye was sleeping at the time with his eighteen-month-old daughter and asserted that he did not hear the announcement. *Id.* Maye grabbed his gun in an act of self-defense and fired at Officer Ron Jones, causing fatal injuries. *Id.* Maye, who had no prior criminal record, was sentenced to death. *Id.* On May 16, 2003, misinformation by an informant caused police to raid the Harlem, New York, home of fifty-seven-year-old Alberta Spruill. Diane Cardwell & William K. Rashbaum, *City Officials Suggest a Shot in Police Raid was Accidental*, N.Y. TIMES, Aug. 6, 2003, at B1. Suprill died of a heart attack after a police team used a flashbang grenade to forcibly enter her home. *Id.* Likewise, police mistakenly raided John Adams' home, when they were in fact supposed to execute a search warrant at the home next door. Warren Duzak, *Chief Addresses Fatal Errors*, THE TENNESSEAN, Oct. 7, 2000, at A1. The officers apparently knocked but did not identify themselves, and then they forcibly entered Adams's home. *Id.* Unaware of who was at the door, Adams met them with a shotgun. *Id.* The officers claimed that Adams fired shots at them and they retaliated, but the question of whether Adams used his gun was disputed. *Id.* Adams died as a result of the police gunshots. *Id.* On September 29, 1999, the Denver police executed a wrong-door raid on Ismael Mena's home based on misinformation by an informant. Bruce Finley, *Mena's Farm Dreams Turned to Dust Talks Start Today in No-Knock Death*, DENVER POST, Mar. 16, 2000, at A1. Mena, awoken by the police forcibly entering his apartment, thought he was being robbed and fired three shots from his own gun. *Id.* As a result, police fired eight bullets into Mena's face, chest and arms, killing him. *Id.*

Evidence suggests that the increased use of paramilitary units will continue in the future.<sup>170</sup> When this disturbing trend is noted in light of *Hudson's* weakening of the knock-and-announce requirement, it certainly appears that the problems of wrong-door raids and excessive police violence will become more commonplace.<sup>171</sup> Accordingly, it is imperative to have guidelines in check that will curb officers' behavior and guarantee that they act in accordance with the law. By not subjecting knock-and-announce violations to the exclusionary rule, there are no real incentives to ensure that officers comply with knock-and-announce procedures.<sup>172</sup> It is not enough to rely on the internal discipline of law enforcement officials, as there is clear evidence that wrong-door raids are occurring and that innocent lives have been lost.<sup>173</sup> *Hudson* presented the Court with the opportunity to create a true deterrence mechanism to limit this aggressive and militaristic conduct. If officers simply knocked and announced, then homeowners would know who was at their door and would be better suited to deal with police presence. By failing to uphold the exclusionary rule for violations of the knock-and-announce rule, the Court gave officers an incentive to ignore its prohibition against unannounced searches. As a result, this Note argues that the exclusionary rule must be extended to knock-and-announce violations to make certain that an effective deterrence mechanism is in place that guarantees that police officers are respecting individuals' constitutional rights when executing search warrants.<sup>174</sup>

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<sup>170</sup> Brandl, *supra* note 130, at 146-47; *see also* Kopel & Blackman, *supra* note 129, at 649-55.

<sup>171</sup> *See* BALKO, *supra* note 10; *see also* Radley Balko, *Hard Knocks with No-Knock: Why Is It Unreasonable to Announce and Wait?*, REASONONLINE: FREE MINDS AND FREE MARKETS, June 20, 2006, <http://www.reason.com/links/links062006.shtml>. I am not the first to suggest that no-knock raids will become more commonplace as a result of *Hudson*. *See* BALKO, *supra* note 10, at 34 (discussing how *Hudson* may turn "every drug search warrant into a no-knock raid"). I have chosen to elaborate on this concept of no-knock raids to explain why the majority's reasoning was in error when they relied on the increasing professionalism of the police force to deter police misconduct.

<sup>172</sup> *See infra* Part V.B.1.

<sup>173</sup> *See supra* note 169.

<sup>174</sup> *See* Kopel & Blackman, *supra* note 130, at 649-55. In stressing the importance of protecting against the increased militarization of the police, Kopel and Blackman cited a powerful quote from the Eighth Circuit opinion, *Bissonette v. Haig*:

Civilian Rule is basic to our system of government. The use of military force to seize civilians can expose civilian government to the threat of military rule and suspension of constitutional liberties. *On a lesser scale, military*

## V. A LOOK INTO THE FUTURE

The studies above indicate that the professionalism of the police force is not as effective a deterrent as the *Hudson* majority suggests.<sup>175</sup> Rather, there appears to be a rise in police misconduct stemming from the increased use of paramilitary units and resulting in an alarming number of wrong-door raids.<sup>176</sup> Consequently, it is imperative that the Court take measures to rectify its decision in *Hudson* and create real incentives that will deter unlawful police behavior. This need for action becomes especially apparent when comparing the knock-and-announce rule to the *Miranda* warnings.

In 1966, in *Miranda v. Arizona*, the Supreme Court held that police officers must inform suspects of their right to remain silent before proceeding with custodial interrogation in order to ensure that confessions were voluntary and therefore admissible at trial.<sup>177</sup> Due to a number of subsequent exceptions that the Court made to the *Miranda* rule, law enforcement officials felt that the original version of *Miranda* was substantially weakened. As a result, certain states began to train police to question outside *Miranda* by instructing officers to continue interrogating suspects even after they invoked their *Miranda* rights.<sup>178</sup> Hence, Fifth Amendment protections

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*enforcement of the civil law leaves protection of vital Fourth and Fifth Amendment rights in the hands of persons who are not trained to uphold these rights.*

*Id.* at 621 (emphasis added) (quoting *Bissonette v. Haig*, 776 F.2d 1384, 1387 (8th Cir. 1985)); see also Case Comment, *Fourth Amendment—Exclusionary Rule—Seventh Circuit Holds that the Suppression of Evidence Is a Disproportionately Severe Sanction for Timing Violation of the Knock-and-Announce Requirement.*—United States v. Espinoza, 256 F.3d 718 (7th Cir. 2001), 115 HARV. L. REV. 709, 713-15 (2001) (arguing that evidence seized in violation of the knock-and-announce requirement needs to be suppressed under the exclusionary rule).

