RECENT DEVELOPMENTS

DON'T KNOCK THEM UNTIL WE TRY THEM: CIVIL SUITS AS A REMEDY FOR KNOCK-AND-ANNOUNCE VIOLATIONS AFTER *Hudson v. Michigan*, 126 S. Ct. 2159 (2006)

The sight of law enforcement officers knocking on a door and yelling "Police!" is more than just television drama. In fact, the idea that police should knock and announce their presence before entering is an ancient requirement that has its roots in the English common law.[1] The requirement was adopted at the time of this country's founding and has been more recently recognized as an "element of the Fourth Amendment reasonable test."[2] The Supreme Court has given content to the requirement by recognizing exceptions and outlining its parameters.[3] Until recently, however, the Court had not addressed the proper remedy for those situations in which officers do not properly knock and announce their presence. The Supreme Court ended its silence on the matter in its decision last Term in *Hudson v. Michigan*.[4]

Police obtained a warrant to search the home of the defendant, Booker T. Hudson.[5] Officers went to the home to execute the warrant and announced their presence; after waiting "three to five seconds," they entered the home where they found drugs and a firearm.[6] Prosecutors brought state law charges against Hudson for drug and firearm offenses.[7] Hudson moved to suppress the evidence seized inside his home, claiming that his Fourth Amendment rights had been violated by the officers' failure to wait the constitutionally required time before entering his home.[8] The state trial court granted the motion.[9]

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1. Wilson v. Arkansas, 514 U.S. 927, 931–32 (1995).
2. *See id*.
3. *See, e.g., id.*; Richards v. Wisconsin, 520 U.S. 385 (1997).
4. Hudson v. Michigan, 126 S. Ct. 2159 (2006).
5. *Id.* at 2162.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Hudson*, 126 S. Ct. at 2162.

On appeal, the Michigan Court of Appeals reversed, citing two Michigan Supreme Court decisions, *People v. Stevens*[10] and *People v. Vasquez*.[11] The Michigan Supreme Court denied leave to appeal,[12] and Hudson was convicted of both offenses.[13] The Michigan Court of Appeals affirmed the conviction, and the Michigan Supreme Court again declined to review the case.[14] The United States Supreme Court granted certiorari.[15]

The Supreme Court affirmed Hudson's conviction.[16] Writing for the Court, Justice Scalia held that the exclusionary rule is not the proper remedy for "knock-and-announce" violations.[17] The opinion did not, however, overrule Court precedent regarding the constitutional nature of the knock-and-announce requirement. Rather, the Court began its analysis by noting the importance of the requirement in the common law and citing *Wilson v. Arkansas*,[18] which held that the knock-and-announce requirement forms part of the Fourth Amendment reasonableness inquiry.[19] Justice Scalia wrote that the rule, while required, is "not easily applied."[20] The rule is difficult to apply because the amount of time officers must wait is "necessarily vague," depending on the amount of time it would require the resident to dispose of suspected contraband.[21]

After reiterating the constitutional nature of the requirement, the Court considered whether its violation triggers the application of the exclusionary rule. It began by outlining the history of the exclusionary rule in the federal courts, tracing the evolution of the rule from "reflexive application" in *Mapp v. Ohio*[22] to a rejection of "its indiscriminate application" in *United States v. Leon*[23] and *Pennsylvania Board of Probation and Parole v. Scott*.[24] In

10. 597 N.W.2d 52 (Mich. 1999) (holding that the exclusionary rule does not apply to evidence seized after officers enter a home pursuant to a search warrant but without properly knocking and announcing their presence).

11. 602 N.W.2d 376 (Mich. 1999) (echoing the holding from *People v. Stevens*).

12. People v. Hudson, 639 N.W.2d 255 (Mich. 2001).

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

14. People v. Hudson, 692 N.W.2d 385 (Mich. 2005).

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

16. *Id.* at 2165.

17. *Id.*

18. 514 U.S. 927, 931–32 (1995).

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

20. *Id.*

21. *Id.* at 2163.