<sup>175</sup> See *supra* Part IV.

<sup>176</sup> See *supra* Part IV.

<sup>177</sup> 384 U.S. 436 (1966). Before suspects in custody are interrogated, they are read their *Miranda* Rights, consisting of four warnings: that a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he can not afford an attorney one will be appointed for him if he so desires.” *Id.* at 479. Accordingly, if evidence is seized in violation of *Miranda*, its use is suppressed at trial. See *United States v. Dickerson*, 530 U.S. 428, 435 (2000).

<sup>178</sup> See Weisselberg, *Saving Miranda*, *supra* note 15, at 109 (arguing that the original vision of *Miranda* has been transformed, and as a result, police departments have begun to promote a policy of questioning outside *Miranda*). Officers were being trained that “it is permissible to question suspects who invoked the right to counsel or the right to remain silent.” *Id.* at 132. For example a training video instructed police officers that:

dissolved and an individual's right to remain silent became increasingly disrespected.<sup>179</sup>

Likewise, as noted by many commentators, the Court's decision in *Hudson* has created incentives for police to violate knock-and-announce guidelines.<sup>180</sup> It therefore appears vital

When you violate *Miranda*, you're not violating the Constitution. *Miranda* is not in the Constitution. It's a court-created decision that affects the admissibility of testimonial evidence and that's all it is . . . [s]o you're not doing anything unlawful, you're not doing anything illegal, you're not violating anybody's civil rights, you're doing nothing improper.

*Id.* at 110 (quoting Videotape: Questioning "Outside *Miranda*" (Greg Gulen Productions 1990)).

<sup>179</sup> *Id.* at 149. The Fifth Amendment states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. This section of the Note will focus on the Fifth Amendment's self-incrimination clause which prohibits police from compelling a suspect to incriminate him or herself.

<sup>180</sup> See, e.g., Milton Hirsch, *Hudson v. Michigan: Whose Fourth Amendment Is It, Anyway?*, THE CHAMPION, Aug. 2006, at 50-51 (stating that, as a result of the majority's opinion, "if the police do come crashing through your front door without giving the householder a fair chance, or any chance, to open the door, the exclusionary rule doesn't apply"). Hirsch argues that there is no remedy when police officers violate the knock-and-announce rule because

[t]he conclusion is inescapable that but one remedy exists to deter violation of the search and seizure clause. That is the rule which excludes illegally obtained evidence. Only by exclusion can we impress . . . that violation of the Constitution will . . . do no . . . good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police.

*Id.* (quoting *Wolf v. Colorado*, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting)). Hirsch is not alone in holding these sentiments. See Cathy Young, Editorial, *Exclusionary Rule Sends Dangerous Message*, SEATTLE POST-INTELLIGENCER, July 9, 2006, at D2 (arguing that "leaving the exclusionary rule intact but exempting no-knock searches from its scope sends a dangerous message that for police to burst into a citizen's house unannounced is no big deal."); Elaine Silvestrini & Valerie Kalfrin, *Ruling Unlikely to Alter Police Searches*, TAMPA TRIBUNE, June 16, 2006 at 1 (quoting defense attorney John Fitzgibbons, "Police now [after *Hudson*] have a great deal of leeway and this simply continues the trend in weakening the Fourth Amendment"); Stephanie Francis Ward, *Court Backs Evidence Found in "Knock-Announce" Case: Justices' 5-4 Decision Narrows Exclusionary Rule in Police Searches*, ABA J. E-REP., June 16, 2006, at 1 (quoting Timothy Lynch, Director of the Cato Institute's Project on Criminal Justice, "Here was an opportunity for the court to put the brake on [paramilitary style raids], and say, 'slow things down,' but they didn't . . . This is a kind of weakening of the [exclusionary] rule, and our fear is that the brake which was needed has not been applied."); see also *Hudson v. Michigan*, 547 U.S. 586, 605 (2006) (Breyer, J.,

that effective deterrence mechanisms be put in place before police training changes in response to a significantly watered down knock-and-announce rule. The institutionalization of questioning outside *Miranda* serves as a warning that if nothing is done, officers may be taught how to effectively get around the knock-and-announce requirement.

A. *Potential Problems If Hudson Is Not Rectified:  
A Comparison to Questioning Outside Miranda*

In 1995, training materials from several California police departments<sup>181</sup> revealed the promotion of a “new vision of *Miranda*” that encouraged officers to continue questioning suspects even after they invoked their Fifth Amendment rights.<sup>182</sup> This technique was referred to as questioning “outside *Miranda*” and was advocated by police officials who believed that Court exceptions had transformed the original version of the *Miranda* rule.<sup>183</sup> For example, in *Harris v. New York*, the Court held that statements obtained in violation of the *Miranda* warnings could still be used at trial for impeachment purposes, as long as trustworthiness was shown.<sup>184</sup> As a result of this exception, officers realized that even if they violated *Miranda*, a suspect’s statements and other valuable evidence could still be admissible at trial, just not in the prosecution’s case-in-chief.<sup>185</sup> Accordingly, exceptions like *Harris* led police to disregard and circumvent the *Miranda* warnings by creating new guidelines that would allow officers to question suspects even after the suspects invoked their *Miranda* rights.<sup>186</sup>

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dissenting) (“[The majority’s decision] destroys the strongest legal incentive to comply with the Constitution’s knock-and-announce requirement.”); BALKO, *supra* note 10, at 34; Randy Balko, *Hard Knocks With No-Knock: Why Is It Unreasonable to Announce and Wait?*, REASONONLINE: FREE MINDS AND FREE MARKETS, June 20, 2006, <http://www.reason.com/links/links062006.shtml>.

<sup>181</sup> In addition to those in California, police officers in Arizona, Colorado, the District of Columbia and Missouri have all been found to question suspects “outside *Miranda*.” Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 670 (2006) (“[E]xact numbers are not available, but evidence suggests the practice has been spreading.”).

<sup>182</sup> Weisselberg, *Saving Miranda*, *supra* note 15, at 132.

<sup>183</sup> Thompson, *supra* note 181, at 649.

<sup>184</sup> *Harris v. New York*, 401 U.S. 222, 226 (1971). For further exceptions see *infra* note 199.

<sup>185</sup> Evidence could not be used in the prosecution’s direct case, but could be used for other purposes such as to impeach or cross-examine a witness. Weisselberg, *Saving Miranda*, *supra* note 15, at 134.

<sup>186</sup> Weisselberg, *Saving Miranda*, *supra* note 15, at 132.



Professor Charles Weisselberg drew attention to this new practice by publicizing training manuals that informed officers that “the warning and waiver components of *Miranda* were simply a court-created ‘series of recommended procedural safeguards that were not themselves rights protected in the Constitution.’”<sup>187</sup> Moreover, officers received instructions that as long as they “avoid overbearing tactics that offend the Fourteenth Amendment due process, the mere fact of deliberate noncompliance with *Miranda* does not affect admissibility for impeachment . . . officers risk no civil liability for ‘benign’ questioning outside *Miranda*. Instead, they have ‘little to lose and perhaps something to gain.’”<sup>188</sup> Thus, this “new vision of *Miranda*” taught officers that adherence to the *Miranda* warnings was optional.<sup>189</sup> Officers realized they had a choice. They could abide by the *Miranda* rule and cease questioning suspects once they invoked their Fifth Amendment rights, or they could violate the rule and the prosecution would only receive a minimal penalty of having the evidence excluded from their case-in-chief.<sup>190</sup> As officers began to do the latter, the protections of the Fifth Amendment were significantly undermined and little respect was given to individual autonomy and Supreme Court authority.<sup>191</sup> As Weisselberg noted, “the Court could not have intended to give police grounds to disobey this

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<sup>187</sup> *Id.* at 133 (quoting a California District Attorneys Association training bulletin). Weisselberg’s article gives examples from training bulletins, manuals, and videos that reflected California’s widespread practice of training officers to go outside *Miranda*. *See id.* at 133-36.

<sup>188</sup> *Id.* at 133-34.

<sup>189</sup> Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1308-10 (2000).

<sup>190</sup> *Id.*; *see* Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121, 1133 (2001) [hereinafter Weisselberg, *After Dickerson*]. When being trained outside *Miranda*, officers are taught “there is nothing legally or morally wrong in interrogating a suspect who has invoked the right to counsel or the right to remain silent. Questioning over an invocation merely has an evidentiary consequence at trial.” *Id.* at 1124-25. Additionally, even though the statement seized can not be used in the prosecution’s case-in-chief, officers are trained that “you can accomplish all of these legitimate purposes that don’t have anything to do with the prosecution of the case, and some that do, by talking to the guy ‘outside *Miranda*.’” *Id.* at 1125 (quoting Videotape: Questioning: ‘Outside *Miranda*’ (Greg Gulen Productions 1990)). As Weisselberg suggests, “Officers trained in this fashion perceive no downside to questioning ‘outside *Miranda*.’ Investigators who respect an invocation . . . will obtain no information from a suspect. On the other hand, questioning over an invocation may yield useful information, even if that information has a limited use at trial.” *Id.*

<sup>191</sup> Weisselberg, *Saving Miranda*, *supra* note 15, at 168; Thompson, *supra* note 181, at 648 (discussing how “the police increasingly ignore *Miranda*”).

portion of *Miranda* deliberately, but this disregard is the natural consequence of these decisions.”<sup>192</sup>

Although the Court did not intend to create a framework in which officers would be trained on how to circumvent the *Miranda* warnings, through its decisions the Court transformed the established rule. As a result of the Court’s *Miranda* exceptions, the “unintended consequence . . . [of] these restrictions sen[t] a clear message that many constitutionally defective evidence-gathering acts will go unpunished. Some police departments have internalized this news as conferring a ‘green light’ to lawless action.”<sup>193</sup> Likewise, as the Court’s decision in *Hudson* has significantly weakened the knock-and-announce rule, there is now the legitimate possibility that officers will be trained in a new manner that will allow them to circumvent knock-and-announce guidelines completely. When the Court weakened the link of the *Miranda* warnings to the Constitution, commentators noted that “by alienating *Miranda*’s rule from the Fifth Amendment, the Justices have undermined its legitimacy.”<sup>194</sup> Accordingly, the same holds true in the knock-and-announce context.

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<sup>192</sup> Weisselberg, *Saving Miranda*, *supra* note 15, at 132 (emphasis added).