22. 367 U.S. 643 (1961).

23. 468 U.S. 897 (1984).

24. 524 U.S. 357 (1998).

particular, precedent required that a constitutional violation must be a "but-for" cause of discovering evidence to justify suppression.[25] The instant case did not meet that standard, the Court reasoned, because officers would have seized the evidence regardless of whether they properly knocked and announced.[26]

The majority also drew upon the Court's precedents regarding attenuation, under which the exclusionary rule is inapplicable if evidence was found "by means sufficiently distinguishable to be purged of the primary taint."[27] The concept of attenuation extends, Justice Scalia wrote, to situations in which "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained" despite the presence of a direct causal connection.[28] Justice Scalia argued that because the knock-and-announce requirement does not protect an individual from having evidence described in a warrant taken from his or her home, the exclusionary rule does not protect the interest guaranteed by the Fourth Amendment and thus should not be applied.[29]

The Court cited *Scott*, which employed a balancing test to determine whether the exclusionary rule applies to particular types of Fourth Amendment violations, to bolster its view that the exclusionary rule was inapplicable.[30] Under the *Scott* test, the Court found that applying the exclusionary rule to knock-and-announce violations would result in substantial social costs. In addition to the usual cost associated with the exclusionary rule—releasing potentially dangerous criminals into society—suppressing evidence for knock-and-announce violations would "generate a constant flood of alleged failures to observe the rule" and produce myriad claims that the support for justification of a no-knock entry was inadequate.[31] Justice Scalia predicted that such a "flood" of litigation would be par-

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25. *Hudson*, 126 S. Ct. at 2164.

26. *Id.*

27. *Id.* at 2164–65 (quoting Wong Sun v. United States, 371 U.S. 471, 487–88 (1963)).

28. *Id.* at 2164.

29. *Id.* at 2165.

30. *Id. Scott* held that the exclusionary rule has only been applied "where its deterrence benefits outweigh its 'substantial social costs . . . '." 524 U.S. at 363 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).

31. *Hudson*, 126 S. Ct. at 2166, citing Richards v. Wisconsin, 520 U.S. 385, 394 (1997).

ticularly problematic because of the inherent difficulties in determining the "reasonable wait time" in a given situation.[32]

In addition, the Court posited that civil suits are a more effective deterrent today than in the *Mapp* era.[33] The opinion noted the passage of 42 U.S.C. § 1983, which allows individuals to sue for constitutional violations, and the subsequent extension of liability under § 1983 to municipalities.[34] The Court also noted the growing number of lawyers willing to bring § 1983 suits in recent years and the "increasing professionalism of police forces, including a new emphasis on internal discipline."[35] With such limited deterrence benefits and substantial social costs in the modern context, the Court concluded that the exclusionary rule was not justified in the context of knock-and-announce violations.

Justice Kennedy concurred in the judgment and with the first three parts of the majority opinion.[36] Without explaining his reasons, Justice Kennedy noted that he was not convinced of the relevance of two Court precedents cited by the majority.[37] He emphasized the continuing importance of both the knock-and-announce requirement and of the exclusionary rule, but ruled that knock-and-announce violations are "not sufficiently related to the later discovery of evidence to justify suppression."[38] Applying the exclusionary rule, even in the face of a widespread pattern of knock-and-announce violations, he wrote, would require "revising the requirement of causation" and would add one more thorny issue to be resolved in criminal trials.[39]

Justice Breyer dissented in an opinion joined by Justices Stevens, Souter, and Ginsburg.[40] Justice Breyer joined the majority in emphasizing the constitutional history of the knock-and-announce requirement.[41] He specifically highlighted the understanding of the Framers of the Fourth Amendment that the manner of entry should be considered in determining the rea-

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32. *Id.*

33. *Id.* at 2167–68.

34. *Id.* at 2167.

35. *Id.* at 2168.

36. *Hudson*, 126 S.Ct. at 2170–71 (Kennedy, J., concurring).