<sup>193</sup> Davies, *supra* note 189, at 1319. For some time, the *Miranda* warnings were considered a non-constitutional rule of evidence. Weisselberg argues that the Court’s opinion in *United States v. Dickerson*, which reaffirmed *Miranda* as a constitutional rule, has resulted in a change of police policies and training as some police departments in California are now being trained *not* to violate the *Miranda* rule by questioning outside *Miranda*. Weisselberg, *After Dickerson*, *supra* note 190, at 1122. *But see* Thompson, *supra* note 181, at 653. Thompson’s article seems to suggest that going outside *Miranda* is still a technique used by law enforcement officials. *Id.* She argues that *Missouri v. Seibert* and *United States v. Patane*, both decided in 2004 after *Dickerson*, have resulted in police questioning outside *Miranda*. *Id.* (stating that this just adds to the already “diminished . . . possibility that *Miranda* might play even a moderately effective role in reducing the coercive atmosphere in the interrogation room”). *Seibert* involved the practice of “questioning first.” *See id.* at 646. Under this practice, an officer does not give the *Miranda* warnings until after a defendant confesses, and then the officer attempts to obtain the confession a second time, which would be admissible because it followed the warnings. *See id.* The officer in *Seibert* admitted that he purposely withheld the *Miranda* warnings, and the Court acknowledged the practice of police circumventing *Miranda* guidelines. *Missouri v. Seibert*, 542 U.S. 600, 605-06 (2004). A divided Court held that the statements were inadmissible, and Justice Kennedy’s concurrence (which provides the holding of the case) devised a two-part test which appears to do little to solve the problem. *Id.* at 618-22; Thompson, *supra* note 181, at 672, 677-81. Additionally, in *United States v. Patane*, the Court held that “the ‘physical fruit’ of a voluntary statement—in this case, a gun—is admissible even if the statement is given without a sufficient *Miranda* warning[.]” Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2032 n.43 (2006) (citing *United States v. Patane*, 542 U.S. 630, 643 (2004)).

<sup>194</sup> Weisselberg, *Saving Miranda*, *supra* note 15, at 130. As Weisselberg notes:

This Note argues that, just as officers saw a weakened *Miranda* rule as the “go ahead” to circumvent the established law, officers may now be influenced to evade the knock-and-announce rule since violations will not always result in the suppression of evidence. Instructive similarities can be drawn between the knock-and-announce rule and the *Miranda* warnings. First, the knock-and-announce rule and the *Miranda* rule are both common law principles that are not explicitly written in the Constitution, but are directly linked to the Constitution through the Fourth and Fifth Amendments respectively.<sup>195</sup> Because the Court has held that violations of the Fourth, Fifth, and Sixth Amendment are subject to the exclusionary rule, it is in the Court’s discretion to suppress the evidence that is obtained in violation of the knock-and-announce rule and the *Miranda* rule at trial.<sup>196</sup> Currently, only

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Here, any wound to the Supreme Court’s authority from allowing the practice of questioning “outside *Miranda*” is mostly self-inflicted. After all, the Supreme Court itself has encouraged the practice by driving a wedge between *Miranda* and the Fifth Amendment and by creating incentives to violate *Miranda*. Nevertheless, the Supreme Court’s clear public rulings—that questioning must cease upon a proper invocation—diverge so greatly from actual police interrogation practices that, whatever the cause, this gap threatens the integrity of the law and its institutions. Obviously aware of this gap between the language in court opinions and police practice, authors of “outside *Miranda*” training materials boldly tell officers that “the courts have no authority to declare that non-compliance [with *Miranda*] is ‘unlawful,’ nor to direct the manner in which police investigate crimes.”

*Id.* at 168-69 (alteration in original) (quoting Commission on Peace Officer Standards & Training, Cal. Dep’t of Justice, Interrogation Law Instructors’ Outline, at 21 (1996)).

<sup>195</sup> See *Miranda v. Arizona*, 384 U.S. 436, 443 (1966); *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995) (establishing that the knock-and-announce rule is mandated by the Constitution and part of the Fourth Amendment); Weisselberg, *Saving Miranda*, *supra* note 15, at 110 (suggesting the link of the *Miranda* rules to the Fifth Amendment self-incrimination clause); see also *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (reaffirming that *Miranda* is and has always been a constitutional rule). For some time, *Miranda* warnings were considered a “prophylactic,” non-constitutional rule, which further supported the idea that officers could go outside *Miranda* and continue to interrogate suspects after they invoked their Fifth Amendment rights. Weisselberg, *Saving Miranda*, *supra* note 15, at 128. However, in *Dickerson*, the Court noted this concern and held that “*Miranda* is a constitutional decision.” 530 U.S. at 437.

<sup>196</sup> *The Exclusionary Rule*, *supra* note 42, at 186-87 (“Under the exclusionary rule, evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments may not be introduced at trial for the purpose of proving the defendant’s guilt.”). The Supreme Court recognized in *Boyd v. United States* the similarities between the Fourth and Fifth Amendments, stating that they “run almost into each other.” 116 U.S. 616, 630 (1886) (quoted in *Mapp v. Ohio*, 367 U.S. 643, 646 (1961)). *Boyd* also noted, “The principles laid down in this opinion . . . apply to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life.” *Id.*

what commentators refer to as a “weak exclusionary rule” is attached to *Miranda*.<sup>197</sup> Second, in establishing the necessity of both the knock-and-announce requirement and the *Miranda* warnings, the Court set forth limitations on the implementation of these rules.<sup>198</sup> Over time, the Court has expanded these limitations and continued to carve out exceptions to both rules, which has weakened their application and created incentives for police to violate their guidelines.<sup>199</sup>

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<sup>197</sup> Weisselberg, *After Dickerson*, *supra* note 190, at 113 (arguing that a weaker exclusionary rule is applied to *Miranda* violations than to Fourth Amendment violations and “other types of compelled testimony and . . . statements that violate the Fourteenth Amendment”); see Thompson, *supra* note 181, at 648 (suggesting that the Court does not strictly apply the exclusionary rule to *Miranda* violations).

<sup>198</sup> In *Wilson*, the Court determined that certain circumstances would reasonably justify a police officer’s unannounced entry, and left the lower courts to decide when those conditions were present. *Wilson*, 514 U.S. at 936. Likewise, the Court did not apply the *Miranda* rules to all interrogations without counsel, just those that took place while a suspect was in custody. Moreover, the *Miranda* Court permitted states to implement their own or additional procedures as long as they would protect an individual’s right against self-incrimination. *Miranda*, 384 U.S. at 490.

<sup>199</sup> In regard to the *Miranda* rules, the Court’s first exception was made in *Harris v. New York*, in which the Court held that “prosecutors can use for impeachment purposes a statement from a suspect in custody who did not receive *Miranda* warnings so long as ‘the trustworthiness of evidence satisfies legal standards’ . . .” Weisselberg, *Saving Miranda*, *supra* note 15, at 127. This allows officers to use statements that were obtained without proper *Miranda* warnings to prove a defendant’s guilt for all purposes, except the government’s case-in-chief. For example, the statement can be used against a defendant for impeachment or cross-examination purposes. *Id.* Additionally, the Court held in *Michigan v. Tucker* “that *Miranda*’s exclusionary rule does not apply to the ‘fruits,’ evidence derived from statements obtained in violation of *Miranda*.” Thompson, *supra* note 181, at 648. This allows the fruits of statements to be admissible where questioning preceded *Miranda*, but trial followed. Moreover, in *New York v. Quarles*, the Court created a “public safety exception” under which “warnings are not necessary when officers ask a suspect questions arising from a reasonable concern for public safety.” Weisselberg, *Saving Miranda*, *supra* note 15, at 129. The Court asserted that a cost-benefit analysis should be applied here, and if the circumstances are such that the need for answers in order to protect public safety outweighs the protection guaranteed by the Fifth Amendment, the failure to give warnings is justified. *Id.* These three exceptions led police to train outside *Miranda*, which is important for the purposes of this Note. However, other exceptions were established which further weakened the *Miranda* rule, such as that in *United States v. Patane*, which “broadens the long-standing rule that physical evidence derived from *Miranda* violations is freely admissible even as part of the government’s case in chief, clarifying that even intentional violations may yield admissible fruits.” Thompson, *supra* note 181, at 648. In *Patane*, the Court held that “the ‘physical fruit’ of a voluntary statement—in this case, a gun—is admissible even if the statement is given without a sufficient *Miranda* warnings.” Klein, *supra* note 193, at 2032 n.43 (citing *United States v. Patane*, 542 U.S. 630, 643 (2004)).

The Supreme Court has also created exceptions to the knock-and-announce rule that have weakened its application and use. See *supra* Part II.A. In *Richards v. Wisconsin*, the Court held that officers are not required to knock and announce when exigent circumstances are present. Thus, where police have a reasonable suspicion that knocking and announcing would be “dangerous or futile,” or would “inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence,” a no-

As a result of the Court's decision not to apply the exclusionary rule to knock-and-announce violations, the Court effectively took away the only major legal incentive that police had to abide by its procedures.<sup>200</sup> Officers are now aware that whether or not they obey the law and follow the knock-and-announce requirement, the evidence seized will still be admissible at trial. Thus, the need for a legal incentive to deter police misconduct and guarantee compliance with the law is imperative. In order to ensure that officers abide by the Fourth Amendment guarantees and protections, the exclusionary rule must be applied to knock-and-announce violations.

*B. The Only Plausible Solution: The Exclusionary Rule as an Effective Remedy*

It is necessary for the Court to apply the exclusionary rule to knock-and-announce violations in order to ensure that an effective deterrence mechanism is in place.<sup>201</sup> Although the Court in *Hudson* determined that the costs of applying the exclusionary rule outweigh the benefits,<sup>202</sup> the increased militarization of the police force and the very real possibility that

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knock entry is lawful. 529 U.S. 385, 394 (1997). Additionally, in *United States v. Banks*, the Court determined that when police believe that destruction of the evidence is possible, fifteen seconds is a reasonable amount of time before entering an individual's home. 540 U.S. 31, 40 (2003). Although this may seem like a long time, for individuals who are sleeping or on the couch in another room, this may not present them with enough time to get to the door before police forcibly enter. See BALKO, *supra* note 10, at 32. Lastly, the Court's decision in *Hudson* appears to be the most significant decision concerning the knock-and-announce rule, as it established that evidence that is seized in violation of the knock-and-announce rule can be used at trial to determine a defendant's guilt. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). Additionally, in *Hudson* the police only waited three to five seconds before entering Hudson's home and although Hudson appealed his conviction based on this premature entry, the Court determined that suppression was not required. *Id.* at 2162. This seems to suggest that in future cases where police only wait three to five seconds before entering, no penalties will be applied.

<sup>200</sup> Before the Court's decision in *Hudson*, courts did apply the exclusionary rule to knock-and-announce violations. For example, in *United States v. Dice*, the Sixth Circuit stated that the exclusionary rule is the appropriate remedy for knock-and-announce violations. In coming to this conclusion, the court determined that "[t]o remove the exclusionary bar from this type of knock-and-announce violation whenever officers possess a valid warrant would in one swift move gut the constitution's regulation of how officers execute such warrants." *United States v. Dice*, 200 F.3d 978, 986 (6th Cir. 2000) (emphasis added). Moreover, the Eighth Circuit opinion in *United States v. Marts* also applied the exclusionary rule to knock-and-announce violations when officers did not wait a reasonable amount of time before entering. 986 F.2d 1216, 1220 (8th Cir. 1993).

<sup>201</sup> See *infra* notes 212-221 and accompanying text.