37. *Id.* at 2171, (citing Segura v. United States, 468 U.S. 796 (1984) and New York v. Harris, 495 U.S. 14 (1990)).

38. *Id.* at 2170.

39. *Id.* at 2171.

40. *Id.* at 2171–86 (Breyer, J., dissenting).

41. *Hudson*, 126 S.Ct. at 2172.

sonableness of a search or seizure.[42] This fact, Justice Breyer argued, should render police entries without a proper knock-and-announce illegal and subject to the exclusionary rule.[43]

Deterrence of unlawful government behavior, Justice Breyer continued, is the purpose of the exclusionary rule.[44] While other remedies are conceivable, Justice Breyer observed that the *Mapp* Court saw them as inadequate, and there is little evidence that anything has since undermined that conclusion.[45] Specifically, he pointed to the high number of knock-and-announce violations, yet observed that the majority could not identify a "single reported case in which a plaintiff has collected more than nominal damages."[46]

Justice Breyer attacked the majority's analysis under *Scott*'s balancing test. He characterized the "substantial social costs" of suppression claimed by the majority as essentially arguments against the exclusionary rule in general.[47] Further, Justice Breyer contended that "no-knock" warrants, which give judicial approval for officers to enter without knocking, make application of the exclusionary rule less costly in the knock-and-announce context than in others.[48]

Justice Breyer next addressed the majority's attempt to separate the manner of entry and the search itself. Justice Breyer attacked this view as distorting the legal definition of causation.[49] If officers entered Hudson's home unlawfully, he observed, their illegal entry indisputably caused the discovery of evidence and that was a foreseeable result of entry.[50] Justice Breyer also criticized the majority's definition and application of the attenuation of taint doctrine, writing that the exclusionary rule is meant to apply regardless of "the reasons underlying the unconstitutionality of the search."[51] Even on the majority's definition of attenuation, however, he argued, the majority ignored the interest citizens have in avoiding the invasion of privacy that accompanies a no-knock entry.[52]

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42. *Id.* (quoting Wilson v. Arkansas, 514 U.S. 927, 934 (1995)).
43. *Id.* at 2173.
44. *Id.*
45. *Id.* at 2174.
46. *Hudson*, 126 S.Ct. at 2174–75 (Breyer, J. dissenting).
47. *Id.* at 2177.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Hudson*, 126 S.Ct. at 2181 (Breyer, J. dissenting).
52. *Id.* at 2180–81.

The Court's holding in *Hudson* should be commended; not all of its reasoning, however, deserves the same praise. While both the Constitution and sound policy command the knock-and-announce requirement, neither require that the exclusionary rule serve as the remedy to vindicate that requirement.

While the knock-and-announce requirement may be both constitutionally required and good police policy, the question of a proper remedy for its violation remains. The majority opinion offers multiple reasons militating against applying the exclusionary rule; but some of these reasons are troubling. Perhaps most worrisome is the conclusion that the exclusionary rule is inapplicable because the failure to knock and announce was not a "but-for" cause of the evidence's discovery. The Court reasoned that officers would have seized the evidence whether they knocked properly or not.[53] By that same reasoning, however, the exclusionary rule could be made inapplicable in cases where officers could have obtained a warrant but did not do so.[54]

The majority opinion also avoids addressing how it was able to separate the manner of entry from the subsequent search,[55] given Court precedent indicating that the entry is part of an inquiry used to evaluate the reasonableness of the search as a whole.[56] Justice Scalia's assertion that exclusion is less necessary today because of "wide-ranging reforms in the education, training, and supervision of police officers" is also troubling.[57] While this assertion may be descriptively accurate, it seems rather conclusory without more empirical support.

These problems aside, the majority's holding is largely correct. The Supreme Court's recent jurisprudence indicates that the sole purpose of the exclusionary rule is deterrence of government misconduct.[58] The deterrence calculation, however, simply does not work as effectively in the knock-and-announce

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53. *Hudson*, 126 S. Ct. at 2164.