<sup>202</sup> *Hudson*, 547 U.S. at 594-95.

police training could change as a result of weakened knock-and-announce guidelines make clear that the costs of *not* applying the exclusionary rule are indeed significant. Thus, the Court must act to rectify its decision in *Hudson* and reinstate the authority of the knock-and-announce rule.<sup>203</sup>

### 1. Other Deterrence Mechanisms Do Not Deter

As the need to preserve individuals' Fourth Amendment rights and promote lawful police activity is imperative, a forceful deterrent must be put in place. The only effective way to create such a deterrent is through the legal threat of the exclusionary rule. In *Hudson*, the majority relied on implausible and ineffective deterrence mechanisms, leaving officers little incentive to comply with knock-and-announce procedures.<sup>204</sup> Specifically, the majority determined that the increased professionalism of law enforcement officials and the threat of civil suits will prevent officers from violating the knock-and-announce rule.<sup>205</sup> Although these safeguards may be available in theory as the Court suggests, in reality they do not serve to deter police misconduct and unlawful behavior.

First, as already explained, the rise of paramilitary units within local police departments has resulted in a militaristic style of law enforcement and detrimental behavior that debunks the Court's notion that police departments have become increasingly professionalized.<sup>206</sup> Second, evidence suggests that a civil suit against a police officer is not a viable remedy when an individual's rights are violated by an officer's failure to knock and announce.<sup>207</sup> Not only do the obstacles faced by one who seeks to bring a suit against a police officer make it unlikely that a victim of police misconduct will succeed

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<sup>203</sup> Although stated in regards to *Miranda*, this statement proves worthwhile here: "If supervisors wish to imbue respect for *Miranda* [in this case the knock-and-announce rule], they must themselves take [it] seriously and signal that they prefer their officers to honor an invocation, even when doing so means losing an opportunity to gain useful information or evidence." Weisselberg, *After Dickerson*, *supra* note 190, at 1156.

<sup>204</sup> See *Hudson*, 547 U.S. at 605 (Breyer, J., dissenting).

<sup>205</sup> *Id.* at 595, 598-99 (majority opinion). See *supra* text accompanying notes 92-95.

<sup>206</sup> See *supra* Part IV.

<sup>207</sup> See *Hudson*, 547 U.S. at 611-14 (Breyer, J., dissenting). This too has proven to be an ineffective remedy to ensure that officers follow knock-and-announce guidelines because there are many obstacles that a lawyer and his client will encounter when bringing a civil rights suit under 42 U.S.C. § 1983 against law enforcement officials.

in court,<sup>208</sup> but even in the rare case that a civil suit survives summary judgment, it is very unlikely that substantial monetary sanctions will be granted.<sup>209</sup> With only these weak

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<sup>208</sup> See generally Criminal Practice Guide, *supra* note 123 (discussing how lawyers should proceed in criminal cases as a result of the Court's decision in *Hudson*). First, most citizens lack the knowledge that civil rights suits are available and, moreover, they do not have the necessary resources to initiate such a suit. *Id.* Even if an individual has the means to initiate a suit, consider a lawyer's argument when asking the jury to find in favor of his or her client. See Hirsch, *supra* note 180. Hirsch offers the following hypothetical opening statement to illustrate the difficulties a lawyer would face when his or her guilty client seeks to bring a civil rights suit for a knock-and-announce-violation:

In this case, the police obtained a warrant to search my client's home for drugs. They searched . . . found the drugs . . . my client was convicted for possession of those drugs . . . which is why he appears before us in court today in handcuffs, leg manacles . . . . Pay no attention to those things. The fact is that the police, in executing their search warrant, smashed my client's door down. Those door hinges were completely destroyed! They were really expensive hinges . . . . [s]o we're going to ask for one million dollars in damages, to teach those police officer to respect [] constitutional rights . . . .

*Id.* As this example suggests, lawyers will have a difficult time convincing a jury to find in favor of their otherwise guilty client. The qualified immunity defense is another hurdle that must be overcome to succeed in a civil rights claim against law enforcement officials for violating the knock-and-announce rule. See *supra* note 123 (explaining the qualified immunity defense). In knock-and-announce suits, a court will often find in favor of an officer on the qualified immunity defense, concluding that the officer had a reasonable belief that a forced entry was necessary to protect him- or herself against harm. *Urbonya*, *supra* note 123, at 104; see, e.g., *Leaf v. Shelnut*, 400 F.3d 1070, 1080-83 (7th Cir. 2006) (granting qualified immunity to an officer after he did not knock and announce and used guns and tactical lights to gain entry into plaintiff's apartment). Moreover, courts have found that when the question is a close one, "the officers are entitled to the benefit of doubt under the qualified immunity standard." *Id.* (emphasis added) (internal quotation marks omitted) (citing *Dickerson v. McClellan*, 101 F.3d 1151, 1160 (6th Cir. 1996)).

<sup>209</sup> See Brief for Petitioner at \*37, *Hudson*, 547 U.S. 586 (No. 04-1360) (alleging that there are no cases cited in the opposition briefs that show the award of tangible damages as a result of knock-and-announce violations); see, e.g., *Doran v. Eckold*, 409 F.3d 958, 960-72 (8th Cir. 2004) (reversing a jury award of over \$2 million for an officer's illegal no-knock entry into the defendant's home, holding that the entry was reasonable under the Fourth Amendment). In an effort to emphasize this point, it is helpful to examine Michigan's state law prior to *Hudson*. In 1999, the Michigan Supreme Court held, in *People v. Stevens*, that the exclusionary rule is not a valid remedy for knock-and-announce violations. 597 N.W.2d 53, 64 (1999). Rather, Michigan relied on federal and state incentives that prohibit police misconduct and allow individuals to bring private claims against officers if a civil rights violation occurs. *Id.* As *Hudson* was being argued, Michigan's law was examined to determine if damages were in fact granted for knock-and-announce violations. *Hudson*, 547 U.S. at 610 (Breyer, J., dissenting). Not only did a brief in support of the petitioner assert that it could not find any decisions that awarded actual damages in knock-and-announce violations, but the respondent's lawyer, Mr. Timothy Baughman, conceded this point during oral argument before the Supreme Court. See Brief for Petitioner at \*59, *Hudson*, 547 U.S. 586 (No. 04-1360); Transcript of Oral Argument, Jan. 9, 2006, at \*31-32, *Hudson*, 547 U.S. 586 (No. 04-1360) [hereinafter *Hudson* Transcript]. Accordingly, Mr. Baughman stated that he was not aware of any successful § 1983 actions in Michigan since the *Stevens* decision, which took place five years prior. *Hudson*