54. Elsewhere in the majority opinion, however, the Court indicates that they have no intention of eliminating the application of the exclusionary rule to warrant requirement violations. *Hudson*, 126 S. Ct. at 2165 ("[E]xclusion of the evidence obtained by a warrantless search vindicates that entitlement.").

55. *See id.* at 2164 (explaining that the "illegal *manner* of entry was *not* a but-for cause of obtaining the evidence").

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

57. *See Hudson*, 126 S. Ct. at 2168.

58. *See* United States v. Leon, 468 U.S. 897, 906 (explaining that the rule exists to deter government misconduct and not as a "personal constitutional right") (internal citations omitted).

context as it does for other Fourth Amendment violations. By way of contrast, consider the warrant requirement. If the exclusionary rule did not apply to the warrant requirement, officers might forego obtaining a warrant if they believed the warrant requirement might keep them from discovering incriminating evidence. The exclusionary rule provides a check on such police behavior because it announces to the calculating officer that any evidence seized would not be admissible.

In the knock-and-announce context, the exclusionary rule has very little potential to deter undesirable police conduct. Officers usually have little to gain by entering unannounced. If armed with a search warrant, officers should eventually discover evidence once admitted to the house. Although evidence may be destroyed as officers wait, the knock-and-announce requirement is suspended if they reasonably suspect the evidence is being destroyed.[59] Accordingly, violations are unlikely to be calculated attempts to illegally obtain evidence. An officer intending to comply might violate the rule by inadvertently entering too soon in the high-pressure context of executing a search warrant. Other violations might occur because the officer is simply unsure how long the "necessarily vague" "reasonable wait time" is in the context of a particular search.[60] For the exclusionary rule to be an effective deterrent, officers must know that what they are doing runs afoul of the Fourth Amendment.[61] In situations in which police officers are likely to violate the knock-and-announce rule, application of the exclusionary rule is very unlikely to deter them.

A better remedy would deter those knock-and-announce violations that can be deterred, differentiate among violations by severity, and provide restitution to innocent individuals whose interests have been violated by an improper police entry.[62] The best such remedy may be civil tort suits.[63] Civil suits brought by victims of improper no-knock searches have the obvious advantage of not impeding a criminal trial's truth-seeking function. Further, while the exclusionary rule only benefits in-

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59. *See Wilson*, 514 U.S. at 936.

60. *See Hudson*, 126 S. Ct. at 2163.

61. *See* Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 951–53 (1983).

62. Because the exclusionary rule is applied at criminal trials, it cannot benefit individuals who do not face a trial.

63. For an excellent discussion of the merits of civil tort suits as a remedy for Fourth Amendment violations, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–800 (1994).

dividuals in possession of incriminating evidence, civil tort suits can provide a remedy for innocent victims of a search in which the knock-and-announce rule was not observed. Moreover, by forcing state and local governments to pay for officers' wrongdoing, tort suits will also provide greater incentive for police departments to train their officers properly.[64]

Critics of civil remedies complain that juries are unlikely to find in favor of victims of knock-and-announce violations who are guilty of (often serious) underlying criminal offenses and who are perceived as suing the police on legal technicalities.[65] According to civil suit detractors, since juries will look unfavorably upon such people, their suits will be unlikely to succeed. As a result officers will lack sufficient incentives to follow the law.[66] Beyond the concern with bias against criminal defendants, jurors may feel that the victim of a no-knock search has suffered little actual injury. As this criticism indicates, the proper damage amount is an important element of a regime for enforcing the knock-and-announce requirement.

Victorious tort plaintiffs ideally receive compensation in an amount commensurate with the damage suffered,[67] but a number of commentators have observed that calculating damages from often-intangible Fourth Amendment harms is inherently difficult.[68] This calculation is no easier in the context of the knock-and-announce rule. Ostensibly, the goal of a civil suit should be to restore plaintiffs to their status prior to the constitutional violation. In many instances, however, a knock-and-announce violation will not result in cognizable harm to the victim. It is clear that the knock requirement protects citizens from property destruction, violence, and intrusion upon an

64. In addition to money damages, tort suits provide other incentives for government compliance. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiff's and Defendants as Private Attorneys General*, 88 COLUM. L. REV 247, 283 (1988) (noting that adverse publicity, the costs and burden of litigation, and the sting of liability also work to deter).