deterrence mechanisms in effect, officers know that whether or not they follow knock-and-announce procedures the likelihood of sanction is slight and the evidence seized will still be admissible at trial.

## 2. Why the Exclusionary Rule? Because It Actually Deters

It is crucial that the Court reconsider *Hudson* and put deterrence mechanisms into effect that will actually prevent unlawful police behavior. In holding that evidence should not be subject to suppression and, subsequently, not condemning officers for forcibly breaking into Hudson's home after only a three-to-five second waiting period, the *Hudson* majority sent the message that knocking-and-announcing is just a futile gesture that does not need to be respected.<sup>210</sup> Thus, as this Note argues, only through the legal sanction of the exclusionary rule

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Transcript, *supra*, at \*31-32. Subsequently, in oral arguments before the Supreme Court in May 2006, Mr. Baughman restated that he was still not aware of any Michigan case where a civil judgment was rendered against law enforcement officials for knock-and-announce violations. *Id.* at \*36-38. Additionally, an extensive search of case law revealed only one unpublished decision where monetary damages were actually awarded. *See Buss v. Quigg*, No. 01-CV-3908, 20002 LEXIS 19324 (E.D. Pa. Oct. 9, 2002). In *Buss*, it appears that the plaintiff collected nominal damages of \$1 after officers failed to knock and announce. Thus, even in the limited cases in which damages are in fact rewarded, they seem to be nominal. This finding is supported by Justice Breyer in his dissent, condemning the majority's reliance on civil suits: "The majority . . . has failed to cite a single reported case in which a plaintiff has collected more than nominal damages solely as a result of a knock-and-announce violation." *Hudson*, 547 U.S. at 610 (Breyer, J., dissenting). Breyer continues, "[T]he majority, as it candidly admits, has simply 'assumed' that '[a]s far as [it] know[s], civil liability is an effective deterrent,' a support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law." *Id.* at 611 (citation omitted).

<sup>210</sup> The decision seems to suggest that in future cases where police only wait three to five seconds before entering an individual's home, no penalties will be applied. Accordingly, the whole purpose of the knock-and-announce rule appears to be undercut as the Court has stated that two of the main purposes of the knock-and-announce rule are

the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. . . . [and the protection of] those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. "The 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."

*Hudson*, 547 U.S. at 594 (citations omitted) (quoting *Richards v. Wisconsin*, 520 U.S. 385, 393 n.5 (1997)). Surely, three to five seconds is not a sufficient amount of time to guarantee that an individual receives the protections afforded by the knock-and-announce rule.



will officers be compelled to abide by knock-and-announce procedures for fear that vital evidence will be suppressed at trial.<sup>211</sup>

In determining the effectiveness of the exclusionary rule, some research suggests that a majority of officers believe the exclusionary rule deters misconduct, and many are convinced that the threat of suppression results in better law enforcement. For example, a study conducted of Chicago's judges, police officers, public defenders, and prosecutors by Professor Myron W. Orfield supports the idea that the exclusionary rule does deter police misconduct.<sup>212</sup> First, Orfield studied the impact of suppression on the rate of conviction and concluded that the exclusionary rule does not often affect the prosecution of crimes because in most cases where evidence was suppressed, a defendant was still convicted based on alternative forms of evidence.<sup>213</sup> Accordingly, the majority's fear in *Hudson* that suppression of the evidence is a "get-out-of-jail-free card" is not as accurate as the Court suggests.<sup>214</sup> Second, Orfield's research of police department members established that they view the exclusionary rule as an advantageous institutional deterrent,<sup>215</sup> which they believe "does little harm to police work, and instead makes them more professional."<sup>216</sup>

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<sup>211</sup> See *infra* notes 212-221 and accompanying text.

<sup>212</sup> See Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75 (1992). For additional studies on the deterrence effect of the exclusionary rule, see H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule*, BYU L. REV. 2006, at 1 (discussing different studies on the effectiveness of the exclusionary rule); see also William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for Civil Administrative Remedy to Replace the Rule*, 83 IOWA L. REV. 669 (1998).

<sup>213</sup> Orfield, *supra* note 212, at 78. Over the course of his research, Orfield determined that "[i]n Chicago, a jurisdiction with a comparatively high rate of suppression, unconstitutionally obtained evidence is suppressed under the exclusionary rule in only 0.9% of armed robbery cases, 0.5% of residential burglary cases, and 0.5% of cases involving violent crimes. Moreover, in many of the cases where evidence was suppressed, convictions were still obtained on the basis of other evidence." *Id.*

<sup>214</sup> See *Hudson*, 547 U.S. at 595-96 (discussing the costs of applying the exclusionary rule).

<sup>215</sup> Ninety-eight percent of Orfield's respondents believed that the exclusionary rule effectively deterred police misconduct. Orfield, *supra* note 212, at 77, 84-85.

<sup>216</sup> *Id.* at 81. Orfield's research for his "Police Study" was gathered when he was a law student at the University of Chicago. Orfield "interviewed twenty-six of approximately one hundred officers in the Narcotics Section of the Organized Crime Division of the Chicago Police Department . . . using a 26-page standardized

Accordingly, Orfield determined that application of the exclusionary rule actually promotes professionalism and internal discipline—the very things that the *Hudson* majority believed made the exclusionary rule unnecessary.<sup>217</sup> His study showed that police and prosecutors design programs and create incentives to avoid the risk of suppression of evidence, which results in better compliance with the Fourth Amendment.<sup>218</sup> Likewise, Orfield noted a similar positive reaction to the exclusionary rule in his study of judges, assistant public defenders, and assistant state attorneys.<sup>219</sup> Orfield's interviewees suggested that because “officers care about convictions and experience adverse personal reactions when they lose evidence . . . [,] police change their behavior in response to suppression of the evidence.”<sup>220</sup> The impact of suppression on the police force in terms of professionalism and conduct led court respondents to proclaim, “that there is no more effective a remedy for Fourth Amendment violations . . . [and] they believe the rule should be retained.”<sup>221</sup> Therefore, it is only through the threat of suppression that officers will curb their unlawful behavior and comply with the established law. As studies show

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questionnaire with multiple choice and open-ended questions centering on deterrence.” *Id.* at 79-80.

<sup>217</sup> See *supra* note 91 and accompanying text. In support of this view, Orfield stated that the “[c]ourt respondents, like the police respondents, believe that the exclusionary rule, although imperfect . . . clearly leads to increased police professionalism and greater observance of the law of the Fourth Amendment.” Orfield, *supra* note 212, at 83 (emphasis added).

<sup>218</sup> Orfield, *supra* note 212, at 80. “These efforts include increased and improved Fourth Amendment training, internal review of lost cases, better administrative record-keeping to track the number of suppression cases, increased use of search warrants, and a system to ‘register’ the anonymous informants who provide information to police.” *Id.*

<sup>219</sup> *Id.* at 83. Orfield's method of obtaining information for his “Court Study” was similar to his police study. Orfield used “a structured questionnaire, this time twenty pages long, with multiple choice and open-ended questions centering on deterrence.” *Id.* at 81. Additionally, “of the 41 felony trial courtrooms in the Criminal Division of the Circuit Court of Cook County, [Orfield] randomly selected a sample of 14. For each of these courtrooms, he attempted to interview the judge, a randomly selected assistant public defender, and an assistant state's attorney assigned to the courtroom.” Ultimately, “[i]n place of the [three] state's attorneys who declined to participate, [he] substituted other persons assigned to the same courtroom. [He] could not substitute for the one non-participant judge. Each interview took one and a half to two hours.” *Id.* at 81-82.

<sup>220</sup> *Id.* Court and police respondents agreed that the exclusionary rule is effective because it educates officers about what is and what is not acceptable behavior under the Fourth Amendment. *Id.* at 91.

<sup>221</sup> *Id.* Furthermore, the court respondents “do not believe the rule causes significant harm to police work. Although . . . the rule can sometimes be unjust to crime victims, they believe the rule's benefits to society equal or exceed the costs.” *Id.*

that the exclusionary rule prevents police misconduct and promotes the increased professionalism of law enforcement officials, it appears to be the only effective remedy to deter knock-and-announce violations.

## VI. CONCLUSION

The knock-and-announce rule has withstood the test of time, with its common law roots dating back to thirteenth century England.<sup>222</sup> In *Wilson v. Arkansas*, the Court recognized the rule's resilience and importance by holding that it is a constitutional command necessary to safeguard an individual's Fourth Amendment rights.<sup>223</sup> Despite its ultimate holding in *Hudson v. Michigan*, the Court reaffirmed the main purposes of the knock-and-announce rule: "the protection of human life and limb" and the protection of "those elements of privacy and dignity that can be destroyed by a sudden entrance."<sup>224</sup> Accordingly, the security that the knock-and-announce rule affords cannot be overstated.

The Court's decision in *Hudson* substantially weakens the knock-and-announce requirement by inviting the police to disobey it:

As repeated players, police have an *incentive to comply with what the established laws allow them to do, rather than what the law explicitly instructs them to do*. Through repeated interaction with the courts (and police disciplinary boards), police officers learn of—and respond to—judicially created incentives.<sup>225</sup>

By mitigating the threat that potential evidence may be suppressed at trial, the Court has undermined the main legal incentive for officers to actually knock and announce.<sup>226</sup> As the police response to weakened *Miranda* jurisprudence illustrates, when an original rule is severely undercut by exceptions, officers discover ways to get around the law.<sup>227</sup> After *Hudson*, officers know that whether or not they abide by the knock-and-announce rule, evidence gathered will still be admissible at

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<sup>222</sup> *Miller v. United States*, 357 U.S. 301, 307 (1958).

<sup>223</sup> *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995).

<sup>224</sup> *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

<sup>225</sup> Case Comment, *supra* note 174, at 714-15 (emphasis added).

<sup>226</sup> *See Hudson*, 547 U.S. at 605, 610-14 (Breyer, J., dissenting). As paramilitary raids result in violence and injury, the Court's decision in *Hudson* leaves the door open for an increase in this behavior.

<sup>227</sup> *See supra* Part V.1.A.

trial. It is not enough for the Court to state that the knock-and-announce rule is still in effect.<sup>228</sup> To prevent unlawful police behavior, it is crucial that the Court re-establish the importance of the knock-and-announce requirement. The only effective way to do so is through legal sanction, and experience has shown that the only effective legal sanction against police misconduct of this sort is that provided by the exclusionary rule.

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<sup>228</sup> *Hudson*, 547 U.S. at 602-03 (Kennedy, J., concurring). In his concurrence, Justice Kennedy states “The Court’s decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law’s concern.” *Id.*

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