65. *See*, Guido Calabresi, *The Exclusionary Rule,* 26 HARV. J.L. & PUB. POL'Y 111, 115 (2002); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 56 (1994).

66. Some argue that the exclusionary rule suffers from a similar defect. Judges, they argue, do not want to let criminals go free, so they twist doctrine to reach their preferred result. *See* Amar, *supra* note 63, at 799.

67. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 85 (5th ed. 1984).

68. *See, e.g.*, William J. Stuntz, *Terry's Impossibility*, 72 ST. JOHN'S L. REV 1213, 1218 (1998).

embarrassing or intimate situation.[69] As Justice Scalia points out, however, because a warrant has already been issued when officers execute a search warrant, the knock-and-announce requirement does not protect the citizen's right to shield "potential evidence from government's eyes."[70] While no-knock victims should be entitled to compensatory damages for tangible and intangible harms caused by the violation,[71] the discovery of evidence during a no-knock search is not itself a cognizable harm. As a result, it is possible that many no-knock violations will result in only nominal damages.

To the extent that compensatory damages inadequately deter police misconduct,[72] they should be supplemented by punitive damages.[73] Punitive damages should be based on the degree of officer misconduct rather than the individual's injury. Such a remedy would not allow for punitive damages where an officer acts in good faith but slightly underestimates the reasonable wait time. The remedy would, however, permit substantial punitive damages when an officer bursts into the home, ignoring the requirement altogether. Calibrating damages based on the degree of officer misconduct would allow deterrence of truly abusive police behavior without also indiscriminately punishing officers for inadvertent conduct that penalties cannot be expected to deter.

Some see *Hudson* as the first cut in what will become a conservative Court's gutting of the exclusionary rule.[74] Justice

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

70. *Id.*

71. Because the knock-and-announce rule exists to protect the person, property and privacy interests of the "guilty" and innocent, damages should be available even if incriminating evidence is discovered.

72. While the number of victims that are entitled to substantial damages under such a system might be lower than those that would benefit from the exclusionary rule, officers would have no idea before entering what they would encounter inside. The mere prospect of substantial damages should cause officers to take care to properly knock and announce their presence. Justice Breyer advances a similar argument in the dissent. In explaining the Court's holding in *United States v. Segura*, 468 U.S. 796 (1984), Justice Breyer argues that the exclusionary rule was not applied because the officers that illegally entered an apartment without a warrant could not know that an independent source for the warrant existed. *Hudson*, 126 S. Ct. at 2183 (Breyer, J., dissenting). Similarly, officers that entered without a proper knock-and-announce could not depend on an assumption that they would not violate the resident's interests.

80. *See* Amar, *supra* note 63, at 814 (arguing that solely compensatory damages would lead to "systematic underdeterrence").

81. *See, e.g.*, William Tucker, *End of a Supreme Court Blunder?*, WEEKLY STANDARD, Aug. 21, 2006, http://weeklystandard.com/Content/Public/Articles/000/000/012/581mnsed.asp (last visited Sept. 30, 2006) (on file with the author).

Kennedy's concurrence, however, indicates that the current Court is unlikely to substantially reduce application of the exclusionary rule. The Supreme Court did, however, allow a significant change in the way some Fourth Amendment violations will be remedied. Civil suits can accomplish the deterrence goals of the exclusionary rule and will certainly impose lower social costs in doing so. At a minimum, the ruling paves the way for interesting empirical studies on the effectiveness of remedies other than the exclusionary rule in the deterrence of police misconduct. If civil suits prove effective, a conversation about the merits of the exclusionary rule in general will be in order. For now, the Supreme Court has wisely removed the exclusionary rule for a class of violations it was particularly ill-suited to remedy.

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